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**IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY**

No P56 of 2011

On appeal from the Full Federal Court

BETWEEN:

**THE HONOURABLE BRENDAN O'CONNOR
COMMONWEALTH MINISTER FOR HOME AFFAIRS**

First Appellant

ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Appellant

**THE HON CHRISTOPHER MARTIN ELLISON,
FORMER MINISTER FOR JUSTICE & CUSTOMS**

Third Appellant

AND:

CHARLES ZENTAI

First Respondent

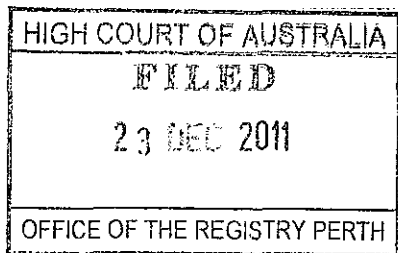
BARBARA LANE

Second Respondent

**THE WESTERN AUSTRALIAN OFFICER IN CHARGE,
HAKEA PRISON**

Third Respondent

APPELLANTS' SUBMISSIONS



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Part I Certification for publication on internet

1. These submissions are in a form suitable for publication on the internet.

Part II The issue

2. The principal issue is whether the majority of the Full Court correctly held that extradition under the Treaty on Extradition Between Australia and the Republic of Hungary (the **Treaty**) is precluded where the *specific offence* for which extradition is sought was *not enacted* under Hungarian law at the time of the conduct constituting that offence, even though the *conduct constituted an offence at that time*.

10 **Part III Section 78B of the *Judiciary Act 1903* (Cth)**

3. The appellants certify that they have considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and are of the view that no such notice is required.

Part IV Citation of reasons for judgment

4. The reasons for judgment of the Full Court of the Federal Court are found at *O'Connor v Zentai* (2011) 195 FCR 515 (**Zentai FFC**). The reasons for judgment of the primary judge (McKerracher J) are found at *Zentai v Honourable Brendan O'Connor (No 3)* (2010) 187 FCR 495 (**Zentai No. 3**), and *Zentai v Honourable Brendan O'Connor (No 4)* [2010] FCA 1385 (**Zentai No. 4**).

Part V Facts

The extradition request

5. On 3 March 2005, a Military Judge of the Military Division of the Budapest Metropolitan Court, Captain Dr Toth Csaba, issued Warrant Number KBNY V 4/2005/3 for the arrest of Mr Zentai (the **Hungarian arrest warrant**).¹ The warrant alleged that, on 8 November 1944, Mr Zentai committed a war crime contrary to s 165 of Act IV of 1978 (being the Criminal Code of Hungary) in circumstances where, whilst on patrol duty as a soldier in the Hungarian Royal Army attached to a unit stationed at Budapest, he captured Mr Peter Balazs (a young man of Jewish origin), dragged him back to the unit's army post and, along with two other soldiers, assaulted Mr Balazs over a number of hours. Mr Balazs died of his injuries. Mr Zentai and the two other soldiers then weighted Mr Balazs's body and threw it into the Danube River.
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6. The English translation of the Hungarian arrest warrant stated the offence of 'war crime' under s 165 of Act IV of the Hungarian Criminal Code as follows:²

20 *A person who seriously violated international legal rules applicable to war in respect of the treatment of the population of the occupied territories or prisoners of war, or treated the population of the reannexed territories barbarously, misusing the power granted to him, or who was an instigator, perpetrator or accomplice of the unlawful execution or torture of persons either in Hungary or abroad.*

The offence was said to carry a "main punishment" of "imprisonment for life, or imprisonment from ten to fifteen years".³

¹ Zentai FFC at [74].

² Zentai FFC at [74]

³ Annexure "DB20" to Affidavit of Dennis Barich sworn on 4 December 2009 (Letter from Ms Ford to Mr Barich of 18 November 2009, Attachment A, pp 5.5). This is interpreted as a minimum offence of 10 years and a maximum term of imprisonment for life: Attachment B ("Background Facts"), para 8.

7. On 23 March 2005, the Department of International Criminal Law of the Ministry of Justice of Hungary sent a letter to the Commonwealth Attorney-General's Department seeking the extradition of Mr Zentai from Australia to Hungary for the purpose of prosecution under the Hungarian Arrest Warrant (the **extradition request**).⁴

