FEDERAL COURT OF AUSTRALIA

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

Citation:	Zentai v Honourable Brendan O'Connor (No 3) [2010] FCA 691
Parties:	**CHARLES ZENTAI v THE HONOURABLE BRENDAN O'CONNOR, COMMONWEALTH MINISTER FOR HOME AFFAIRS, COMMONWEALTH ATTORNEY-GENERAL, BARBARA LANE, THE WESTERN AUSTRALIAN OFFICER IN CHARGE, HAKEA PRISON and THE FORMER MINISTER FOR JUSTICE AND CUSTOMS, THE HONOURABLE CHRISTOPHER MARTIN ELLISON**
File number:	WAD 220 of 2009
Judge:	**MCKERRACHER J**
Date of judgment:	2 July 2010
Catchwords:	**ADMINISTRATIVE LAW** - judicial review – s 39B(1) and s 39B(1A) of the *Judiciary Act 1903* (Cth) - review of decisions made pursuant to ss 16, 19 and 22 of the *Extradition Act 1988* (Cth) - failure to consider a relevant matter - jurisdictional error - *Wednesbury* unreasonableness **EXTRADITION** - whether the applicant was 'accused' for the purposes of the Extradition Act and therefore an 'extraditable person' - where extradition sought for investigation and criminal proceedings not commenced by the requesting country - material before the Minister when he decided to issue a Notice under s 16 of the Extradition Act - where decisions pursuant to s 19 and s 22 of the Act are parasitic on the decision made pursuant to s 16 - where new material became available to the Minister- whether extradition was sought for an 'extraditable offence' - double criminality - where offence was not an offence in the requesting country at the time of the conduct constituting the offence - humanitarian considerations - where requesting country may not be capable of providing a fair trial - where applicant is 89 years old and in poor health - where alternatives were available to the Minister pursuant to the legislative scheme if extradition were refused

Legislation:

Extradition Act 1988 (Cth) ss 3(a), 6, 11, 16, 16(1), 16(2), 19, 19(9), 19(10), 21, 22, 22(2), 22(3)
Federal Court of Australia Act 1976 (Cth) s 23
Judiciary Act 1903 (Cth) ss 39B(1), 39B(1A)

Treaty on Extradition Treaty Between Australia and the Republic of Hungary 1995 Arts 1, 2, 3, 7

Constitution s 75(v)

Cases cited:

A v Secretary of State for the Home Department (No 2) [2006] 2 AC 221
ARM Constructions Pty Ltd v Deputy Commissioner of Taxation (1986) 10 FCR 197
(*Associated Provincial Picture Houses v Wednesbury Corporation* 1948] 1 KB 223
Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353
Baker v The Queen (2004) 223 CLR 513
Bruce v Cole (1998) 45 NSWLR 163
Cabal v Vanstone (2000) 101 FCR 112
Cabal v United Mexican States (No 3) (2000) 186 ALR 188
Chang v Laidley Shire Council (2007) 234 CLR 1
Deloitte Touche Tohmatsu v Australian Securities Commission (1996) 136 ALR 453
Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat & Live-Stock Corporation (1990) 96 ALR 153
Federal Commissioner of Taxation v Brian Hatch Timber Co. (Sales) Pty. Ltd.(1972) 128 CLR 28
Foster v Minister for Customs & Justice (1999) 164 ALR 357
Foster v Minister for Customs and Justice (2000) 200 CLR 442
Habib v Commonwealth of Australia (2010) 113 ALD 469
Hamden v Rumsfeld 548 US 557 (2006)
Harris v Attorney-General (Cth) (1994) 52 FCR 386
Hempel v Attorney-General (Cth) (1987) 77 ALR 641
Hindi v Minister for Immigration and Ethnic Affairs (1988) 20 FCR 1
Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149
Immigration, Local Government & Ethnic Affairs, Minister for v Pashmforoosh (1989) 18 ALD 77
Jason McGoldrick and Michael Turner v Central Court, Pest (McGoldrick-Turner) [2009] EWHC 2816
Kajewski v Commissioner of Taxation (2003) 52 ATR 455
Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291
Kolotex Hosiery (Aust) Pty Ltd v Commissioner of Taxation (Cth) (1975) 132 CLR 535

Lichtenstein v Guatemala (1955) 22 ILR 349
M160/2003 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 85 ALD 532
McHugh Holdings Pty Ltd v Director General (NSW) [2009] NSWSC 1359
Minister for Immigration and Citizenship v SZIAI (2009) 111 ALD 15
Minister for Immigration and Multicultural Affairs v Anthonypillai (2001) 106 FCR 426
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
Mokbel v Attorney-General for the Commonwealth of Australia (2007) 162 FCR 278
Murrumbidgee Groundwater Preservation Assn Inc v Minister for Natural Resources [2005] NSWCA 10
O'Donoghue v Ireland (2009) 263 ALR 392
O'Donoghue v Ireland, Zentai v Republic of Hungary, Williams v United States of America (2008) 234 CLR 599
Oates v Attorney-General (2001) 181 ALR 559
Pasini v United Mexican States (2002) 209 CLR 246
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Public Prosecutions (Cth), Director of v Kainhofer (1995) 185 CLR 528
Public Service Board of New South Wales v Osmond (1986) 159 CLR 656
QAAH v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 145 FCR 363
R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100
R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389
R v Connell; Ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407
R v Davis [2008] 1 AC 1128
Re Arton (No 2) [1896] 1 QB 509
Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme (2003) 216 CLR 212
Republic of Croatia v Snedden (2010) 265 ALR 621
Saville v Health Care Complaints Commission [2006] NSWCA 298
Secretary of State for the Department v AF [2009] UKHL 28
Snedden v Republic of Croatia (2009) 178 FCR 546
Sykes v Cleary [No 2] (1992) 176 CLR 77
Tasmanian Conservation Trust Inc v Minister for Resources (1995) 55 FCR 516
Tervonen v Minister for Justice and Customs (No 2) (2007) 98 ALD 589
Timar v Minister for Justice and Customs (2001) 113 FCR

