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' REPLY

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1. The following submissions, which are in a form suitable for publication on the internet, are made in response to the respondent's submissions filed and served on 10 February 2012 (**RS**).

Vienna Convention- generally

2. The first respondent submits that the interpretation of treaties comprises separate consideration of the factors in Art 31 of the Vienna Convention in sequential order (namely, ordinary meaning, context, and then object and purpose) (RS [15]). This is not the approach adopted by this Court in *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225, where Brennan J said (at 231.2) that: "*[i]n interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules*". Justice McHugh explained (at 252.10-253.1) that the "*ordinary meaning of the words of the treaty are presumed to be the authentic representation of the parties' intentions*", and "*are not to be determined in a vacuum removed from the context of the treaty or its object or purpose*". His Honour held that an "*ordered yet holisitic approach*" comprises a "*single combined operation which takes into account all relevant facts as a whole*" (at 254.3). Primacy is to be given to the written text of the treaty,[1] but the context, object and purpose of the treaty must also considered "*compositively*" (at 254.5).[2]

Vienna Convention – subsequent agreement and state practice

3. The submission of the first respondent that any subsequent agreement between the parties "*may inform or confirm, but cannot override, the construction that is arrived at by the process described by Art 31(1)*" (RS at [16]), is misconceived.[3] There are not two separate processes of interpretation:[4] that is, a primary process dictated by Art 31(1), and a subsequent and secondary process dictated by Art 31(3), such that the result of the latter process may conflict with the result of the former process.

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1 The Convention should be interpreted "*giving primacy to the ordinary meaning of its terms in their context and in the light of its object and purpose*": *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 177.6 (Murphy J).

2 The circumstance that "*[i]nternational treaties often fail to exhibit the precision of domestic legislation*", confirms the need to adopt interpretative principles which are founded on the view that treaties "*cannot be expected to be applied with taut logical precision*" (McHugh J at 255.9 - 256.1). See also Dawson J at 240.3.

3 Similarly, after an examination of the "*ordinary meaning*" of Art 2(5)(a) of the Treaty, pursuant to Art 31(1) of the Vienna Convention, the first respondent concludes that the subsequent practice of the parties (as per Art 31(3)(a) of the Vienna Convention), cannot be regarded as "*displacing*" the ordinary meaning (RS at [35]).

4 The structure of Part VII of the first respondent's submissions (regarding "*Application of the principles*") also demonstrates a bifurcated, sequential process of interpretation.

4. The first respondent's submissions on the subsequent agreement of the parties rest on the false premise that such an agreement supplements or varies the meaning of the Treaty provisions (RS at [31], [32], [35]). The agreement, as per the operation of Art 31(3) of the Vienna Convention, *confirms* the intention of the parties as to the meaning of the terms employed in the Treaty.[5] It does not alter that meaning to create new obligations.

5. As to the first respondent's submissions at [31]: The suggestion that the agreement is convenient or self-serving is not warranted, and it is beside the point. The submission fails to conceive that construction of Art 2(5)(a), taking into account the subsequent agreement of the parties regarding the interpretation of the provision, constitutes construction in accordance with generally accepted principles of treaty interpretation. The evidence before the Full Court indicated that the Contracting States Parties agree as to the correct construction of the provision (see AS at [31]). That evidence was not contested by the first respondent.

6. As to the first respondent's attempt to impugn the nature of the agreement between, and the practice of, the parties (RS at [34]): The submission that the agreement between the parties is not 'considered' is pure assumption. The submission that the agreement is not 'public' assumes that the agreement should take a particular form, which is simply not prescribed by the Vienna Convention or otherwise at international law.[6] The submission that the agreement is based on inference belies the evidence of an express agreement as to the meaning of Art 2(5)(a).[7] The submission that the practice relied upon is self-referential, and not objective, misses the point. It is the subsequent practice of the parties in the application of a bilateral treaty, which indicates the agreement of those parties regarding its interpretation. As such, it is a consideration to be taken into account in interpreting that treaty. The fact that it is practice in the application of the Treaty does not undermine the 'quality' of that practice; it is a condition of the application of the accepted interpretative principle as contained in Art 31(3)(b).