Extradition proceedings

- 10 8. On 8 July 2005, the third appellant issued a notice of receipt of the extradition request pursuant to s 16 of the *Extradition Act 1988* (Cth) (the **Act**). A provisional arrest warrant for the arrest of Mr Zentai was issued under s 12 of the Act. Mr Zentai was arrested and granted bail subject to conditions, pursuant to s 15(2) of the Act.⁵
9. On 20 August 2008, the second respondent determined that Mr Zentai was eligible for extradition to Hungary and issued a warrant committing Mr Zentai to prison under s 19(9) of the Act.⁶ On that day, Mr Zentai was granted bail pending the determination of his application under s 21 of the Act for review of the Magistrate's determination under s 19 of the Act.
10. On 31 March 2009, Gilmour J affirmed the Magistrate's determination under s 19 of the Act: *Zentai v Republic of Hungary* [2009] FCA 284.
- 20 11. On 8 October 2009, the Full Federal Court dismissed the appeal from Gilmour J's decision: *Zentai v Republic of Hungary* (2009) 180 FCR 225.
12. On 12 November 2009, the first appellant made a determination under s 22 of the Act that Mr Zentai be extradited to Hungary, and issued a warrant under s 23 of the Act requiring Mr Zentai to be released from prison into the custody of Australian police officers and then placed in the custody of Hungarian police officers for transport to Hungary.⁷

⁴ *Zentai FFC* at [74].

⁵ *Zentai FFC* at [76] - [78].

⁶ *Zentai FFC* at [81].

⁷ *Zentai FFC* at [84].

The decision of the primary judge

13. On 4 December 2009, Mr Zentai commenced a proceeding seeking a review of the first appellant's s 22 determination.⁸
14. On 16 December 2009, McKerracher J made orders admitting Mr Zentai to bail.⁹
15. On 2 July 2010, McKerracher J found, relevantly, that the offence of 'war crime' was not an 'extradition offence' for the purposes of the Act by virtue of Article 2(5)(a) of the Treaty,¹⁰ as the offence was first created in 1945 under s 11 of the Prime Minister's Decree No 81 of 1945, re-enacted by the 1978 Criminal Code of Hungary: *Zentai (No. 3)* at [186]. On that basis, his Honour held (at [214]) that "[i]t was not open to the Minister in the exercise of his s 22 discretion to surrender for extradition a person when the offence of which the person was 'suspected' (not charged) did not exist at the relevant time".
16. On 10 December 2010, his Honour ordered that writs of certiorari issue to quash the s 22 determination and the s 23 warrant, and that a writ of mandamus issue to the Minister directing him to determine that Mr Zentai not be surrendered to the Republic of Hungary in response to the extradition request, and to order his release: *Zentai (No. 4)*.

The decision of the Full Court

17. On 4 January 2011, the appellants filed a notice of appeal contending, relevantly, that the primary judge erred in finding that, in construing Article 2(5)(a) of the Treaty, it was not open to the first appellant in the exercise of his discretion under s 22 of the Act to determine that Mr Zentai is to be

⁸ *Zentai FFC* at [87].

⁹ See *Zentai v O'Connor* [2009] FCA 1597 (24 December 2009).

¹⁰ A copy of the Treaty is set out in the Schedule to the *Extradition (Republic of Hungary) Regulations 1997* (Cth).

surrendered in relation to the offence of 'war crime' on the basis that the offence did not exist at the time.¹¹

18. By notice of contention filed on 4 February 2011, Mr Zentai contended that the orders of the primary judge should be affirmed on grounds additional to those relied upon by the court below.¹²

19. On 16 August 2011, North, Besanko and Jessup JJ upheld the grounds of appeal, save (per Besanko and Jessup JJ) for that regarding the construction of Article 2(5)(a) of the Treaty (that is, ground 4 of the original application)¹³: *Zentai FFC*. The Full Court dismissed all of the grounds of the notice of contention.

Grant of leave and the appeal

20. On 2 December 2011, this Court ordered (by consent) that, pending determination of the applicants' application to the High Court for special leave to appeal and, if special leave is granted, pending determination of the appeal:

a) the order of the Full Court on 16 August 2011 that a writ of mandamus issue to the first appellant directing him to determine, according to law, whether Mr Zentai is to be surrendered to the Republic of Hungary in relation to the offence of war crime, be stayed;

b) Mr Zentai be admitted to bail upon conditions; and

c) the s 19(9) warrant issued by the Magistrate on 20 August 2008 committing Mr Zentai to imprisonment in Hakea Prison, Canning Vale, Western Australia, be stayed.

¹¹ See *Zentai FFC* at [121].

¹² See *Zentai FFC* at [122].

¹³ See *Zentai FFC* at [89] (point 4).

21. On 9 December 2011, this Court granted to the appellants special leave to appeal from the judgment and orders of the Full Court of the Federal Court given and made on 16 August 2011.⁴
22. The appellants filed the notice of appeal on 21 December 2011.