	32 *Trenk v District Court of Pizen-Mesto, Czech Republic* [2009] EWHC 1132 *Turner v Minister for Immigration and Ethnic Affairs* (1981) 55 FLR 180 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 183 CLR 595 *Vyner v Keeper of Her Majesty's Penitentiary at Malabar* (1975) 6 ALR 105 *Western Australia v Watson* [1990] WAR 248 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 *Windisch v Austria* (1990) 13 EHRR 281 *Zentai v Honourable Brendan O'Connor* (No 2) [2010] FCA 252 *Zentai v Honourable Brendan O'Conno*r [2009] FCA 1597 *Zentai v Republic of Hungary* (2006) 153 FCR 104 *Zentai v Republic of Hungary* (2007) 157 FCR 585 *Zentai v Republic of Hungary* (2009) 180 FCR 225 *Zentai v Republic of Hungary* (No 2) [2006] FCA 1735 *Zentai v Republic of Hungary* [2007] FCA 842 *Zentai v Republic of Hungary* [2007] HCATrans 491 *Zentai v Republic of Hungary* [2008] FCA 1335 *Zentai v Republic of Hungary* [2009] FCA 284 *Zentai v Republic of Hungary* [2009] FCA 511
Date of hearing:	27-28 April 2010
Place:	Perth
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	401
Counsel for the Applicant:	MJ McCusker QC with PW Johnston and VM Priskich
Solicitor for the Applicant:	Fiocco's Lawyers
Counsel for the First, Second and Fifth Respondents:	JD Allanson SC with P Hannan
Solicitor for the First, Second and Fifth Respondents:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 220 of 2009**

BETWEEN:	**CHARLES ZENTAI** **Applicant**
AND:	**THE HONOURABLE BRENDAN O'CONNOR, COMMONWEALTH MINISTER FOR HOME AFFAIRS** **First Respondent**
	COMMONWEALTH ATTORNEY-GENERAL **Second Respondent**
	BARBARA LANE **Third Respondent**
	THE WESTERN AUSTRALIAN OFFICER IN CHARGE, HAKEA PRISON **Fourth Respondent**
	THE FORMER MINISTER FOR JUSTICE AND CUSTOMS, THE HONOURABLE CHRISTOPHER MARTIN ELLISON **Fifth Respondent**

JUDGE:	**MCKERRACHER J**
DATE OF ORDER:	**2 JULY 2010**
WHERE MADE:	**PERTH**

THE COURT ORDERS THAT:

1. The applicant, within 28 days, do file and serve submissions supporting a minute of orders which the applicant contends should be made.

2. The respondents who wish to do so, do file and serve within 28 days submissions in reply and a minute of orders proposed.

3. The applicant, within 14 days thereof, do file any submissions in reply and any amended orders.

4. There be liberty to apply.

5. Costs be reserved.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
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BETWEEN:	**CHARLES ZENTAI** **Applicant**
AND:	**THE HONOURABLE BRENDAN O'CONNOR, COMMONWEALTH MINISTER FOR HOME AFFAIRS** **First Respondent**
	COMMONWEALTH ATTORNEY-GENERAL **Second Respondent**
	BARBARA LANE **Third Respondent**
	THE WESTERN AUSTRALIAN OFFICER IN CHARGE, HAKEA PRISON **Fourth Respondent**
	THE FORMER MINISTER FOR JUSTICE AND CUSTOMS, THE HONOURABLE CHRISTOPHER MARTIN ELLISON **Fifth Respondent**
JUDGE:	**MCKERRACHER J**
DATE:	**2 JULY 2010**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

INTRODUCTION

1 The applicant (Mr Zentai) applies for judicial review in respect of three decisions made under the *Extradition Act 1988* (Cth) (**the Act**).

- The first is the second respondent's (**the Attorney-General**) decision made on 8 July 2005 to issue a notice under s 16 of the Act;
- The next is the third respondent's (**the magistrate**) decision made on 20 August 2008 to issue a warrant committing Mr Zentai to prison under s 19(9) of the Act; and
- The third is the first respondent's (**the Minister**) decision made on 12 November 2009 under s 22 of the Act to surrender Mr Zentai to the Republic of Hungary (**Hungary**).

2 There are five affidavits relied upon in support of Mr Zentai's case. The first of those affidavits dated 19 November 2009 is the most extensive and is the subject of discussion below. Generally, the essential factual material is not in dispute.

BACKGROUND

3 The reasons in the following judgments, either interlocutory or final, record previous litigation involving Mr Zentai and various representatives of the Government:

Zentai v Republic of Hungary (2006) 153 FCR 104
Zentai v Republic of Hungary (No 2) [2006] FCA 1735
Zentai v Republic of Hungary (2007) 157 FCR 585
Zentai v Republic of Hungary [2007] FCA 842
O'Donoghue v Ireland, Zentai v Republic of Hungary, Williams v United States of America (2008) 234 CLR 599
Zentai v Republic of Hungary [2008] FCA 1335
Zentai v Republic of Hungary [2009] FCA 284
Zentai v Republic of Hungary [2009] FCA 511
Zentai v Republic of Hungary (2009) 180 FCR 225
Zentai v Honourable Brendan O'Connor [2009] FCA 1597
Zentai v Honourable Brendan O'Connor (No 2) [2010] FCA 252

4 The contemporary events commenced on 3 March 2005 when Captain Dr Toth Csaba, a Military Judge of the Military Division of the Budapest Metropolitan Court, issued Warrant Number KBNY V 4/2005/3 for the arrest of Mr Zentai (**Hungarian Arrest Warrant**).

5 The Hungarian Arrest Warrant on its face alleged that Mr Zentai had committed a war crime contrary to s 165 of Act IV of 1978 (being the Criminal Code of Hungary).

6 In substance, the allegation is that the crime occurred on 8 November 1944 at Budapest in the following circumstances:

1. Mr Zentai was a soldier in the Hungarian Royal Army attached to a unit stationed at Budapest.
2. Whilst on patrol duty Mr Zentai captured Mr Peter Balazs (a young man of Jewish origin).
3. Mr Zentai dragged Mr Balazs back to the unit's army post.
4. Mr Zentai and two other soldiers (Captain Mader and First Lieutenant Nagy) assaulted Mr Balazs over a number of hours. Mr Balazs died of his injuries.
5. Mr Zentai, Captain Mader and First Lieutenant Nagy weighted Mr Balazs' body and threw it into the Danube River.

