IN THE HIGH COURT OF AUSTRALIA **No. P 56 of 2011**
PERTH REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

THE HONOURABLE BRENDAN O'CONNOR
COMMONWEALTH MINISTER FOR HOME AFFAIRS
First Appellant

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Appellant

THE HONOURABLE CHRISTOPHER MARTIN ELLISON,
FORMER MINISTER FOR JUSTICE AND CUSTOMS
Third Appellant

AND:

CHARLES ZENTAI
First Respondent

BARBARA LANE
Second Respondent

THE WESTERN AUSTRALIAN OFFICER IN CHARGE,
HAKEA PRISON
Third Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

The Appeal

2. The issue raised by the Appeal is whether the First Appellant ("the Minister") fell into error in forming the state of satisfaction, for the purpose of s 22(3)(e) of the *Extradition Act 1988* (Cth)

Filed on behalf of the First Respondent by:

FIOCCO'S LAWYERS
Level 3, 25 Barrack Street
PERTH WA 6000

Contact: Denis Barich

File ref: DB:10357
Telephone: 08 9325 5510
Facsimile: 08 9325 7710
E-mail: dbarich@fiocco.com.au

("the Act"), that no circumstances existed in which surrender was to be refused pursuant to the *Treaty on Extradition between Australia and the Republic of Hungary 1997* ("the Treaty").[1]

3. That issue turns on whether Art 2(5)(a) of the Treaty is to be construed as requiring:

   (a) that the offence in relation to which extradition is sought was identified as a distinct offence under Hungarian law at the time the relevant conduct is alleged to have occurred; or

   (b) merely that that alleged conduct constituted an offence (ie, any offence) at that time.

Notice of Contention

4. The issue raised by the Notice of Contention is whether the decision of the Minister to order the surrender of the First Respondent was vitiated by the Minister's refusal to give reasons for that decision.

PART III: SECTION 78B NOTICE

5. The First Respondent served a notice under s 78B of the *Judiciary Act 1903* (Cth) on the Attorneys General on 3 January 2012 relating to the second issue above. The First Respondent considers that no further notice is required. As a precautionary measure, the First Respondent intends to serve a supplementary notice relating to the submission advanced at paragraph 31 below.

PART IV: MATERIAL FACTS

6. The summary of material facts and the chronology provided by the Appellants is accepted. For the purpose of the Notice of Contention the First Respondent adds that on 17 and 19 November 2009 his solicitors sought a statement of the First Appellant's reasons from officers of the Attorney General's Department but by letter dated 20 November 2009 the Department replied that no such statement would be provided.

PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

7. The Appellants' statement of applicable statutes and regulations is accepted with the addition of the following:

   (a) Constitutional provisions: ss 75(iii) and (v).

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[1] Australian Treaty Service 1997 No 13 (a copy of which forms the Schedule to the Regulations).

(b) Statutes: s 39B of the Judiciary Act 1903 (Cth).

PART VI: ARGUMENT ON THE APPEAL

Context in which the issue arises

8. In the proceedings below, the First Respondent ("Mr Zentai") sought judicial review of the Minister's determination, made on 12 November 2009, that he be extradited to Hungary. That determination was purportedly made under s 22 of the Act.

9. Section 11 of the Act authorises the making of regulations which provide that the Act is to apply, in relation to a specified extradition country, subject to such limitations, conditions, exceptions and qualifications as are necessary to give effect to an extradition treaty. By s 11(1C), such regulations may "be expressed in the form that this Act applies to the country concerned subject to that treaty". Regulation 4 of the *Extradition (Republic of Hungary) Regulations 1997* is expressed in that form and incorporates the Treaty. Accordingly, the Act is required to be applied subject to limitations necessary to give effect to the Treaty.[2]

10. Article 2 of the Treaty is headed "Extraditable Offences" and defines the offences in relation to which extradition may be sought as between Australia and Hungary. Relevantly, Art 2(5)(a) excludes certain offences from the class of extraditable offences on the ground of retrospectivity. Article 2(5) as a whole provides:

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

11. Article 2(5)(a), as given effect by the Regulations, limits the power in s 22. By virtue of s 22(3), the Attorney-General may not order a person to be surrendered unless (*inter alia*):

> (e) where, because of section 11, this Act applies in relation to the extradition country subject *to a lim*itation, condition, qualification or exception that has the effect that:
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> (i) surrender of the person in relation to the offence shall be refused; ...
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> ...
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> in certain circumstances—the Attorney-General is satisfied:
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> (iii) where subparagraph (i) applies—that the circumstances do not exist; ....