Part VI Argument

Grounds of the appeal

- 10 23. Ground 1 of the notice of appeal identifies the error in the construction of Article 2(5)(a) of the Treaty adopted by the majority of the Full Court. Ground 2 advances the proper construction of that provision. On that basis, Ground 3 identifies the conclusion that the majority of the Full Court should have reached on the question of the first appellant's satisfaction under s 22(3)(e) of the Act. Essentially, however, there is one question regarding the proper construction of Article 2(5)(a) of the Treaty.
- 20 24. The issue in the present case (identified in Part II) arises in the context of the first appellant's determination under s 22 of the Act that Mr Zentai is to be surrendered to the Republic of Hungary in relation to the offence of war crime. The evidence before the Full Court of the Federal Court established that 'war crime' was not an offence under Hungarian law at the time that the conduct constituting the offence is alleged to have occurred (8 November 1944). However, the conduct constituting the offence fell under the rubric of the offence of 'murder'.
25. In accordance with s 11(1) and (1C) of the Act, the *Extradition (Republic of Hungary) Regulations 1997* (Cth) (the **Regulations**) provide that the Act applies in relation to the Republic of Hungary subject to the Treaty (reg 4). Consequently, and in accordance with s 22(3)(e)(i) and (iii) of the Act,

⁴ That order was entered on 19 December 2011, and indicates that special leave be granted upon the applicants' undertaking that they will: (1) not seek to disturb any orders as to costs which have been made in the court below; and (2) pay the first respondent's costs of the appeal, including the costs of the special leave application.

where a provision of the Treaty has the effect that the surrender of an 'eligible person' shall be refused in certain circumstances, the person is only to be surrendered in relation to the 'qualifying extradition offence' if the Attorney-General is satisfied that those circumstances do not exist. The issue, then, falls to be determined on the basis of the proper construction of Article 2(5)(a) of the Treaty.

26. For the reasons developed below, it is submitted that the majority of the Full Court erred by holding that:

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- a) extradition under the Treaty and pursuant to the Act is precluded where the *specific offence* for which extradition is sought was *not enacted* under Hungarian law at the time the conduct constituting the offence took place (at [70]; [156]-[157]); and
 - b) therefore, the first appellant committed a jurisdictional error in determining pursuant to s 22 of the Act that Mr Zentai is to be surrendered to the Republic of Hungary in relation to the offence of 'war crime' (which did not exist under Hungarian law at the relevant time) (at [71]; [163]).

27. The Full Court should have held that:

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- a) extradition is not precluded under Article 2(5)(a) of the Treaty where the conduct constituting the offence for which extradition is sought constituted *an offence* in the Requesting State at the time the conduct took place; and
 - b) therefore, it was open to the first appellant pursuant to s 22(3)(e)(i) and (iii) of the Act to be satisfied that Mr Zentai may be surrendered to the Republic of Hungary in relation to the offence of 'war crime' (given that the conduct constituting that offence also constituted the offence of 'murder', which did exist under Hungarian law at the relevant time).

Relevant principles of treaty construction

28. Extradition treaties are to be given a broad and generous construction so far as the text permits in order to facilitate “*the purpose of bringing to justice those accused of serious crimes*”,¹⁵ which is consonant with the purposive approach laid down in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (the **Vienna Convention**).¹⁶ To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve that purpose.¹⁷
29. Justice Jessup acknowledged (at [178]) that: “*The Treaty is fundamentally an agreement between nations, a circumstance which must, by the terms of ss 11 and 22(3)(e) of the Act, inevitably inform the operation of the latter*”. It would be a mistake to think that the Treaty had to be construed as though it were a domestic statute.¹⁸ This is underscored by the fact that the Treaty is equally authentic in both languages.¹⁹ As Deane J stated in *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 261.6:

20 *International agreements are commonly “not expressed with the precision of formal domestic documents as in English law”. The reasons for this include the different importance attributed to the strict text of agreements under different systems of law, the fact that such agreements are ordinarily “the result of compromise reached at the conference table” and the need to accommodate structural differences in official languages: see Wynes, Legislative, Executive and Judicial Powers in Australia, 5th ed. (1976), p.299.*

¹⁵ *In re Ismail* [1999] 1 AC 320 at 326-327, per Lord Steyn.

¹⁶ This was accepted by the Full Court in *Zentai FFC* at [11] (North J); [66] (Besanko J); and [148] (Jessup J). Australian courts have accepted that the interpretation of treaties is governed by the Vienna Convention: see, for example, *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 93.2 (Gibbs CJ); 177.6 (Murphy J); 222.9 (Brennan J).

¹⁷ *R v Governor of Ashford Remand Centre, Ex parte Postlethwaite* [1988] 1 AC 924 at 947C-D (Lord Bridge of Harwich). See also *Zentai FFC* at [12] (North J).