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

8 The Department prepared a submission dated 8 July 2005 in respect of the s 16 Notice Decision required of the Attorney-General under s 16 of the Act.

9 On 8 July 2005 the Attorney-General made the s 16 Notice Decision.

10 On 8 July 2005 a provisional arrest warrant for the arrest of Mr Zentai was issued under s 12 of the Act: see *Zentai v Republic of Hungary* (2009) 180 FCR 225 (at [2]).

11 On 8 July 2005, Mr Zentai was arrested and granted bail subject to conditions.

12 On 8 July 2005 eligibility proceedings under s 19 of the Act were commenced in the Perth Magistrates Court in respect of Hungary's request that Mr Zentai be extradited.

13 On 6 February 2006, Mr Zentai commenced proceedings in the Federal Court challenging the validity of the functions conferred on State magistrates under the Act.

14 On 12 September 2006, Siopis J dismissed the proceedings: see *Zentai v Republic of Hungary* (2006) 153 FCR 104.

15 On 21 September 2006, Mr Zentai appealed Siopis J's decision to the Full Federal Court.

16 On 16 April 2007, Moore, Tamberlin and Gyles JJ dismissed the appeal: see *Zentai v Republic of Hungary* (2007) 157 FCR 585.

17 On 11 May 2007 Mr Zentai sought special leave to appeal to the High Court against the Full Federal Court decision.

18 On 3 September 2007 the High Court granted Mr Zentai special leave to appeal: see *Zentai v Republic of Hungary* [2007] HCATrans 491.

19 On 23 April 2008 the High Court dismissed the appeal against the decision: see *O'Donoghue v Ireland, Zentai v Republic of Hungary, Williams v United States of America* (2008) 234 CLR 599.

20 On 18 August 2008 the eligibility proceedings in the Perth Magistrates Court were heard by the magistrate.

21 On 20 August 2008 the magistrate determined that Mr Zentai was eligible for extradition to Hungary and made the s 19 Committal Decision: see *Zentai v Republic of Hungary* 180 FCR 225 (at [5]).

22 On 20 August 2008, Mr Zentai applied to the Federal Court (WAD 178 of 2008) under s 21 of the Act for review of the magistrate's determination under s 19 of the Act that Mr Zentai was eligible for extradition to Hungary.

23 On 20 August 2008, Mr Zentai was granted bail pending the determination of the application.

24 On 9 March 2009 a relative of Mr Zentai living in Hungary delivered to the Military Division of the Budapest Metropolitan Court a series of written questions concerning Hungarian criminal law and procedure.

25 On 13 March 2009, Gilmour J heard Mr Zentai's application under s 21 of the Act.

26 By letter dated 19 March 2009 an officer of the Budapest Metropolitan Court replied to some of the questions referred to above.

27 On 31 March 2009, Gilmour J affirmed the magistrate's determination under s 19 of the Act that Mr Zentai was eligible for extradition to Hungary: see *Zentai v Republic of Hungary* [2009] FCA 284.

28 On 6 April 2009, Mr Zentai appealed Gilmour J's decision to the Full Federal Court (WAD 47 of 2009).

29 By a letter dated 25 May 2009 from Mr Zentai's solicitors to the Freedom of Information Section of the Commonwealth Attorney-General's Department (**the FOI Section**), Mr Zentai made a request under the *Freedom of Information Act 1982* (Cth) for disclosure of: (1) documents recording the s 16 Notice Decision; (2) any departmental submission concerning the making of the s 16 Notice Decision; and (3) any opinion that the offence of war crime under s 165 of the Hungarian Criminal Code was an extradition offence.

30 In response to that request, the FOI Section sent Mr Zentai's solicitors a letter dated 23 June 2009 enclosing an incomplete copy of a submission dated 8 July 2005 in respect of the issue of a notice under s 16 of the Act.

31 Under cover of a letter dated 20 August 2009, Mr Zentai's solicitors sent the Attorney-General submissions in respect of the Minister's possible decision under s 22 of the Act.

32 On 25 August 2009, Black CJ, Tracey and Barker JJ heard the appeal in WAD 47 of 2009: see *Zentai v Republic of Hungary* (2009) 180 FCR 225.

33 Under cover of a letter dated 31 August 2009, Mr Zentai's solicitors sent the Minister copies of the documents referred to in the questions concerning Hungarian criminal law and

procedure and made submissions in respect of the Minister's possible decision under s 22 of the Act.

34 By a letter dated 7 September 2009 from Mr Zentai's solicitors to the Minister, Mr Zentai made further submissions in respect of the Minister's possible decision under s 22 of the Act. That letter referred to the decision of the Full Federal Court in *Snedden v Republic of Croatia* (2009) 178 FCR 546.

35 Under cover of a letter dated 18 September 2009, Mr Zentai's solicitors sent the Minister 'personal submissions' in respect of the Minister's possible decision under s 22 of the Act.

36 By a letter dated 21 September 2009, Mr Mark Ierace SC of the New South Wales Public Defender's Office made a submission to the International Crime Cooperation Central Authority (**the ICCCA)** concerning the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009*.

37 In the submission to the ICCCA, Mr Ierace SC suggested it would be appropriate to add an extradition objection to the Act - viz where on surrender to the extradition country the subject person may be prejudiced in her/his trial by reason of a failure to comply with Art 14 of the ICCPR.

38 In the submission to the ICCCA, based on media reports and a telephone conversation with Mr Zentai's counsel, Mr Ierace SC opined that any trial of Mr Zentai in Hungary would contravene Art 14(3)(e) of the ICCPR because:

1. there are no living witnesses to the crime Mr Zentai is alleged to have committed;
2. confessions made by Mr Zentai's two alleged accomplices, who were arrested shortly after World War II, were alleged by those persons to have been extracted under torture; and
3. reliance by the prosecution on statements from deceased witnesses would mean that Mr Zentai's counsel could not cross examine.