Application of the principles

7. The first respondent's primary submission is that the opening word ("*it*") of Art 2(5)(a) refers to "*the offence in relation to which extradition is sought*" in the chapeau to that Article (RS at [17]); denoting a defined set of physical and mental elements (RS at [18]). However, the attendant analysis is predicated on the proposition that Art 2(2) has no role to play in the

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5 See Appellants' Submissions (**AS**) at FN 24.

6 See AS at FN 21.

7 See AS at FN 20.

construction of Art 2(5)(a). That is the point at which the appellants and the first respondents differ. By virtue of Art 2(2)(b), the reference to "*offence*" in the chapeau should be understood as referring to the totality of acts or omissions that constituted the offence.[8]

8. The first respondent submits that Art 2(1) "*has the indirect effect of confirming that the term 'offence' is used throughout Article 2 at least, if not in other parts of the treaty, in a consistent way as denoting a legal construct rather than a set of acts or omissions*" (RS at [23]). If by "*legal construct*", the first respondent refers to the "*particular, identified offence*" previously referred to (at [19]), then it is difficult to see how that submission can be sustained when Art 2(1) refers to offences "*however described*": that is, not particular, identified offences. Furthermore, Art 2(2), which the first respondent acknowledges is addressed to the determination of the issues framed by Art 2(1),[9] directs that, "*for the purposes of this Article*", in determining whether an offence is an offence against the law of both Contracting States, the basis of the assessment shall be the totality of the acts or omissions alleged against the person whose extradition is sought. The submission that "*it is only because 'offence' is used in the sense of a legal construct that Article 2(2) has any work to do*" (RS at [24]), does not assist the first respondent. Article 2(2) directs that "*offence*" is not to be so used; that is the work that it does.

9. As to the first respondent's submission that "*offence*" may be used in Art 3 in a sense different from that contended for by the first respondent in relation to Art 2 (RS at [26]):[10] The fact that Arts 2 and 3 deal with different issues does not itself explain a different meaning. In any event, the reference to "*offence*" in the Treaty cannot be said necessarily to refer to, as the first respondent would have it, "*a legal construct*", but may denote acts or omissions constituting that offence (AS at [38]-[39]).

Notice of Contention – alleged jurisdictional error from failure to give reasons

10. The first respondent submits that the issue raised by notice of contention is whether the decision of the first appellant under s 22 of the Act was *vitiated* by his refusal to give reasons for that decision (RS at [4]). That is, it was valid but became invalid when reasons were not given.

11. Sections 75(iii) and (v) are not a source of substantive rights, but a grant of jurisdiction.[11] The first respondent says that, by implication from this grant

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8 See AS at [36]-[37].

9 RS at [24]. The point of distinction with the position of the appellants is that Art 2(2) also applies to the steps in Art 2(5)(a) and 2(5)(b) (AS at [36]).

10 The first respondent cites McHugh J in *Applicant A* at 255-256.

11 Section 75(iii): *Commonwealth v Mewett* (1997) 191 CLR 471 at 500-501 (Dawson J).
Section 75(v): *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at

of jurisdiction, the conferral of statutory power (under s 51 of the Constitution) necessarily imposes an obligation on the decision-maker to explain the basis upon which the power was purportedly exercised (RS at [43]).

12. Any implication affecting the specific powers granted by the Constitution must be drawn from the Constitution itself.[12] The nature and extent of any implication "*is governed by the necessity which requires it*".[13] The first respondent fails to demonstrate any implication that is necessary to, or inherent in, the grant of jurisdiction in s 75(iii) and (v).