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[2] Australian Treaty Service 1997 No 13 (a copy of which forms the Schedule to the Regulations).

12. If the Minister proceeded on an incorrect understanding of the requirement imposed by Art 2(5)(a), it follows that he did not have the state of satisfaction required by s 22(3) and his determination must therefore be set aside. This was the basis upon which Mr Zentai succeeded in the Full Court.[3] That success is reflected in the orders of the Full Court, which affirmed the judgment of McKerracher J in so far as it set aside the Minister's determination but not otherwise.

13. The issue between the parties is the proper construction of Art 2(5)(a). It is common ground that the offence of "War Crime"[4] did not exist in Hungarian law at the time of the acts Mr Zentai is alleged to have committed; so that, if (as the Full Court held) Art 2(5)(a) requires the relevant offence to have been on the statute book at the relevant time, the Minister was not entitled to be satisfied of the matter in s 22(3)(e). On the other hand, it is accepted that the Minister was entitled to conclude that the acts alleged against Mr Zentai probably were criminal at the relevant time; so that, if the construction advanced by the Appellants is correct, Art 2(5)(a) was met and the Minister did not err in reaching the relevant state of satisfaction.

Treaty interpretation

14. Where a treaty is incorporated into the law of Australia, the interpretation of that treaty (including in the effect it has as part of domestic law) is governed by the principles of international law and, in particular, by relevant provisions of the *Vienna Convention on the Law of Treaties 1969* ("the Vienna Convention").[5] Relevantly to the present issue, Art 31 of the Vienna Convention is structured as follows:

    A. Paragraph 1 calls for a treaty to be interpreted "[i] in accordance with the ordinary meaning of the terms of the treaty in their context and [ii] in the light of its object and purpose".

    B. Paragraph 2 expressly includes certain documents and agreements, made in connection with the conclusion of the treaty, in the concept of "context".

    C. Paragraph 3 requires there to be "taken into account, together with the context", three additional considerations: any subsequent agreement between the parties "regarding the

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3 *O'Connor v Zentai* (2011) 195 FCR 515 ("*Zentai FFC*") at [61] per Besanko J (the reference to s 22(2)(e) in that paragraph appears to be a typographical error), [161]-[163] per Jessup J.

4 The specified offence of war-crime was created in 1945 under section 11 of the Prime Minister's decree number 81 of 1945 (PJD), re-enacted by the 1978 *Criminal Code of Hungary*. An English translation of the terms of s 165 of that Code appears at Full Court AB 910.

5 *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225, 230-231 per Brennan CJ, 239-240 per Dawson J, 251-256 per McHugh J, 277 per Gummow J, 294 per Kirby J.

interpretation of the treaty or the application of its provisions"; any subsequent practice which establishes the agreement of the parties regarding interpretation; and any relevant rules of international law applicable to relations between the parties.

15. This Court in *Applicant A*, applying Article 31, endorsed a "holistic but ordered approach",[6] which takes the text as its starting point and gives primacy to the ordinary meaning of its terms read in their context.[7] Thus, as Finkelstein J observed in *Qenos Pty Ltd v Ship "APL Sydney"*:[8]

> Article 31 therefore invites the following approach. First, determine the ordinary meaning of a term. Second, ask whether that meaning (or one of several meanings) should be adopted having regard to the context. The context includes the Article in which the word is found, as well as the whole treaty (and may also include the previous treaties). Third, the purpose and object of the treaty must be considered. But the third step should not be undertaken in isolation from the terms of the treaty, but rather as part of the context which can shed light on the meaning of particular terms.