39 The Department of International Criminal Law of the Ministry of Justice of Hungary sent a letter dated 23 September 2009 to the Commonwealth Attorney-General' Department providing information about, *inter alia*, Hungarian criminal law and procedure.

40 On 8 October 2009 the Full Federal Court dismissed the appeal in WAD 47 of 2009: see *Zentai v Republic of Hungary* (2009) 180 FCR 225.

41 The Department of International Criminal Law of the Ministry of Justice of Hungary sent a letter dated 14 October 2009 to the Department providing information about, inter alia, the proposed travel arrangements for Mr Zentai and whether he would receive a fair trial.

42 By a letter dated 19 October 2009 from Mr Zentai's solicitors to the ICCCA, Mr Zentai, amongst other things, asked whether Hungary had provided advice as to whether: (1) Mr Zentai's extradition was sought for the purpose of immediate prosecution; and (2) Mr Zentai would be able to ask questions at trial of prosecution witnesses.

43 Under cover of a letter dated 21 October 2009, the ICCCA provided to Mr Zentai's solicitors a summary of advice received from Hungary concerning those matters.

44 Under cover of a letter dated 26 October 2009, Mr Zentai's solicitors sent the ICCCA supplementary submissions in respect of the Minister's possible decision under s 22 of the Act.

45 The Department of International Criminal Law of the Ministry of Justice of Hungary sent a letter dated 30 October 2009 to the Department providing further information about, *inter alia*, Hungarian criminal law and procedure.

46 By a letter dated 5 November 2009, Dr Sarah McCosker of the Office of International Law (**OIL**) in the Department provided the ICCCA with advice on the prospects of Hungary providing Mr Zentai with a fair trial and an adequate standard of detention in the event Mr Zentai was returned to Hungary.

47 The Department presented to the Minister a submission and supporting documents for the Minister's consideration prior to making the s 22 Surrender Decision.

48 On 12 November 2009 the Minister made a determination under s 22 of the Act that Mr Zentai be extradited to Hungary.

49 On 12 November 2009 the Minister 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 into the custody of Hungarian police officers for transport to Hungary.

50 On 12 November 2009, the ICCCA informed Mr Zentai's solicitors that the Minister had:

1. made a determination under s 22 of the Act that Mr Zentai should be extradited to Hungary; and

2. issued a warrant under s 23 of the Act.

51 By a letter dated 12 November 2009 from Mr Zentai's solicitors to the ICCCA, Mr Zentai sought reasons for the s 22 Surrender Decision and copies of all documents to which the Minister had regard in making the s 22 Surrender Decision.

52 Under cover of a letter dated 18 November 2009 the ICCCA provided to Mr Zentai's solicitors a copy of the submission and supporting documents but with only a redacted version of a document entitled 'Consideration of the Pre-conditions to Surrender and Grounds for Refusal of Surrender under the *Extradition Act 1988*' (also referred to as **Attachment C**).

53 By a letter dated 19 November 2009 from Mr Zentai's solicitors to the ICCCA, Mr Zentai again requested the Minister to provide reasons for making the s 22 Surrender Decision.

54 On 19 November 2009, Mr Zentai commenced WAD 210 of 2009 seeking an interim injunction to restrain his extradition consequent upon the s 22 Surrender Decision.

55 On 19 November 2009, Barker J made an order in WAD 210 of 2009 restraining the Minister until further order from giving effect to the s 22 Surrender Decision. That order was made on the undertaking of Mr Zentai to commence proceedings on or before 4 December 2009.

56 By a letter dated 20 November 2009 from the ICCCA to Mr Zentai's solicitors, the Minister declined to provide reasons for making the s 22 Surrender Decision.

57 On 4 December 2009, Mr Zentai commenced these proceedings (WAD 220 of 2009) by filing an application with supporting grounds of review.

58 On 16 December 2009, I made orders in WAD 210 of 2009 discharging the interim injunction restraining the Minister until further order from giving effect to the s 22 Surrender Decision and dismissing the application.

59 On 16 December 2009, I made orders in these proceedings joining the third and fourth respondents as parties.

60 On 16 December 2009 I also made orders in these proceedings staying the s 19 Committal Decision and the s 23 Warrant Decision and admitting Mr Zentai to bail: see *Zentai v Honourable Brendan O'Connor* [2009] FCA 1597.

61 On 16 December 2009, Mr Zentai filed an amended application and amended grounds of review in these proceedings (dated 15 December 2009).

62 On 17 December 2009, Mr Zentai served on the Minister and the Attorney-General a notice to produce an unredacted version of Attachment C.

63 On 23 December 2009 the third and fourth respondents filed a notice of intention to abide by the decision of the Court.

64 On 8 January 2010 the Minister served a notice of objection to the notice to produce an unredacted version of Attachment C.

65 On 19 March 2010, I ordered the Minister and the Attorney-General to comply with the notice to produce: see *Zentai v Honourable Brendan O'Connor (No 2)* [2010] FCA 252.

THE CHALLENGE

66 The primary relief now sought by Mr Zentai is review of the Determination of the Minister made on 12 November 2009 that Mr Zentai be surrendered for extradition to Hungary pursuant to s 22 of the Act. The application is made pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth) (**the Federal Court Act**) together with s 39B(1) and s 39B(1A) of the *Judiciary Act 1903* (Cth) (**the Judiciary Act**). Mr Zentai seeks a declaration that the Determination is invalid. He also pursues consequential orders in the nature of certiorari, injunction and prohibition to quash the Determination. He seeks orders restraining and prohibiting the Minister from implementing the Determination.

67 Mr Zentai contends that the Attorney-General acting through his delegate, the then Minister for Justice, erred in law and in fact and misdirected himself on a fundamental matter regarding whether Mr Zentai was 'an extraditable person' and made a jurisdictional error in both deciding to issue and issuing, pursuant to s 16 of the Act, a Notice of Receipt of Extradition Request on 8 July 2005.