¹⁸ *R v Governor of Ashford Remand Centre, Ex parte Beese* [1973] 1 WLR 969 at 973B-C (Lord Widgery CJ). This statement was made in circumstances where the (extradition) treaty “*is to be treated as part of the Act of 1870. Accordingly, one must from time to time look at the treaty itself to see what the scope of the Act may be. In particular, if the treaty restricts or reduces the circumstances in which a fugitive offender can be arrested and surrendered, then so far as that offender is concerned the Act must be treated as amended accordingly.*” (at 972H)

¹⁹ The fact that the Treaty was “*done in duplicate*” in English and Hungarian “*both texts being equally authentic*” is indicated in the final sentence of the Treaty. See *Zentai FFC* at [15] (North J).

30. Article 31(1) of the Vienna Convention provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Article 31(3)(a) and (b) provides that:

3. *There shall be taken into account, together with the context:*

(a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

(b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; ...*

10 31. The evidence before the Full Court indicated that the Contracting States Parties agree as to the correct construction of Article 2(5)(a) of the Treaty; namely, that extradition is not precluded by that provision given that the conduct alleged against Mr Zentai constituted an offence at the time the conduct allegedly occurred.²⁰ This demonstrates the subsequent agreement between the parties regarding the interpretation of the Treaty, which, in accordance with Article 31(3)(a) of the Vienna Convention, must be taken into account in interpreting Article 2(5)(a) of the Treaty.²¹

20 32. Furthermore, the request by the Republic of Hungary for the extradition of Mr Zentai in respect of the offence of ‘war crime’, in combination with:
20 (a) the statement of receipt of the request on 8 July 2005 pursuant to s 16 of the Act, which was predicated on an acceptance that “*the requirements of Article*

²⁰ This agreement was indicated to the first appellant in a departmental submission (dated 6 November 2009) regarding the determination under s 22 of the Act (Attachment C - Consideration of the preconditions to surrender and grounds for refusal of surrender, para 100): “*This [conduct-based] interpretation [of Article 2(5)(a)] also appears consistent with the view taken by the Hungarian Government. The Ministry of Justice has indicated it believes the request is not precluded by Article 2(5)(a), given that ‘it can be established that the action [allegedly] committed by Zentai was an offence even at the time of its commission.’*” See Annexure “DB20” to Affidavit of Dennis Barich sworn on 4 December 2009. Note that no reference was made in the courts below to any *travaux préparatoires* of the Treaty.

²¹ See *Zentai FFC* at [14] (North J). This ‘agreement’ can take various forms (which may or may not be legally binding): see Aust, A., *Modern Treaty Law and Practice* (2007), pp 239-2, 240-4.

2(5)(a) of the Treaty have been met”;²² and (b) accession to that request by Australia (by way of the s 22 determination), or, at least, the acceptance that the request for the offence of ‘war crime’ presents no obstacle to the extradition of Mr Zentai,²³ constitutes subsequent state practice in the application of the Treaty. In accordance with Article 31(3)(b) of the Vienna Convention,²⁴ this must be taken into account in construing Article 2(5)(a) of the Treaty.

The proper construction of Article 2(5)(a) of the Treaty

- 10 33. The object or purpose of the Treaty is disclosed in its preamble, namely: “... to make more effective the cooperation of the two countries in the suppression of crime”. Article 1 of the Treaty discloses the principal obligation, which is “... to extradite to each other, subject to the provisions of this Treaty, any person found in the territory of one of the Contracting States who is wanted for prosecution by a competent authority for, or has been convicted of, an **extraditable offence** against the law of the other Contracting State” (emphasis added). Clearly, the notion of an “extraditable offence” is central to the ambit of the obligation to extradite under the Treaty.
34. The ambit of that notion is addressed in Article 2 of the Treaty.²⁵ Importantly, paragraphs (1) and (2) of Article 2 identify extraditable

²² See Annexure “DB2” to Affidavit of Denis Barich sworn on 8 April 2010, Attachment B “Preconditions to the issue of a notice under section 16 of the Extradition Act 1988”, para 20. This evidence was before the primary judge.

²³ It is not necessary to show that each party has engaged in a practice, only that all have expressly or tacitly accepted it: Aust, A., *Modern Treaty Law and Practice* (2007), p 243.3. ‘Subsequent practice’ is sometimes understood in a broad sense to include unilateral acts as well as subsequent agreements: Corten, O., & Klein, P. (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Vol 1) (2011), para 42 (p 826.2).

²⁴ The rule is that the relevant conduct of the contracting parties after conclusion of the treaty has a high probative value as to the intention of the parties at the time of its conclusion (and existed prior to the conclusion of the Vienna Convention): Lord McNair, *The Law of Treaties* (1961, repr. 1998), pp 424-429 (see comment upon Article 19 of the Harvard Research Draft Convention, p 966: “If all the parties to a treaty execute it, or permit its execution, in a particular manner, that fact may reasonably be taken into account as indicative of the real intention of the parties or of the purpose which the instrument was designed to serve.”). See also Corten, O., & Klein, P. (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Vol 1) (2011), para 43 (p 826.6).