16. The Court in *Applicant A* did not need to give specific attention to the effect of Art 31(3) of the Vienna Convention. However, the conclusion that primacy was to be given to the text was clearly adopted in the context of a consideration of the whole Article.[9] In that light, two points should be noted about Art 31(3). First, in so far as it requires attention to subsequent agreements of the parties and subsequent practice, it is limited to agreement (or practice establishing an agreement) as to the *interpretation* of the treaty (and thus does not include, for example, any later agreement to vary the rights and obligations which the treaty establishes. Secondly, such agreements are to be "taken into account", "together with the context". That suggests that such agreements do not form part of the "context" referred to in Art 31(1); and that they may inform or confirm, but cannot override, the construction that is arrived at by the process described in Art 31(1).[10]

Application of the principles

Ordinary meaning of the terms of the treaty

17. Turning to Art 2(5)(a) of the Treaty, it is tolerably clear that the opening word ("it") refers back to "the offence in relation to which extradition is sought" in the chapeau. On that basis,

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6 As described at 231 per Brennan J.

7 At 254-255 per McHugh J (Brennan J agreeing at 231, Gummow J agreeing at 277); also per Dawson J at 240.

8 (2009) 187 FCR 282 at [15].

9 190 CLR at 254-255 per McHugh J. See also Sorel and Boré-Evino, "1969 Vienna Convention Article 31 – General rule of interpretation" in Corten and Klein (eds), *The Vienna Conventions on the Law of Treaties: A commentary* (OUP 2011) 804 ("Sorel and Boré-Evino") at 807 [8].

10 See Sorel and Boré-Evino at 825-826 [42].

Art 2(5)(a) provides that extradition is not to be granted unless the following condition is satisfied:

"the *offence* in relation to which extradition is sought"

"*was an offence* in the Requesting State"

"*at the time* of the *acts or omissions constituting* the offence".

18. The terms of Article 2(5)(a) thus distinguish between the "offence" (as a legal construct in relation to which extradition is sought) and the conduct "constituting the offence". They impose a criterion on the former – ie, that the offence "was an offence" at a particular time. The "conduct constituting the offence" is referred to in order to identify that time. The expression "offence" in this context should be construed according to its normal meaning as a creation of the law of the relevant country – that is, as a label which denotes a defined set of physical and mental elements which, if established, leads to criminal liability. Thus, when Art 2(5)(a) calls for attention to whether the specified offence for which extradition is sought "*was an offence*" at a specified time, it asks whether that particular offence existed in the law of the country concerned at that time; not whether, in a more general sense, the conduct alleged against the person involved a breach of the law.

19. Contrary to the Appellants' submissions,[11] paragraphs (a) and (b) of Article 2(5) are addressed to *different issues* (and different points in time): the existence of an offence in the *Requesting* State at the time of the relevant conduct (i.e., retrospectivity); and the criminality of equivalent conduct in the *Requested* State at the time of the request (i.e., dual criminality). Nevertheless, para (b) serves to illustrate the distinction referred to above. Its subject-matter is not "the offence" but "the acts or omissions alleged". It asks a hypothetical question about those acts or omissions: whether they would have "constituted *an* offence" in the Requested State. For the purpose of this dual criminality requirement, there is no need for the analysis to be tied to a single specified offence and certainly not a single specified offence in the requested State, hence the reference in para (b) to *an* offence. Paragraph (a), on the other hand, does focus on a specific offence. Its use of the definite article before "offence" confirms what is implicit in the Treaty as a whole: that extradition is to be requested for a particular, identified offence with which a person is to be charged (e.g. "murder" or "war crime"). Extradition is not to be sought generally for "acts or omissions" without specifying *the* offence, said to be constituted by those acts or omissions, for which the person is to stand trial. The question posed by Art 2(5)(a) is

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[11] Appellants' Submissions at [37] to [40]

thus a question about the existence of a legal construct, rather than about the acts or omissions which are said to bring a person within the scope of that construct.

20. Since Art 2(5)(a) refers expressly to the conduct constituting the offence (for the purpose of identifying a particular time), the conclusion is inescapable that, if the drafters had been concerned with whether *that conduct* constituted an offence at the relevant time, they would have framed the provision in that way: e.g., "the acts or omissions constituting that offence constituted an offence at the time they occurred". That is the approach taken to retrospectivity by, e.g., Art 22(1) of the *Statute of Rome Constituting the International Criminal Court 1998* and by Art 15(1) of the *International Convention on Civil and Political Rights 1966*. (The latter provision is subject to an express exception relating to conduct which, when committed, was criminal according to principles of law recognised by the community of nations. No such special provision is made by the present Treaty.)