10 13. As this very case shows, the absence of reasons does not leave the decision immune from judicial review (cf. RS at [42]).[14] Moreover, the first respondent has acknowledged that the Court is capable of drawing inferences in relation to the decision on the basis of the material before the decision-maker (RS at [37]).

14. The implication sought to be drawn by the first respondent is not necessary in order to effectuate judicial review of the first appellant's decision under s 22 of the Act. Any difficulties that arise when pursuing judicial review in the absence of reasons (RS at [37]) cannot by themselves provide a justification for implying an obligation to give reasons.[15]

20 15. The analysis of the first respondent gives rise to an inconsistency. To the extent that any obligation to provide reasons arises "*when asked to do so*", it is a contingent obligation that: (a) may never arise (if the request is not made); and (b) if a request is made, arises after the decision is made. The difficulty with this proposition is that it belies the submission of the first respondent that an unreasoned decision is *per se* offensive to the purported constitutional implication. On that basis, the obligation to explain is an

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178.9 (Mason CJ), 205.4 (Deane and Gaudron JJ), 232.1 (Toohey J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [156] (Hayne J).

12 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 231.1 (Brennan J). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 145.5 (Knox CJ, Isaacs, Rich & Starke JJ); *McGinty v Western Australia* (1996) 186 CLR 140 at 168.9 (Brennan J); 231.6 (McHugh J).

13 *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322 at [27] (Gleeson CJ and Heydon J); [66] (McHugh J). See also *Lange v Australian Broadcasting Corporation* (1996) 189 CLR 520 at 567.5; *McGinty v Western Australia* (1996) 186 CLR 140 at 168.7 (Brennan CJ); 184.5 (Dawson J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135.2 (Mason CJ).

14 *Avon Downs Pty Ltd v Commissioner of Taxation* (1949) 78 CLR 353 at 260.2 (Dixon J); *Foster v Minister for Customs & Justice* (1999) 164 ALR 357 at [66] (Drummond J) (in relation to a challenge to the decision to issue a warrant under s 23 of the Act authorising the applicant's surrender to the extradition country).

15 *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at [106] (Basten JA). See also *Zentai FFC* at [214] (Jessup J, with whom North and Besanko JJ agreed).

absolute one that arises upon the making of the decision (irrespective of a request for reasons). This is to be contrasted with a contingent obligation that arises upon the making of a request.

16. The first respondent does not appear to confine the purported implication to the operation of s 22 of the Act, but, indeed, to extend the implication to any conferral of public power by statute (or perhaps even beyond statute). Accordingly, any enactment (or provision thereof) that purported to exempt a decision-maker from the obligation to furnish reasons for a decision would be invalid. This would implicate Schedule II of the *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**), which excludes certain decisions from the obligation contained in s 13 of that Act.[16]

17. There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions.[17] In any event, even if the Court were to find that there is a statutory or constitutional obligation to provide reasons, the failure to discharge that obligation does not of itself vitiate the first appellant's surrender decision under s 22 of the Act for jurisdictional error.[18] Such a duty to provide reasons may be enforced by an order for mandamus.[19]

Dated: 17 February 2012

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[16] On the respondent's analysis, it is not clear whether the implication would extend to review by the Federal Court or Federal Magistrate's Court (as provided for in s 5 of the ADJR Act) given that it is purportedly drawn from the grant of jurisdiction to this Court.

[17] *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 662.8 (Gibbs CJ). See also *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [34]-[35] (Gummow A-CJ and Kiefel J).

[18] *Vanstone v Clark* (2005) 147 FCR 299 at [243] (Weinberg J, with whom Black CJ agreed). See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at [41]-[48] (Gleeson CJ, Gummow and Hayne JJ); [55]-[56] (McHugh J); and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [10] per Gleeson CJ, at [68]-[69] per McHugh, Gummow and Hayne JJ.

[19] See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at [41], [48] (Gleeson CJ, Gummow and Hayne JJ); [57] (McHugh J).