²⁵ It also contains the relevant limitation or condition for the purposes of the combined operation of ss 11 and 22 of the Act, and reg 4 of the Regulations (that is, for the purpose of the operation of the Act, subject to the Treaty).

offences, not by reference to names or elements of offences, but by reference to their punishability according to the laws of the Requesting and Requested States by a minimum standard of severity (that is, the 'eliminative' or 'no list' method'). This is a departure from earlier treaty practice that characterised extraditable offences by specifying by name the offence for which extradition will be granted (that is, the 'enumerative method').²⁶

10 35. This departure is significant in that it indicates (contrary to the finding of Jessup J at [157]) that the Treaty is concerned with the criminality of the relevant conduct, and is not "*preoccupied*" with the name (or elements) of the offence for which extradition is sought.²⁷ This is underscored by the fact that paragraph (1) refers to offences "*however described*", and paragraph (2) dismisses as irrelevant ("*in determining whether an offence is an offence against the law of both Contracting States*"): (a) whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology; and (b) whether the constituent elements of the offences differ under the law of the Contracting States, requiring the totality of the alleged acts or omissions to be taken into account.

20 36. Article 2(2) applies to each of the steps in paragraph (1), and subparagraphs (5)(a) and (5)(b). This is evident from the fact that paragraph (2) applies: (i) "[f]or the purposes of this Article" (and not solely to paragraph 1); and (ii) in relation to an enquiry that is not (in its terms) replicated in any other part of Article 2.²⁸ Accordingly, the assessment in paragraph (2) (with reference to "*both Contracting States*") applies to the assessment of offences in both Contracting States *individually*; that is, to *each* State.²⁹ As such, Article 2(5) involves an assessment of the nature of the offence in "*both Contracting States*", albeit a different constraint is imposed on each of subparagraphs (5)(a) (which applies to the Requesting State) and (5)(b) (which applies to the

²⁶ See Shearer, I., *Extradition in International Law* (1971), pp 133-137.

²⁷ See *Zentai FFC* at [18] (North J).

²⁸ Article 2(1) is concerned with whether offences (however described) are **punishable** by imprisonment for a specified period under the laws of **both Contracting States**. Article 2(5)(a) is concerned with whether alleged acts or omissions constituted an offence in the **Requesting State**. Article 2(5)(b) is concerned with whether alleged acts or omissions would constitute an offence in the **Requested State**.

²⁹ See *Zentai FFC* at [22] (North J).

Requested State). In this way, the approach of focusing upon the totality of acts or omissions alleged against the person whose extradition is sought is applied consistently to the processes of examining offences under Article 2.

37. The chapeau of Article 2(5) provides that “[e]xtradition may be granted pursuant to the provisions of this Treaty irrespective of **when the offence in relation to which extradition is sought was committed ...**” (emphasis added). The emboldened expression identifies a point in time by reference to the taking place of alleged acts or omissions that constituted an offence. The use of the term “it” in subparagraph 5(a) flows grammatically from the use of the term “offence” (in the chapeau). However, by reason of paragraph (2), that term should be understood as referring to the totality of acts and omissions alleged to constitute that offence.³⁰ Accordingly, the enquiry in subparagraph (5)(a) is whether, when the acts or omissions constituting the offence for which extradition is sought took place, those acts or omissions constituted an offence in the Requesting State. That enquiry does not require that extradition be sought for an offence under the same law or in identical terms, only that the conduct in question was criminal at the time it occurred.
38. Reference to the offence for which extradition is sought so as to refer to acts or omissions constituting that offence (and not solely to an offence enacted under municipal legislation) is seen elsewhere in the Treaty. Notably, Article 3(1)(d) provides that extradition shall not be granted “if final judgment has been passed in the Requested State or in a third state in respect of **the offence for which the person’s extradition is sought**” (emphasis added). It does not include the additional words “or another offence constituted by the same conduct as constitutes the extradition offence”, which appear, for example, in the equivalent extradition objection regarding double jeopardy in s 7(e) of the Act. It is clear that, in the context of this Treaty, the emboldened expression encompasses a reference to conduct constituting the offence, and not solely the enacted offence. This is because: (a) a judgment passed in the Requested (or a third) State could not be passed in respect of the precise offence enacted in the municipal law of the Requesting State; and (b) the protection against double jeopardy is advanced where the expression refers to the acts or

³⁰ Cf. *Zentai FFC* at [155] (Jessup J).

omissions alleged in the extradition request, and not only the precise equivalent offence.³¹