21. The Appellants' fear that extradition would be required to be refused where the relevant offence was renamed or included in a restatement[12] is misplaced. Variations in the way the relevant offence was described would clearly not prevent Art 2(5) being satisfied.[13] Nor would a codification of existing common law offences or a restatement of the existing criminal law. This is not (as Besanko J described it below)[14] a "qualification" of the construction being advanced here. It is merely the consequence of questions of compliance with the Treaty being approached (as they must be) as matters of substance rather than form.

Context

22. Art 2(5)(a) is an element of the Treaty's definition of extraditable offences. Consideration of the broader terms of that definition – ie, of Art 2 as a whole –supports the construction outlined above.

23. Article 2(1) supplies the basic definition of "extraditable offences". These are "offences however described"; that is, they are things which have some form of definition in the law of the relevant country. Offences are things of which a person may be convicted and which are punishable under the law in the sense that penalties attached to them by law. It 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.

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[12] Appellants' Submissions at [40].

[13] Cf *Zentai* FFC at [69] per Besanko J, [159] per Jessup J.

[14] *Zentai FFC* at [70].

24. The test imposed by Art 2(1) is whether an offence is punishable "under the law of both Contracting States"; and it is only because "offence" is used in the sense of a legal construct that Art 2(2) has any work to do.

    1. Article 2(2) is expressly addressed to the determination of the issue framed by Art 2(1) – whether an offence is punishable under the law of "both Contracting States". The Appellants' attempt to read this phrase as if it meant "either Contracting State", and thereby to make it applicable to Art 2(5)(a),[15] involves an unacceptable distortion of its language.

    2. If Art 2(1) were concerned with whether particular alleged *conduct* was punishable under the law of both States, there would be no need for provisions of the kind seen in Art 2(2). Their inclusion serves to confirm that an "offence" in this context is a reference to a creation of the criminal law.

25. Article 2(3) refers to an "offence against a law" of a particular kind; and Art 2(4) refers to the place where "the offence has been committed" (ie, where the conduct constituting the offence occurred). These provisions are consistent with the earlier use of "offence" to refer to a legal construct.

26. It may be that "offence" is used in a different sense in some provisions of Art 3. That is a reflection of the fact that Arts 2 and 3 deal with different issues: while Art 2 defines offences in which extradition may be sought, Art 3 identifies circumstances particular to the person whose extradition is sought (the conduct alleged against him or her[16] or other proceedings relating to that conduct)[17] in which extradition for such an offence is to be, or may be, refused. It is also, perhaps, an illustration of the observation that "international treaties often fail to exhibit the precision of domestic legislation".[18] Use of a term in a different sense in Art 3 should not be understood to detract from the coherence of Art 2.

Purpose

27. The Appellants submit that the proper interpretative approach is to read Art 2(5) according to a *broad, generous, and liberal approach* in order to facilitate the purposes of international

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[15] Appellants' Submissions at [36].

[16] Eg Art 3(2)(d), relied on by the Appellants at [39].

[17] Eg Art 3(1)(d) and (2)(b) and (e), relied on by the Appellants at [38]-[39].

[18] *Applicant A* 183 CLR at 255-256 per McHugh J.

extradition and cooperation in the suppression of crime.[19] That, however, is a somewhat simplistic way of understanding the objects and purposes of the Treaty for the purpose of construing Art 2(5)(a). The assertion that the purpose of the Treaty is to facilitate extradition cannot provide substantial assistance in construing a provision such as Article 2, the purpose and function of which is to chart the limits of the category of offences in relation to which that form of international cooperation is to occur.

a) First, judicial statements of principle advocating a "broad" approach to the construction of extradition treaties[20] do not in truth go any further than the normal interpretive rule of giving the text its natural meaning in the light of its purpose. That rule is authoritatively laid down by the Vienna Convention. Thus, as Jessup J observed,[21] the Court is not at liberty to take whatever steps seem appropriate to give effect to the object expressed in the preamble to the Treaty.

b) Secondly, the purpose of the Treaty is seen with more particularity in the core "obligation to extradite" provided for in Art 1.[22] That obligation is expressed to be "subject to the provisions of this Treaty", and to apply to persons wanted for, or convicted of, "an extraditable offence" (which of course is defined in Art 2). A proper understanding of the Treaty's purpose thus proceeds from an understanding of Art 2, rather than the reverse.

c) Thirdly, the Treaty does not dispense with the protection of fundamental rights. In addition to Art 2(5)(a), the circumstances in which extradition is not to be granted include political offences[23] and double jeopardy;[24] and there is a discretion to refuse extradition if it would be unjust, oppressive or incompatible with humanitarian considerations.[25] In a treaty between two states which are parties to the main international human rights

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[19] Appellants' Submissions at [28]-[29], [33] and [40]. However a distinction must be drawn between interpreting specific provisions in a treaty as a matter of international law, and identifying the ambit of a treaty broadly for the purpose of determining the validity of a statute as supported by the external affairs power under s 51(xxix) of the Constitution. The passage from Deane J cited by the appellants at [29] is directed to the latter issue.

