Zentai v Honourable Brendan O'Connor (No 3) [2010] FCA 691 (2 July 2010)

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Introduction

Can an Australian be extradited for a fair trial for an alleged war crime on the basis of statements from deceased witnesses, confessions from alleged accomplices credibly extracted under torture, and the absence of contemporary forensic evidence? That was the "compelling aspect" recently considered by the Federal Court of Australia in *Zentai v Honourable Brendan O'Connor (No 3)* ('*Zentai*').[1] The judgment answered the question by reference to several national and international legal matters and in so doing provided guidance on preparing Ministerial advice.

1. Factual and Procedural History

In 2005, the Budapest Metropolitan Court issued an arrest warrant alleging that Charles Zentai (Zentai), a Hungarian soldier during 1944, killed a Jewish male with two accomplices. Hungary requested extradition pursuant to the *Treaty on extradition between Australia and the Republic of Hungary* (the Treaty).[2] The Commonwealth Attorney-General issued a notice under s 16 of *The Extradition Act 1988* (Cth) (the Act) stating that a request was received.[3] A provisional arrest warrant was issued.[4] Zentai unsuccessfully challenged the validity of the functions conferred on magistrates under the Act.[5] His application to the High Court of Australia was granted and the appeal dismissed.[6] In 2008, a magistrate acting as *persona designate* in administrative proceedings determined under s 19 that Zentai was eligible for extradition.[7] That decision was unsuccessfully challenged.[8] In 2009, the Commonwealth Minister for Home Affairs (the Minister) determined under s 22—without

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1 *Zentai v Honourable Brendan O'Connor (No 3)* [2010] FCA 691, [106]-[107] (McKerracher J, 2 July 2010) ('*Zentai*')

2 *Treaty on Extradition between Australia and the Republic of Hungary*, Australia, signed 25 October 1995, ATS No 13 (entry into force 25 April 1997).

3 *The Extradition Act 1988* (Cth) applies in relation to specified extradition countries to give effect to bilateral extradition treaties: Extradition (Republic of Hungary) Regulations 1997, regulation 4.

4 *Zentai v Republic of Hungary* (2009) 180 FCR 225, [2].

5 *Zentai v Republic of Hungary* (2006) 153 FCR 104 affirmed in *Zentai v Republic of Hungary* (2007) 157 FCR 585. Hungary was restrained from prosecuting the extradition in *Zentai v Republic of Hungary [No 2]* [2006] FCA 1735 and *Zentai v Republic of Hungary* (2007) FCA 842.

6 *Zentai v Republic of Hungary* (2007) HCATrans 491; *O'Donoghue v Ireland, Zentai v Republic of Hungary, Williams v United States of America* (2008) 234 CLR 599.

7 *Commonwealth Director of Public Prosecutions v Charles Zentai* (PE 36608 of 2005), Magistrates Court of Western Australia, Perth, 20 August 2008; *Zentai v Republic of Hungary* (2009) 180 FCR 225, [5]. Bail was granted: *Zentai v Republic of Hungary* (2008) FCA 1335 and *Zentai v Republic of Hungary* (2009) FCA 511.

8 *Zentai v Republic of Hungary* (2009) FCA 284, affirmed in *Zentai v Republic of Hungary* (2009) 180 FCR 225.

giving reasons—that Zentai, having been found by a magistrate to be an 'eligible person', would be surrendered for extradition. Zentai obtained orders staying the s 19 committal decision and the arrest warrant decision.[9] He obtained production of a document entitled 'Consideration of the Pre-conditions to Surrender and Grounds for Refusal of Surrender under the *Extradition Act 1988*' (Attachment C).[10]

Zentai sought judicial review of the ss 16, 19 and 22 decisions. These are not subject to merits review but can be challenged for jurisdictional error.[11] A court needs to consider whether the required state of satisfaction could have been formed by a reasonable person with a correct understanding of the law.[12]

2. Grounds of Review and their Resolution

Zentai contended that the s 16 notice was void because he was not 'accused' of an offence under Hungarian law. Hungary had sought Zentai's extradition only for the purposes of preliminary investigations. Consequently, the magistrate and the Minister erred in finding that he was an 'eligible person'. The Commonwealth argued that extradition would enable criminal procedures. The Minister could not but be satisfied that Zentai could be surrendered because the magistrate had already made an order to that effect.