39. Reference to the offence for which extradition is sought to connote the acts or omissions constituting that offence is also used in Article 3(2)(b), (d) and (e), which provides that extradition may be refused where (respectively): (i) the competent authorities of the Requested State have decided to refrain from prosecuting the person for “*the offence in respect of which extradition is sought*”; (ii) “*the offence for which extradition is sought*” is regarded under the law of the Requested State as having been committed in whole or in part within that State; and (iii) prosecution in respect of “*the offence for which extradition is sought*” is pending in the Requested State against the person whose extradition is sought. As in the case of Article 3(1)(d), reference to the precise enacted offence does not make sense in the context of these provisions, and the relevant protection afforded by these provisions is undermined where the expression is read as a reference solely to the precise equivalent offence.
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40. The construction of Article 2(5)(a) of the Treaty advanced by the appellants best achieves the purpose or object of the Treaty: namely, co-operation in the suppression of crime. That construction is also consistent with the general approach of the Treaty that emphasises the underlying criminality, and not the form, of the offence. This is seen in the provision for dual criminality in Article 2(5)(b) of the Treaty, and that of the rule of speciality in Article 12(1)(a). The latter provision precludes a person extradited under the Treaty from being detained or tried, or subjected to any other restriction of personal liberty in the Requesting State for any offence committed prior to extradition other than the offence for which extradition was granted or “*any other extraditable offence of which the person could be convicted upon proof of the facts upon which the request for extradition was based*” (provided that that offence does not carry a penalty that is more severe than that which could be imposed for the offence for which extradition was granted). This provision embraces an approach that circumscribes the outer limit of the obligation by reference to the conduct constituting the offence for which extradition was granted. There is no reason of principle for the adoption of a different approach (requiring formal correspondence between the offences in both Contracting
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³¹ For example, if Mr Zentai were acquitted of ‘murder’ in Australian criminal proceedings, Article 3(1)(d) of the Treaty would preclude extradition to the Republic of Hungary for the offence of ‘war crime’ (assuming the extradition request arose from the same conduct).

States) in relation to Article 2(5)(a), thus setting the operation of that provision apart from that of the other provisions of the Treaty.³²

The error in the construction by the majority of the Full Court

41. The central error in the approach of the majority is the finding that Article 2(2) has no role to play in the construction of Article 2(5)(a). The majority found that Article 2(2) is addressed solely to the dual criminality requirement in Article 2(5)(b) (Besanko J at [63]; Jessup J at [153]). As explained above, this finding is not supported by the terms of paragraph (2).
- 10 42. Justice Jessup held that “*it is no part of the function of Art 2.2 to require, or to permit, recourse to be had to offences in the Requesting State other than the one in relation to which the person concerned is wanted for prosecution, or of which he or she has been convicted*”, in determining whether that offence is one which the Requested State also makes punishable (at [155]). His Honour reasoned that, just as it would not be permissible for the Requested State to search for some offence other than that in relation to which the obligation to extradite arises for the purposes of the application of Article 2(2), neither would they be permitted, in the application of Article 2(5)(a), to search for some other offence which existed at the time of the acts or omissions which constituted the offence in relation to which the person concerned was actually wanted for prosecution or of which they had actually been convicted (at [156]).
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43. His Honour misconceived the operation of the dual criminality requirement, which, as Deane J stated in *Riley v The Commonwealth* (1985) 159 CLR 1 at 17.8, “*is satisfied if the acts in respect of which extradition is sought are criminal under both systems even if the relevant offences have different names and elements.*”³³ That is, the relevant basis of the assessment of dual criminality is the *acts or omissions* constituting the offence (which acts or omissions must correspond with an offence in the Requested State at the time of the extradition request); not a fixed offence in the Requesting State, contrary to his Honour’s assessment (at [153]). This demonstrates a fundamental
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³² See *Zentai FFC* at [29] (North J); cf. [63], [69] (Besanko J) [156] (Jessup J).

³³ *Riley v The Commonwealth* (1985) 159 CLR 1 at 17.8 (Deane J).

misunderstanding of the requirement of dual criminality, which ultimately infects his Honour's construction of Article 2(5)(a) (at [156]).