[20] Eg *Re Arton (No 2)* [1896] 1 QB 509, 517 per Lord Russell CJ; *Re Ismail* [1999] 1 AC 320, 326-327 per Lord Steyn.

[21] *Zentai FFC* at [149].

[22] See *Zentai FFC* at [150].

[23] Article 3(1)(a)-(b),

[24] Article 3(1)(d).

[25] Article 3(2)(f).

conventions,[26] a purpose of overriding the protection of such rights should not be readily inferred; and provisions which serve to limit what is otherwise a derogation from such rights are entitled to a broad rather than a narrow construction.

28. This last point is not answered by observing that extradition does not involve any finding of guilt or innocence or imposition of punishment. Plainly, the point of the exercise is to expose a person to prosecution in a foreign country where those things may occur. The process itself involves a deprivation of personal liberty whose consequences may be, practically speaking, not very different from an imposition of punishment.[27]

29. Further, as to the rights protected by Art 2(5)(a), the Appellants' reference to the *nullum crimen sine lege* principle[28] is question-begging: the issue between the parties is precisely whether that is all that Art 2(5)(a) does – including whether the cognate principle *nulla poena sine lege*[29] is also embodied in the provision. In that regard, the additional encroachment on personal liberty which would ensue from adoption of the Appellants' construction is not insignificant, and should not be allowed to be obscured by the assertion (noted but not endorsed in the advice to the Minister, and not the subject of any finding) that the acts alleged against Mr Zentai constituted the serious crime of murder under Hungarian law when they were committed.[30] The provision may fall to be applied where the conduct in question constituted a relatively minor offence when committed, but is then caught by a retroactive criminal law attaching more severe penalties. If given a broad construction appropriate to a provision protecting individual liberty, Art 2(5)(a) can be seen to embody both principles.

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[26] Both Australia and Hungary are parties to, eg, the *International Covenant on Civil and Political Rights 1966*, the *International Covenant on Economic, Social and Cultural Rights 1966* and the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984*.

[27] *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at [34] (Gleeson CJ).

[28] Appellants' Written Submissions at [46].

[29] That is, not only must the law clearly define the *elements of a crime*, so that an individual might know what acts and omissions will make him liable, but it must *also prescribe a penalty that is certain*. Both principles are now incorporated into Arts 22 and 23 of the *Rome Statute of the International Criminal Court 1998*.

[30] See Full Court AB Tab 26, p 848 [94]. It will be noted that the alleged conduct as described in the Arrest Warrant at Full Court AB Tab 13, pp 482-483 does not contain any allegation concerning *mens rea*, and the Director of Public Prosecutions had advised that under Western Australian law it might constitute one of several offences (Full Court AB Tab 26, 835 [8]). While it must be accepted that the Minister was entitled to conclude that the alleged conduct was criminal, he did not have a proper basis to be satisfied – if it were relevant – that it constituted the crime of murder.

Subsequent agreement of the parties

30. Four points should be made about the Appellants' reliance on any subsequent 'agreement' of the parties to establish a construction of Article 2(5)(a).[31]

31. First, Article 2(5)(a) should be read against the background that the executive government of Australia is not competent to alter operation of a domestic statute by agreement with another country: such an agreement becomes part of the law only when incorporated by statute.[32] A statute which incorporates treaty obligations should not lightly be construed as picking up, in an ambulatory way, changes in the content of those obligations resulting from executive action from time to time. A statutory provision which purported to give force to whatever agreements might be reached from time to time by the executive government with the government of another country would fail to meet the description of a "law" and would not constitute an exercise of legislative power.[33] Statutory references to the limitations necessary to give effect to a particular treaty should therefore be understood to refer to the written text of that treaty, construed in accordance with general principles of treaty construction, and not to subsequent agreements between governments as to the effect which they would prefer the treaty to have. An expansive approach to meaning does not permit changing or creating different meanings or supplementing or augmenting provisions to cover situations not previously considered.