68 The reason for this, it is said, is that according to information provided on 17 March 2009 by the leader of the Military Panel of the Budapest Municipal Court (**Military Panel**) and accepted as correct by the Hungarian Government, the extradition of Mr Zentai was sought only for the purposes of preliminary investigation about his involvement in an alleged war crime. There is and has been no indictment before the Military Panel charging Mr Zentai with any offence.

69 Mr Zentai contends that as the proceedings in the Military Panel are investigative and preliminary and not at a more advanced stage involving the laying of any charge, he is not a person who is 'accused' (within the meaning of s 6(A) of the Act) of having committed the alleged offence of a war crime in relation to which Hungary's request for extradition was made. Mr Zentai argues that the statutory requirement that an 'extraditable person' be 'accused' of a relevant extradition offence is not satisfied by expressions such as 'wanted for prosecution' or being 'suspected of committing' the relevant offence. He contends that the s 16 notice was therefore unlawful and void. It follows therefore, he argues, that the order made on 20 August 2008 by the magistrate, after conducting eligibility proceedings pursuant to s 19(9) of the Act, was beyond jurisdiction, unlawful and void. Mr Zentai also claims that

the Minister (as distinct from the Attorney-General) erred in law and in fact and misdirected himself on a fundamental matter in the same way.

70 From this, it is said that as Mr Zentai was not an extraditable person when the request for his extradition was made to the Australian Government, proceedings against him under the Act were and are contrary to the requirements of the Act and should not have been commenced.

71 A further contention is that the Minister erred in law in determining that Mr Zentai was to be surrendered under s 22 of the Act in relation to a 'qualifying extradition offence' of war crime, as the alleged war crime was not an offence under Hungarian municipal law at the date when it is alleged the conduct constituting the offence occurred (8 November 1944).

72 Mr Zentai maintains that the Minister also erred in law in failing to give proper, realistic and genuine consideration to whether, in the exercise of the discretion conferred by Art 3 para 2(a) of the *Treaty on Extradition Between Australia and the Republic of Hungary 1995* (**the Treaty**), he should refuse extradition having regard to the fact that Mr Zentai is a national of Australia and all other relevant factors.

73 Mr Zentai asserts that the Minister erred in law in failing to conclude that Mr Zentai's extradition would be unjust, oppressive and incompatible with humanitarian considerations as provided for in terms of Art 3 para 2(f) of the Treaty. In relation to this argument, it is said that the Minister failed to satisfy himself as to the capacity of the Military Panel to provide procedures consistent with Australia and Hungary's international obligations under Art 14 of the *International Covenant on Civil and Political Rights* (**the ICCPR**) to ensure a fair trial if the Military Panel were to charge and prosecute Mr Zentai for the offence of war crime. It is said the Minister failed to take into account that Hungary relies upon minutes and records of statements made in criminal proceedings before the Hungarian People's Court in 1946-1947 by the defendants and various witnesses in the trials of Captain Mader and Lieutenant Nagy. Such statements by deceased persons will, it is said, apparently be the foundation on which any prosecution of Mr Zentai would be based.

74 Those witnesses are said to be no longer alive or available for examination.

75 The Minister, it is said, has given no adequate consideration to the fact that the Hungarian authorities have failed to give an assurance that statements recorded by the People's Court in 1946-1947 that were possibly 'coerced by torture' would not be produced as evidence in proceedings before the Military Panel.

76 Extensive particulars are supplied in support of the contention that there could be no guarantee of a fair trial before the Military Panel.

THE LEGISLATIVE FRAMEWORK

77 The principle objects of the Act include:

- to codify the law relating to the extradition of persons from Australia to extradition countries: s 3(a); and
- to enable Australia to carry out its obligations under extradition treaties.

78 By Pt II of the Act, procedures are established to be followed in circumstances where a request for extradition is made to Australia by an extradition country. There are four stages in extradition proceedings – commencement, remand, determination by a magistrate of eligibility for surrender and the Executive determination that a person is to be surrendered: *Harris v Attorney-General (Cth)* (1994) 52 FCR 386 at 389. Mr Zentai challenges decisions by the Minister and the Attorney-General at the commencement stage (s 16) and the Executive's determination (s 22).

79 Where the Attorney-General receives an extradition request, he or she may in his or her discretion by notice state that the request has been received (s 16(1)). By subs (2), the occasions in which the Attorney-General shall not give the notice are specified. Each of those occasions is by reference to the opinion of the Attorney-General as to specific matters.

80 Section 19 provides for the determination of eligibility for surrender by a magistrate performing an administrative function as *persona designata*. An order of a magistrate under s 19(9) or s 19(10) may be the subject of review by a Federal Court or the Supreme Court of the State or Territory (s 21). The reviewing court is required to determine whether the decision of the magistrate was right or wrong and, if wrong, what decision should have been made by the magistrate. This process enables the determination of rights and liabilities of the

parties to the review proceedings. It is the exercise of judicial power: *Pasini v United Mexican States* (2002) 209 CLR 246 at 255; *Public Prosecutions (Cth), Director of v Kainhofer* (1995) 185 CLR 528.

81 Finally, s 22 of the Act makes provision for an Executive determination as to whether a person who has been found by a magistrate to be an eligible person will be surrendered. Section 22(3) provides in paras (a)-(f) a series of requirements to be met if the eligible person is to be surrendered. These include (in para (f)) a general discretion.

82 Section 22 provides as follows:

> **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:
> (a) the Attorney-General is satisfied that there is no extradition objection in relation to the offence;
> (b) the Attorney-General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture;
> (c) where the offence is punishable by a penalty of death—by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:

(i) the person will not be tried for the offence;
(ii) if the person is tried for the offence, the death penalty will not be imposed on the person;
(iii) if the death penalty is imposed on the person, it will not be carried out;

(d) the extradition country concerned has given a speciality assurance in relation to the person;

(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; or
(ii) surrender of the person in relation to the offence may be refused;
in certain circumstances—the Attorney-General is satisfied:
(iii) where subparagraph (i) applies—that the circumstances do not exist; or
(iv) where subparagraph (ii) applies—either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; and

(f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

(4) For the purposes of paragraph (3)(d), the extradition country shall be taken to have given a speciality assurance in relation to the eligible person if, by virtue of:
(a) a provision of the law of the country;
(b) a provision of an extradition treaty in relation to the country; or
(c) an undertaking given by the country to Australia;
the eligible person, after being surrendered to the country, will not, unless the eligible person has left or had the opportunity of leaving the country:
(d) be detained or tried in the country for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender other than:
(i) any surrender offence;
(ii) any offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the eligible person could be convicted on proof of the conduct constituting any surrender offence;
(iii) any extradition offence in relation to the country (not being an offence for which the country sought the surrender of the eligible person in proceedings under section 19) in respect of which the Attorney-General consents to the eligible person being so detained or tried; or

(e) be detained in the country for the purpose of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender to the first mentioned country, other than any offence in respect of which the Attorney-General consents to the eligible person being so detained and surrendered.