44. Justice Jessup found that Article 2(2) is dealing with *one question only*: is there an offence in the Requested State that has the necessary correspondence with the offence in the Requesting State? That offence is a “*known, fixed, entity*” (at [153]). This is an *a priori* conclusion that is not supported by any reasoning. This premise leads to a number of conclusions: first, that the reference to the “*laws of the Contracting States*” in Article 2(2)(a) and (b) is, in fact, a reference to the laws of the Requested State (at [154])³⁴ (contrary to the terms of that provision); and secondly, that it is no part of the function of Art 2.2 to require, or to permit, recourse to be had to offences in the Requesting State other than the one in relation to which the person concerned is wanted for prosecution, or of which he or she has been convicted. These conclusions follow from an incorrect premise or construction of Article 2(2); they do not support that construction.
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45. As North J acknowledged, Article 2(5)(a) is “*obviously concerned to implement the principle that a person should not be subject to criminal liability unless the conduct was unlawful where and when it was done*” (at [23]). This is its “essential utility”, which, like the principle of dual criminality, is “*likely to be outweighed by the impediment which it represents to the advancement of criminal justice if its content is defined in over-technical terms which would preclude extradition ... notwithstanding that the acts alleged against the accused involve serious criminality under the law of both requesting and requested states*”.³⁵
- 20
46. The construction adopted by the majority draws a distinction between the operation of the *nullum crimen sine lege* principle in Article 2(5)(a) of the Treaty, and the operation of the dual criminality requirement in Article 2(5)(b). The majority justify this distinction, in part, on the basis that better words (or words identical to those used in Article 2(5)(b)) could have been employed to express a conduct-based principle (at [62], [157]). Such an (overly literal) approach invites error, as it ignores the context in which the terms of the Treaty are negotiated and concluded. The criticism that the negotiated terms of the Treaty could have been expressed more precisely is,
- 30

³⁴ His Honour's analysis also necessitates reading the reference to “*the law of both Contracting States*” in the chapeau of Article 2(2) as a reference to the law of the Requested State.

³⁵ *Riley v The Commonwealth* (1985) 159 CLR 1 at 17.5 (Deane J).

in the present case, a criticism of the syntax of Article 2(5)(a) (which does, in fact, refer to the “*acts or omissions constituting the offence*”)³⁶ and, in any event (as explained above), does not deny the construction contended for by the appellants.

47. Furthermore, as Besanko J acknowledged (at [69]), the result of this construction is “*two tests*”: a broader one in the case of the assessment of dual criminality and a “*quite narrow*” test in respect of the principle of retrospectivity. The construction adopted by the majority elevates form over substance and as such draws an arbitrary distinction, which does not advance the object of the Treaty: namely, (making more effective the co-operation of the Contracting States in) the suppression of crime.³⁷ As acknowledged by Besanko J (at [69]), the construction advanced by the appellants both promotes that object, and avoids the need to imply a separate, narrow test.
- 10
48. A further difficulty with an approach that insists on a formal correspondence of offences is revealed by way of the necessary consequence that extradition would be refused, for example, where the offence for which extradition is sought is renamed or included in a restatement that applies retrospectively. In order to avoid this consequence, the majority stated a “*minor qualification*” to their approach. Justice Besanko held (at [69]) that there need not be “*precise identification*” between the offence in the Requesting State at the time of the acts or omissions and the offence for which extradition is sought. His Honour interpreted the Treaty “*as allowing for minor variations such as changes in the name of the Act or Decree and changes so as to bring the language up to date*”. Similarly, Jessup J held (at [159]) that he would not regard “*variations in the way an offence was described*” as necessarily foreclosing an affirmative answer to the question whether “*the offence was an offence at the relevant time*”. His Honour added that all would depend on the content of the offence and the nature of the variations.
- 20
- 30 49. This qualification undermines a construction that is predicated on the existence of a “*known, fixed*” offence (Besanko J at [70]; Jessup J at [153]).

³⁶ Furthermore, Jessup J draws a distinction between Article 2(5)(a) and 2(5)(b) on the basis that the former employs the sobriquet “*the offence*”, whereas the latter employs “*an offence*” (at [156]). In fact, Article 2(5)(a) refers to both “*the offence*” and “*an offence*”.

³⁷ See *Zentai FFC* at [27] and [29] (North J).

One cannot sustain a construction of Article 2(5)(a) of the Treaty that is based on a 'known, fixed' offence and, at the same time, allow for variations, even of a nominal character, in the offence. Furthermore, this approach invites ambiguity in the determination of permissible variations in the description of offences, and provides no basis upon which the present case (or indeed any other case) might fall outside that which is considered 'permissible'. As such, it is by no means clear what kind of variation would fall foul of the principle of the retrospective operation of criminal law.

Part VII Legislative materials

- 10 50. The relevant statutory provisions and regulations are reproduced in Annexure I. Those provisions are still in force, in that form, at the date of making these submissions.

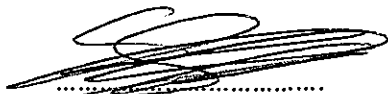
Part VIII Chronology

51. The chronology of events is reproduced in Annexure II.

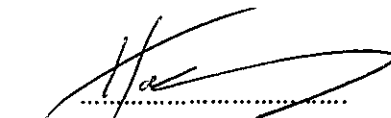
Part IX Orders

52. For the reasons set out above, the appeal should be allowed. The appellants have undertaken to pay the first respondent's costs of defending the appeal.
53. Orders 1-4 of the Full Court of the Federal Court given on 16 August 2011 should be set aside. In substitution for those orders:
- 20 a) The appeal be allowed.
- b) The orders made by the primary judge on 10 December 2010 be set aside. In substitution for those orders, the Further Amended Application be dismissed.