The Court noted that the legislative scheme envisages administrative powers being exercised sequentially, with no decision-maker authorised to review the exercise of earlier powers.[13] The Minister had been incorrectly advised that Zentai was an 'accused'.[14] When the s 16 notice was issued (2005), it was unknown that Zentai was only wanted for questioning. This information only emerged through Attachment C in 2009. While the magistrate could not go behind the s 16 notice, the Minister had not been estopped in 2009 from making a fresh eligibility assessment when new information exposed the earlier determinations as having a false premise. The Minister's s 22 determination was thus unauthorised because Zentai was not in fact an 'eligible person'.[15]

The Court also agreed with Zentai's argument that a war crime was not a 'qualifying extradition offence'; that is, an offence under Hungarian law at the time of its alleged commission.[16] The Minister had been incorrectly advised on a 'central issue' that the alleged 'conduct' would have constituted murder because in the 'plainest of language' the

[9] *Zentai v Honourable Brendan O'Connor* (2009) FCA 1597.
[10] *Zentai v Honourable Brendan O'Connor* [No 2] (2010) FCA 252.
[11] *Administrative Decisions (Judicial Review) Act 1977* (Cth), Schedule 1; *Australian Constitution*, section 75(v); *Judiciary Act 1903* (Cth), section 39B.
[12] For example, *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, [430], [432].
[13] *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528, [538].
[14] Above n 1, [165]–[166].
[15] Ibid [178]–[179].
[16] Article 2(5)(a), Treaty; section 11, the Act.

Treaty dealt with offences. Nor was being 'suspected' of committing murder a de facto or de jure surrogate for the offence for which extradition was sought.[17]

Zentai contended that the Minister failed to consider his Australian nationality.[18] If the state of nationality refuses extradition, it shall upon request submit the case to the competent local authorities and may refuse extradition where they refrain from prosecution.[19] Zentai argued that he lost Hungarian nationality and became an Australian in 1958.

The Minister was advised that Hungary regarded him as Hungarian and it was 'long standing' policy that Australian nationality 'alone' was insufficient to decline extradition. The Australian Federal Police opted not to investigate Zentai following advice from the Commonwealth Director of Public Prosecutions that, without any testimony from living witnesses, a prima facie case did not exist under the *War Crimes Act 1945* (Cth).

The Court found that, since the possibility of domestic prosecution was 'barely mentioned' in Attachment C, the Minister was not adequately advised to consider declining extradition and acceding to a Hungarian request that Zentai be prosecuted in Australia.[20] Attachment C inaccurately concluded that Australian authorities had 'not yet' refrained from prosecution and that Zentai retained Hungarian citizenship.[21] Notwithstanding this 'accumulation of errors', it was open to the Minister to grant extradition.[22]

It was asserted that the Minister misapprehended that Hungary was unaware of Zentai's presence in Australia until 2004. The Minister was advised that the 65-year delay was partly due to a deliberate name change. Zentai contended that he had lived openly in Australia from 1950 under this name. The Court concluded that, although the erroneous impression was 'unfortunate', a factual error—if any—was insufficient to constitute jurisdictional error.[23]

The Court rejected Zentai's claim that various 'egregious' errors rendered the exercise of the Minister's discretion unreasonable.[24] The Minister had been advised that none of the matters raised by Zentai, taken singularly or collectively, warranted refusal to extradite. Zentai submitted that the requirement to be satisfied of certain matters under s 22 supported a necessary implication to provide reasons. According to the Commonwealth,

[17] Above n 1, [199], [210]–[214].
[18] Article 3(2)(a), Treaty.
[19] Article 3(2)(b), Treaty.
[20] Above n 1, [256], [258]. The 'more humane solution' of a domestic prosecution was 'within the bounds of the Treaty' and 'seemingly tailor made for an exceptional case of this nature' (at [395] and [398]).
[21] Ibid [251]–[253].
[22] Ibid [259].
[23] Ibid [362].
[24] Ibid [375].

no such statutory or common law obligation existed. The Court agreed, observing that the asserted implication was unsupported by the statutory language.[25]