(5) Where the Attorney-General determines under subsection (2) that the eligible person is not to be surrendered to the extradition country in relation to any

> qualifying extradition offence, the Attorney-General shall order, in writing, the release of the person.

83 By s 11 of the Act, regulations under the Act may state that the Act applies in relation to a specified extradition country subject to certain limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country. Regulations in this instance have been made, *Extradition (Republic of Hungary) Regulations 1997* (**the Regulations**). Regulation 4 provides that the Act applies subject to the Treaty set out in the schedule to the Regulations.

84 The decisions of the Attorney-General under s 16 and s 22 are not subject to review under the Act. Decisions under the Act are also excluded from review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**the ADJR Act**) by virtue of sch 1 to the ADJR Act. The decisions are, however, subject to the constitutional writs provided for under s 75(v) of the *Constitution* and s 39B of the Judiciary Act. Those writs lie for jurisdictional error but do not permit a review of the merits of a decision.

85 It is necessary also to consider certain Articles of the Treaty as set out in the schedule to the Regulations. Articles 1, 2, 3 and 7 of the Treaty provide as follows:

> **ARTICLE 1**
> **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.

3. Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, foreign exchange control or other revenue matter extradition may not be refused on the ground that the law of the Requested State does not impose the same kind of tax or duty or does not contain a tax, duty, customs, or exchange regulation of the same kind as the law of the Requesting State.

4. Where the offence has been committed outside the territory of the Requesting State extradition shall be granted where the law of the Requested State provides for the punishment of an offence committed outside its territory in similar circumstances. Where the law of the Requested State does not so provide the Requested State may, in its discretion, grant extradition.

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:
   (a) if the offence for which extradition is sought is a political offence. Reference to a political offence shall not include:
      (i) an offence constituted by taking or endangering, attempting to take or endanger or participating in the taking or endangering of, the life of a person, being an offence committed in circumstances in which such conduct creates a collective danger, whether direct or indirect, to the lives of other persons;
      (ii) any offence in respect of which the Contracting States have assumed or will assume an obligation pursuant to an international agreement to which they are both Parties, to submit the case to their competent authorities for a decision as to prosecution if extradition is not granted; or
      (iii) an offence against the law relating to genocide;
   (b) if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality or political opinion or that that person's position may be prejudiced for any of those reasons;
   (c) if the offence for which extradition is sought is an offence under military law, which is not an offence under the ordinary criminal law of the Contracting States;
   (d) if final judgement 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;

(e) if the person whose extradition is sought has, according to the law of either Contracting State, become immune from prosecution or punishment by reason of lapse of time; or

(f) if the person, on being extradited to the Requesting State, would be liable to be tried or sentenced in that State, by a court or tribunal:

(i) that has been specially established for the purpose of trying the person's case; or

(ii) that is only occasionally, or under exceptional circumstances, authorised to try persons accused of the offence for which extradition is sought.

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

(a) if the person whose extradition is sought is a national of the Requested State. Where the Requested State refuses to extradite a national of that State it shall, if the other State so requests and the laws of the Requested State allow, submit the case to the competent authorities in order that proceedings for the prosecution of the person in respect of all or any of the offences for which extradition has been sought may be taken;

(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;

(c) if the offence with which the person sought is accused or convicted, or any other offence for which that person may be detained or tried in accordance with this Treaty, carries the death penalty under the law of the Requesting State unless that State undertakes that the death penalty will not be imposed or, if imposed, will not be carried out;

(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;

(f) if the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is sought, the extradition of that person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.

3. This Article shall not affect any obligations which have been or shall in the future be assumed by the Contracting States under any multilateral Convention.

ARTICLE 7
ADDITIONAL INFORMATION

1. If the Requested State considers that the information furnished in support of a request for extradition is not sufficient in accordance with this Treaty to enable extradition to be granted that State may request that additional information be furnished within such time as it specifies.

2. If the person whose extradition is sought is under arrest and the additional information furnished is not sufficient in accordance with this Treaty or is not received within the time specified, the person may be released from custody.

> Such release shall not preclude the Requesting State from making a fresh request for the extradition of the person.
>
> 3. Where the person is released from custody in accordance with paragraph 2, the Requested State shall notify the Requesting State as soon as practicable.

SOME THRESHOLD CONSIDERATIONS

The role of advice to the Minister

86 The Act does not require the decision-maker under s 22 to give reasons. There is no other statutory obligation to give reasons. The evidence in support of Mr Zentai's application includes submissions with supporting attachments prepared by officers of the Department for consideration of the Minister as delegate of the Attorney-General. The submission (which has been referred to as Attachment C) does not constitute a statement of reasons of the Minister (*Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212 at [40]). It does, nevertheless, set out, for the Minister's consideration, the preconditions for surrender and the mandatory and discretionary grounds for refusing surrender under s 22 of the Act and the Treaty. The representations made on behalf of Mr Zentai were addressed or attached to Attachment C. It summarises those representations and the Department's response to the representations relevant to the preconditions for surrender, grounds for refusal and the exercise of the Minister's discretion. Attachment C includes advice of the Department that it is open to the Minister to be satisfied that the requirements of s 22 are met. The Minister reached that conclusion by circling the word 'approved' on the front page of a minute enclosing Attachment C and signing and dating that action.