Dated: 22 December 2011



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ANNEXURE I

LEGISLATIVE MATERIALS

Extracts from *Extradition Act 1988 (Cth)*

11. Modification of Act in relation to certain countries

(1) The regulations may:

- (a) state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations;

...

(1C) For the purposes of subsections (1) and (1A), the limitations, conditions, exceptions or qualifications that are necessary to give effect to a treaty may be expressed in the form that this Act applies to the country concerned subject to that treaty.

22. Surrender determination by Attorney-General

(1) In this section:

eligible person means a person who has been committed to prison:

- (a) by order of a magistrate made under section 18; or
- (b) by order of a magistrate made under subsection 19(9) or required to be made under subparagraph 21(2)(b)(ii) (including by virtue of an appeal referred to in section 21), being an order in relation to which no proceedings under section 21 are being conducted or available.

qualifying extradition offence, in relation to an eligible person, means any extradition offence:

- (a) if paragraph (a) of the definition of *eligible person* applies—in relation to which the person consented in accordance with section 18; or
- (b) if paragraph (b) of the definition of *eligible person* applies—in relation to which the magistrate referred to in that paragraph or the court that conducted final proceedings under section 21, as the case requires, determined that the person was eligible for surrender within the meaning of subsection 19(2).

(2) The Attorney-General shall, as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person, determine whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences.

(3) For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

...

(e) where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:

(i) surrender of the person in relation to the offence shall be refused;

...

in certain circumstances--the Attorney-General is satisfied:

(iii) where subparagraph (i) applies--that the circumstances do not exist;

...

Extracts from *Extradition (Republic of Hungary) Regulations 1997 (Cth)*

4. The *Extradition Act 1988* applies in relation to the Republic of Hungary subject to the Treaty on Extradition between Australia and the Republic of Hungary (a copy of which is set out in the Schedule).

SCHEDULE

**TREATY ON EXTRADITION BETWEEN AUSTRALIA AND THE
REPUBLIC OF HUNGARY**

Australia and the Republic of Hungary

DESIRING to make more effective the co-operation of the two countries in the suppression of crime by concluding a treaty on extradition,

HAVE AGREED as follows:

ARTICLE 1

THE OBLIGATION TO EXTRADITE

The Contracting States undertake to extradite to each other, subject to the provisions of this Treaty, any person found in the territory of one of the Contracting States who is wanted for prosecution by a competent authority for, or has been convicted of, an extraditable offence against the law of the other Contracting State.

ARTICLE 2

EXTRADITABLE OFFENCES

1. For the purposes of this Treaty, extraditable offences are offences however described which are punishable under the laws of both Contracting States by imprisonment for a maximum period of at least one year or by a more severe penalty. Where the request for extradition relates to a person convicted of such an offence who is wanted for the enforcement of a sentence of imprisonment, extradition shall

be granted only if a period of at least six months of such penalty remains to be served.

2. For the purpose of this Article in determining whether an offence is an offence against the law of both Contracting States:

(a) it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ.

...

5. Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence in relation to which extradition is sought was committed, provided that:

(a) it was an offence in the Requesting State at the time of the acts or omissions constituting the offence; and

(b) the acts or omissions alleged would, if they had taken place in the territory of the Requested State at the time of the making of the request for extradition, have constituted an offence against the law in force in that State.

ARTICLE 3

EXCEPTIONS TO EXTRADITION

1. Extradition shall not be granted in any of the following circumstances:

...

(d) if final judgment has been passed in the Requested State or in a third state in respect of the offence for which the person's extradition is sought;

...

2. Extradition may be refused in any of the following circumstances:

...

(b) if the competent authorities of the Requested State have decided to refrain from prosecuting the person for the offence in respect of which extradition is sought;

...

(d) if the offence for which extradition is sought is regarded under the law of the Requested State as having been committed in whole or in part within that State;

(e) if a prosecution in respect of the offence for which extradition is sought is pending in the Requested State against the person whose extradition is sought;

...

ARTICLE 12

RULE OF SPECIALITY

1. Subject to paragraph 3, a person extradited under this Treaty shall not be detained or tried, or be subjected to any other restriction of his personal liberty, in the territory of the Requesting State for any offence committed before his extradition other than:

(a) an offence for which extradition was granted or any other extraditable offence of which the person could be convicted upon proof of the facts upon which the request for extradition was based, provided that that offence does not carry a penalty which is more severe than that which could be imposed for the offence for which extradition was granted;

...