Zentai argued that extradition would be unjust, oppressive and incompatible with humanitarian considerations.[26] The Minister failed to consider Hungary's capacity to ensure a fair trial consistent with human rights standards. The witnesses on whose statements Hungary would rely were not alive or available for cross-examination.[27] Nor did Hungarian assurances exclude statements which may have been coerced by torture. The Commonwealth argued that the Minister was not bound to inquire as to what procedural measures Hungary could adopt and that comity obliged Australia to accept its request.[28] The Court concluded that Attachment C was reasonably fulsome, that the Minister had considered the fair trial question, and that Hungary could be assumed to make appropriate allowances.[29]

Humanitarian considerations included Zentai's advanced age and ill-health. However the Minister was advised that Zentai's medical concerns were not 'so significant' as to 'weigh heavily' on his discretion, because fitness for trial was a matter for Hungary. Zentai argued that Attachment C was skewed towards the seriousness of war crimes, the state interest in extraditing suspects and comity instead of domestic prosecution with reduced health risks. The Court agreed that state interests had to be weighed against the extraordinary factors in this case. The prospect of extradition being a 'death knell' for Zentai had been very substantially discounted in the advice. A lack of proper consideration was indicated by ignoring domestic prosecution as expressly contemplated in the Treaty.[30]

Individuals should be prosecuted in accordance with normal judicial proceedings having procedural safeguards rather than fora which lack internationally accepted standards. Zentai submitted that a Military Panel of the Budapest Municipal Court had been specially established to try his case and was 'only occasionally' or 'under exceptional circumstances' authorised to prosecute war criminals.[31] The Court concluded that the Minister's decision had a proper foundation, namely that the Panel applied a criminal procedure code which fully complied with Hungary's human rights obligations.[32]

Finally, Zentai made a 'poisoned root' argument that Hungary would not be impartial because the 2005 arrest warrant was parasitic upon one issued by a communist regime in 1948. The Minister had failed to consider that he would be prejudiced at trial or punished

[25] Ibid [386].
[26] Article 3(2)(f), Treaty; section 11, 22, the Act.
[27] See further *Windisch v Austria* (1990) 13 EHRR 281.
[28] Compare *Foster v Minister for Customs and Justice* (1999) 164 ALR 357, [39]–[40].
[29] Above n 1, [291].
[30] Ibid [344]–[347].
[31] Article 3(1)(f), Treaty.
[32] Above n 1, [320]–[321].

because of his nationality or political opinions.[33] However, the Court concluded that there was no evidence to support these concerns.[34]

3. Observations

Zentai ultimately succeeded on several grounds and appropriate orders were solicited.[35] One might be surprised after he had apparently exhausted litigation at every turn. However, the judgment applies the uncontroversial principle that decision-makers should consider the most recent material available.[36] Given the Act's subject matter, scope and purpose and the Treaty's intention, a requirement was implied into s 22 to consider contemporary information indicating that a person was wrongly classified as an 'extraditable person' at an earlier stage.

The judgment is noteworthy for additional reasons. First, *Zentai* considered a range of international legal material. For example, Zentai claimed that his Australian nationality was comparatively superior to that of Hungary consistent with the *Nottebohm* principle.[37] To resolve other points, the Court also considered human rights and international criminal and humanitarian law.

Second, orthodox principles of treaty interpretation were applied in an international humanitarian law context. The Treaty was found to express the maxims *nullum crimen sine lege* (no crime without breach of law) and *nulla poena sine lege* (no punishment without law) as per Articles 22 and 23 of the *Rome Statute of the International Criminal Court*.[38] However the Treaty, unlike other international instruments where the principle of retrospectivity is qualified by an exception for war crimes, contained no such exception. Including this exception in clear, direct and unequivocal terms is 'well known' to international humanitarian law.[39] It is also a principle of construction that, to apply retrospectively, municipal legislation must be such that no other conclusion is possible.[40] The Federal Court in *Zentai* concluded that Article 2(5)(a) of the Treaty, which specifies that extradition may be granted provided the nominated offence existed under national law at the time of the relevant acts, should be read strictly and given its plain meaning so that this Article is unqualified by any exception for war crimes.[41] This point has implications for a significant number of other bilateral extradition treaties. The Department of Foreign Affairs and

[33] Section 7(c), the Act. See further *Republic of Croatia v Snedden* (2010) 265 ALR 621, [23], [72].
[34] Above n 1, [306]–[308].
[35] Ibid [400]–[401].
[36] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
[37] *Lichtenstein v Guatemala (the Nottebohm Case)* [1955] ICJ Rep 4; *Sykes v Cleary* [No 2] (1992) 176 CLR 77, [105]–[107].
[38] Article 22 provides that the definition of a war crime should be strictly construed and, in cases of ambiguity, interpreted in favour of individuals: *Rome Statute of the International Criminal Court* opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).
[39] Above n 1, [194].
[40] *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 183 CLR 595, [622]–[624].
[41] Above n 1, [195].