87 I will refer to the first, second and fifth respondents collectively as the 'Commonwealth'. The Ministers and the Attorney-General were represented but the learned magistrate and the fourth respondent filed submitting appearances.

88 For the Commonwealth it was stressed, and I accept, that Attachment C should be read as a whole and individual parts should not be taken out of context. Secondly, it should be noted that an error in the advice to the Minister does not of itself constitute reviewable error or, in itself, render the decision invalid: *McHugh Holdings Pty Ltd v Director General (NSW)* [2009] NSWSC 1359 (at [41]) and *Oates v Attorney-General* (2001) 181 ALR 559 (at [133]).

89 For Mr Zentai, it was contended that while there is no explicit statutory obligation under the Act or elsewhere to record findings and provide reasons, a requirement to that effect should be implied from s 22 of the Act. This argument, indeed, is necessary for Mr Zentai to succeed on a specific ground of the appeal which will be discussed below. As will be evident from my consideration of the ground, I do not consider that there is an obligation to give reasons, nor can it be implied. The reasons for reaching that conclusion will also be discussed below.

90 Mr Zentai stresses that the Commonwealth response in relation to Attachment C is artificial in that it does not function in a purely neutral, independent and impartial manner. To the contrary, it is argued for Mr Zentai that it does overwhelmingly stress a particular policy viewpoint, is argumentative, expresses opinions, makes comments urging views upon the Minister to a degree that is almost wholly negative and adverse to any propositions advanced by Mr Zentai. It is submitted that the Court should read Attachment C as a document seriously intended to influence the Minister's decision. Mr Zentai accepts that Attachment C needs to be read as a whole and also that mere demonstration that legal advice from the Department to the Minister is wrong, is not sufficient to establish reviewable error. Rather, it is contended for Mr Zentai that the individual issues for review depend on the proper inferences the Court draws from the existence of erroneous advice, its likely effect on the Minister's determination and whether it has caused the determination to miscarry.

91 In *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, in a joint judgment of Dixon CJ, Williams, Webb and Fulligar JJ a writ of prohibition issued prohibiting the cancellation or possible suspension of the registration of an employer by the Board in circumstances where the fact disclosed no basis for supposing that the employer was 'unfit to continue to be registered as an employer'. In the analysis of the material that was before the Board, their Honours said (at 119-120):

> It is not enough if the Board or the delegate of the Board, properly interpreting paras (a) and (b) of s 23(1) and applying the correct test, nevertheless satisfies itself or himself on inadequate material that facts exist which in truth would fulfil the conditions which one or other or both of those paragraphs prescribe. The inadequacy of the material is not in itself a ground for prohibition. **But it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied of the requisite matters**. If there are other indications that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a **short step to the conclusion that in truth the power has not arisen because the conditions for its existence do not exist in law and in fact**.

92 Taking the totality of the material in Attachment C, an appropriate question in my view is whether, taken as a whole, there are sufficient inadequacies and/or sufficient errors so as to reach the conclusion, by inference, that the wrong test has been applied or that the Minister was not 'in reality' satisfied of all or some of the requisite matters.

The timing of the s 16 challenge

93 There is also a threshold debate as to the timing of the s 16 challenge. Mr Zentai seeks certiorari to quash the decision and notice under s 16 of the Act. For the Commonwealth it is argued that unwarrantable delay is a discretionary basis for the refusal of a constitutional writ: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

94 The assertion of rights by other legitimate means, however, may be a sufficient explanation for delay in seeking judicial review: *M160/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 85 ALD 532 (at [8]) per Finkelstein J. But the Commonwealth contends that Mr Zentai has provided no explanation for the delay in challenging the s 16 decision and notice.

95 In my view, if there be any delay, the cause of it is obvious. Mr Zentai had only become aware on 17 March 2009 of the fact that the Hungarian authorities wanted him for what was described as investigation only and that he might therefore not be properly 'accused' for the purposes of s 16 of the Act (**the 2009 information**). Prior to that date, inquiries about the Hungarian process directed to Hungary through its legal representatives yielded no response. It was a private inquiry directed to the Head of the Military Panel that finally led to the revelation concerning the status of the proceedings against Mr Zentai. It was only from this point that this issue became the basis of representations to the Minister in anticipation of a decision to be made by the Minister under s 22 of the Act.

96 On the timing issue, another debate arises. The Commonwealth argues that Mr Zentai can only challenge on the basis of materials which were before a decision-maker at the time of making the decision. In each instance this was prior to receipt of the 2009 information. For Mr Zentai it is submitted that it is artificial to assert that the Attorney-General (or the Minister as his delegate) is incompetent to revisit the various issues concerning eligibility on the basis that he is irremediably bound to accept as valid the original s 16 notice issued by his

delegate. It would be open for the Minister, if he chose, to undertake what is really an administrative reconsideration of all the various preconditions to surrender that were already considered at an earlier stage. Nothing in s 22 of the Act would render the prior provisional determinations of jurisdictional facts *functus officio*.

97 Nor, it is argued, does the delay argument accord with the remarks of the Full Court in *Zentai v Republic of Hungary* (2009) 180 FCR 225 (at [33]-[35], [76]-[77] which recognise that the opportunity to challenge the eligibility of Mr Zentai on grounds going to the existence of the particular offence and the eligibility status (the 'inquiry' versus being 'accused' argument) can still arise at the s 22 stage.

98 I do not accept that there has been relevant delay on the part of Mr Zentai. Nor would I refuse to consider the issues arising from grounds 1, 2 and 3 of the application on the basis of that contention.

A difficult challenge

99 Before coming to consider the arguments raised concerning s 16 and s 22 of the Act, something should be said about the correct approach to reviewing the opinion reached by a decision-maker or the satisfaction reached by the decision-maker about matters referred to in those sections.

100 The Commonwealth makes the point that s 16 and s 22 are to be construed as requiring the decision-maker to 'reasonably form the opinion or be so satisfied'. The question on judicial review is whether the decision-maker *could* have formed that opinion or obtained that satisfaction *reasonably* in the sense explained in numerous authorities. To take just one of those, however, in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 and 432, Latham CJ emphasised that the question for a reviewing court is whether the opinion or satisfaction was such that it could be formed by a reasonable man *who correctly understands the law*. The Chief Justice stated that if the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required had not been formed. In that event, the basis for the exercise of the power would be absent just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.