32. Secondly, turning to the principles of treaty construction, Art 31(3) of the Vienna Convention permits reference to subsequent agreements of the parties "regarding the interpretation of the treaty or the application of its provisions"; that is, agreements about the *meaning* of the existing text. It does not extend to agreements that supplement or vary the terms of a treaty to create new obligations. Subsequent agreements which seek to give a particular effect to treaty terms can therefore only be given weight to the extent that such a construction is open as a matter of "ordinary meaning" of those terms read in context.

33. Thirdly, when 31(3)(a) of the Vienna Convention allows any subsequent agreement of the parties to be "taken into account", along with the "context", it expressly refrains from making such agreements determinative, and calls for a judgment about the weight to be given to them. The weight to be given to subsequent agreements of the parties will necessarily depend on the nature and subject-matter of the treaty. And when the treaty is clearly one which was envisaged as being reflected in domestic law, and affecting the rights of individuals (including their right to

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[31] Appellants' Submissions at [31]-[32]; their reliance upon North J is misplaced.

[32] *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287-288 per Mason CJ and Deane J.

[33] Cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512-513 [102].

liberty), the argument for stability and predictability of effect (and thus for adherence to the text) is at its strongest.

34. Fourthly, in the instant case any such agreement is apparently to be inferred from correspondence between officials in relation to the request to extradite Mr Zentai; or from the making of the request itself and the Minister's accession to it.[34] No reference is made to any considered, let alone public, statement by the parties to the Treaty.[35] In effect, therefore, the Minister seeks to establish the validity of his action by reliance on the action itself; an exercise in both self-levitation and self-empowerment. The dealings of the two governments in the present case is hardly an objective instance of "practice", or a considered agreement reached after deliberation. It is rather the subjective *ex post* reaction of the two parties to the Treaty to a particular unprecedented request.

35. For each of these reasons, the asserted agreement (or practice) of the parties to the Treaty cannot be regarded as displacing the ordinary meaning of Art 2(5)(a).

Conclusions on the treaty construction issue

36. On the correct construction of that provision, the offence in relation to which Mr Zentai's extradition was sought is not an extraditable offence under the Treaty. For that reason it is not an "extradition offence" under the Act and his surrender is not permitted. Alternatively, in expressing his satisfaction for the purposes of s 22(3) that circumstances in which extradition was to be refused did not exist, the Minister erred in a way that went to his jurisdiction.

PART VII: ARGUMENT ON THE NOTICE OF CONTENTION

37. The practical importance of the provision of reasons in any system of judicial review of administrative action was noted by Gummow A-CJ and Kiefel J in *Minister for Immigration and Citizenship v SZMDS*,[36] and has been widely discussed by commentators.[37] A decision for

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[34] See Appellants' Written Submissions footnote 20. This reliance on hearsay to establish a point of fact which the Court must find for itself (albeit "statutory" rather than adjudicative fact – cf *Gerhardy v Brown* (1985) 159 CLR 70, 141-142 per Brennan J) illustrates the problem. An agreement as to the construction of an international instrument, intended to affect the construction of that instrument, would normally be expected to be reflected in some form of official government notice which would conclusively establish its existence.

[35] Significantly the appellants have not cited any authority or decision where such a slight interchange of notes has been recognised by an international adjudicatory body as state practice within the meaning of Art 31 of the Vienna Convention.

[36] (2010) 240 CLR 611, 622-624 [32]-[36].

[37] See eg Dyzenhaus and Taggart, "Reasoned Decisions in Legal Theory", in Edlin (ed), *Common Law Theory* (Cambridge University Press 2007) 134-167; Cane and McDonald, *Principles of Administrative Law* (OUP 2008), 145-146; Basten, "Judicial Review: Recent Trends", (2001) 29 FL Rev 365 .

which no reasons are given presents, on judicial review, an "inscrutable face".[38] Hitherto it has been accepted that, while the court in such a case may draw certain inferences about the decision-maker's reasoning from the material before it[39] (including, in some cases, an inference from the absence of reasons itself),[40] a failure to give any reasons, absent a statutory obligation to do so, constitutes a difficulty to be overcome by an applicant for review.