Trade inserted a provision to ensure that the acts or omissions for which extradition is sought must constitute an offence at the time of their commission. The Court did not directly respond to Zentai's argument that Australia had adopted an equivocal attitude by including war crimes under the *Criminal Code Act 1995* (Cth) consistently with its obligations under the *Rome Statute* but refraining from making them retrospective in bilateral extradition treaties.

The judgment also illustrates the application of orthodox administrative law principles to the exercise of discretional powers. Extradition decisions, being a matter for the executive, are only reviewable for jurisdictional error. Judicial review applications are typically cast in terms of failing to properly, genuinely and realistically consider relevant matters. Successful challenges are 'rare'.[42] However, the Court was satisfied on the evidence that the Minister could not have properly considered the merits of the 'virtually unmentioned far more humanitarian option' of domestic prosecution.[43] The Court novelly found that it would not have been difficult to inquire—as the Treaty contemplated—how Hungary would have provided bail, health care and a fair trial given the 'dire' consequences for Zentai.[44] The Minister had allowed himself to be overridden by policy objectives as a question of weight instead of genuinely assessing the merits. The Court also identified the exceptional features of Zentai's situation which 'set it apart from any precedent'.[45]

Zentai confirms the paramount importance of Australia's treaty obligations concerning extradition. *The Extradition Act* gives effect to Australia's international obligations,[46] which are 'strictly observed'—particularly for war crimes.[47] Extradition is moreover a matter of comity between nations. Courts accordingly endeavour to fulfil the statutory objective of enabling Australia to discharge its responsibilities to other states, notwithstanding different criminal procedures. Some latitude is necessary and a precise equivalence of language and form between civil law and common law systems is not required. Consistent with the act of state doctrine, and described as a principle of non-adjudication, the Federal Court refrained from adjudging the acts of Hungary done within its own territory, including the functions and effectiveness of its judicial system.[48]

Finally, *Zentai* illustrates the consequences of imperfectly advising Ministers.[49] While omissions offer uncontradicted inferences that matters were not considered, this only becomes significant when Ministers are required to address those matters. Erroneous advice by itself does not render decisions invalid. Occasional errors are inconsequential

[42] Ibid [393].
[43] Ibid [399], following *Hindi v MIEA* (1988) 20 FCR 1 at 11–15.
[44] Ibid [395].
[45] Ibid [394]–[395].
[46] *Cabal v United Mexican States (No 3)* (2000) 186 ALR 188, [126]–[134].
[47] Above n 1, [393].
[48] *Mokbel v Attorney-General* (2007) 162 FCR 278, [58]–[59].
[49] Above n 1, [390]–[392].

because it is unknown whether Ministers relied on them. However, errors that are central to the issues under consideration or that go to the heart of statutory objectives, undermine the jurisdictional prerequisites that require satisfaction before Ministerial powers can be said to be properly exercised. In the Court's view, Attachment C approached the question of medical risk, for example, 'as it did others': instead of weighing the totality of factors, the advice considered whether Zentai had positively established each individual matter. The advice also reported that there was no information justifying his concerns.[50] The Court was evidently persuaded that extraditable persons should be seen to be treated fairly.[51]

Conclusion

Zentai sends a clear judicial expectation that the protection by Australia of its nationals, which the applicant characterised as an obligation to afford diplomatic protection, can warrant domestic prosecution as a viable extradition alternative. To that end, it sheds light on practical questions of construction of relevance to bilateral extradition treaties and *The Extradition Act*. The judgment is also a useful reminder for government lawyers of the necessary rigour when preparing Ministerial advice.

[50] Ibid [331].
[51] *Hempel v Attorney-General (Cth)* (1987) 77 ALR 641 [659].