38. In *SZMDS* Gummow A-CJ and Kiefel J also referred also to the importance of s 75(v) of the Constitution in ensuring that "the legislative expression of jurisdictional facts in terms of satisfaction or opinion of a decision-maker does not rise higher than its source".[41] This observation has two aspects which are relevant to the present issue.

39. First, the Parliament is a legislature of limited powers and cannot confer unlimited power on administrative decision-makers. Legislation which conferred an unexaminable power would rise higher than its constitutional source. Likewise, a purported administrative act which pays no regard to the limits of the relevant power – or which purports to reach some necessary state of satisfaction without a rational basis for doing so – attempts to rise higher than its legislative source. In these ways, an unreasoned decision engages the doctrine in the *Communist Party case*.[42]

40. Secondly, s 75(v) of the Constitution has a central place in the maintenance of the rule of law under the Constitution. It ensures that those who exercise public powers which purport to emanate from the Constitution itself, or the laws of the Commonwealth, are bound by the law in an actual as well as a theoretical sense.[43] Decisions made by the repositories of such powers are therefore necessarily examinable, in the sense that both the limits on power and the facts which bring the decision within power (or not) must be ascertainable by this Court (or by any other court upon which a parallel jurisdiction has been conferred). *Dicta* of members of the Court which suggest the invalidity of an incontestable tax (ie, liability based on a discretion of the Commissioner in terms which deny the taxpayer any capacity to prove in the courts that the

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[38] *SZMDS* 240 CLR at 623 [34].

[39] As explained in *Avon Downs Pty Ltd v Commissioner of Taxation* (1949) 78 CLR 353, 360.

[40] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 663-664.

[41] 240 CLR at 625 [42] (see also at 621 [25]).

[42] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262-263 per Fullagar J; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614-615 per Brennan J. The metaphor of the stream and the source goes back further, at least to *Heiner v Scott* (1914) 19 CLR 381, 393 per Griffith CJ.

[43] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513-514 [104].

criteria of liability were not satisfied)[44] are an expression of the same idea: exercises of Commonwealth executive or statutory power cannot be made unexaminable.

41. As noted above, the examinability of an administrative decision depends on the capacity to ascertain both the limits on the relevant power and the basis upon which (and way in which) the power was purportedly exercised. For this reason, in the case of a statutory power, the provision to interested parties and the courts of some means for understanding the basis for exercise of the relevant power is critical to the validity of the conferral of power itself. This was recognised, in the context of a power to refuse registration as a migration agent based on a broadly expressed criterion, by Mason CJ and Brennan J in *Cunliffe v Commonwealth*.[45]

42. Viewed in the light of the significance of s 75(v), a decision which is unexplained is in the same category as a decision which is unreasoned. Both involve an attempt to dispense with limits on the decision-maker's power; and a statute which conferred powers whose limits could be dispensed with would be, to that extent, invalid. Another way of putting the point is that the conferral of a public power, without an express or implied obligation to explain purported exercises of that power, creates "islands of power immune from supervision or restraint",[46] the existence of which is inconsistent with the constitutional principle embodied in s 75(v).

43. The power conferred by s 22 of the Act must therefore be understood to be conditioned by an obligation to explain, when asked to do so by a party with standing to challenge the decision, the basis upon which the decision-maker understood the power to be available (including the basis of any necessary state of satisfaction as to particular matters) and the considerations which were taken into account in exercising any discretion. That follows either by direct implication from the conferral of jurisdiction on this Court by s 75(iii) and (v), or as a result of construing the Act so as to avoid invalidity. If such a construction were not possible, s 22 would be invalid. Either way, Mr Zentai is entitled to orders setting aside the decision of the Minister.

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[44] See most recently *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2008) 237 CLR 198, 204 [9]. The points made there can be traced back, through *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 639-640, and *Deputy Commissioner of Taxation v Hankin* (1959) 100 CLR 566, 576-577, to the *Communist Party case*.

[45] (1994) 182 CLR 272, 303, 331 (see also per Deane J at 342).

[46] Cf *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 581 [99] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

Geoffrey Kennett
Ph. (02) 9221 3933
Fax (02) 9221 3724

Vicky Priskich
Ph. (03) 9640 3130

Peter Johnston
Ph. 0412 933 689

Counsel for the First Respondent

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