GROUNDS OF REVIEW AS AMENDED

101 The grounds for review were:

1. The Second Respondent, acting through his delegate, the Minister for Justice and Customs of the Commonwealth, erred in law and fact and misdirected himself on a fundamental matter regarding whether the Applicant was an "extraditable person", and made a jurisdictional error, in deciding to issue, and issuing, pursuant to s.16 of the Act, a Notice of Receipt of Extradition Request (the s.16 Notice) on 8 July 2005.

Particulars

(a) According to information provided on 17 March 2009 by the leader of the Military Panel of the Budapest Municipal Court ("Military Panel") and accepted as correct by the Hungarian Government, the extradition of the Applicant is only sought for the purposes of preliminary investigation about his involvement in the alleged war crime, and there is no indictment currently before the Panel charging him with the alleged offence.

(b) As the proceedings instituted in the Military Panel are essentially investigative and preliminary and not at a more advanced state involving the laying of any charge, the Applicant is not a person who is "accused" (within the meaning of s.6(a) of the Act) of having committed the alleged offence of war crime in relation to which the Republic of Hungary's request for extradition was made.

(c) The statutory requirement that an "extraditable person" be "accused" of a relevant extradition offence is not met by equating it with expressions such as "wanted for prosecution", or being "suspected of committing" the relevant offence.

(d) The Applicant therefore is not and never was an "extraditable person" within the meaning of, and for the purposes of, the Act.

(e) As the Applicant was not an "extraditable person" when the Extradition Request was made by the Republic of Hungary to the Australian Government, the Second Respondent should not have acted upon the Extradition Request by issuing the s.16 Notice. To do so was beyond his statutory power.

(f) The s.16 Notice was therefore unlawful and void.

2. The order made on 20 August 2008 by the Third Respondent, after conducting eligibility proceedings under s.19 of the Act, pursuant to s.19(9) of the Act, committing the Applicant to imprisonment in Western Australia, was beyond jurisdiction, unlawful and void.

Particulars

(a) Eligibility proceedings under s.19 of the Act cannot be conducted unless, as required by s.19(1)(b) of the Act, the Attorney-General has directed "a notice under s.16(1)" to a magistrate.

(b) By reason of the matters particularised in the preceding Ground, the s.16 Notice directed to the Third Respondent on 8 July 2005 by the Second Respondent, purportedly pursuant to s.16(1) of the Act, was unlawful and of no legal effect.

(c) Therefore the Applicant should not have been found to be an

"eligible person", and the Third Respondent had no power or jurisdiction to conduct proceedings under s.19 of the Act, or to make the order, on 20 August 2008, pursuant to s.19(9) of the Act, committing the Applicant to prison.

3. The Minister (First Respondent) made an error of law and fact and misdirected himself on a fundamental matter regarding whether the Applicant was capable of being surrendered under the Act, and made a jurisdictional error, in finding that the Applicant was an "eligible person" within the meaning of s 19(2) of the Act, and for the purposes of s 22 of the Act in relation to an extradition offence of war crime established by s 165 of the Hungarian Criminal Code Act IV of 1978 in conjunction with s 11 para 5 of Prime Minister's-Decree No 81/1945 (II.5) ME on the Peoples Jurisdiction enacted by Act VII of 1945 amended and complemented by Decree No 1440/1945 (V.1.) ME ("war crime").

Particulars

(a) The Applicant repeats Particular 1(a).
(b) The Applicant repeats Particular 1(b).
(c) The Applicant repeats Particular 1(c).
(d) The Applicant repeats Particular 1(d).
(e) In apparently concluding that the Applicant satisfies the definition of an "extraditable person", and hence "eligible person", the Minister failed to have proper regard to the legal distinction between preliminary investigative process and the more advanced state of affairs where charges are laid or are imminent, and was inferentially misled to an incorrect understanding of the relevant legal concept of "accused" by the reference in Departmental Attachment C (para 262; also para 190) to the Australian High Court authority of *Director of Public Prosecutions (Cth) & the Republic of Austria v Kainhofer* [1995] HCA 35; (1995) 185 CLR 528 which is cited for the proposition that extradition legislation must be construed so as to recognize differences between the common law and continental systems of criminal law, but omitting reference to the passage from Gummow J in *Kainhofer* (at [88]), cited in the Applicant's Supplementary Submission dated 26 October 2009, in which his Honour made the above relevant distinction is made. (sic)
(f) As the Applicant was not an "extraditable person" when the request for his extradition was made to the Australian Government, proceedings against him under the Act were and are contrary to the requirements of the Act and should not have been commenced, and he should not have been found to be an "eligible person" by the Magistrate for the purposes of sub-ss 19(2) and (9) of the Act.
(g) As the Applicant was incapable of being found to be an "eligible person" under sub-s 19(2) of the Act the Minister had no power to make a determination for his extradition under s 22 of the Act.
(h) In consequence, the Minister's determination that the Applicant should be surrendered for extradition is not authorised by law and is a nullity.

4. The Minister further erred in law and made a jurisdictional error, in determining that the Applicant was eligible to be surrendered under s 22 of the Act, in relation to a "qualifying extradition offence" of war crime, and that determination was not authorised by the Act and was a nullity.

Particulars

(a) By virtue of Article 2 paragraph 5(a) of the *Extradition Treaty between Australia and the Republic of Hungary 1995* ("*Extradition Treaty*"), as incorporated into the Act under of s 11 of the Act and the *Extradition (Republic of Hungary) Regulations 1997*, the alleged war crime was not an offence under Hungarian municipal law at the time (8 November 1944) when the conduct constituting the offence is alleged to have occurred.

(b) "War crime" was not made an offence under the Hungarian Criminal Code until legislation of Hungary enacted by Decree No 81/1945 (1945 Decree) which was purportedly given retrospective effect in Hungary by s 1 of the 1945 Decree.

(c) Relative to extradition requests by the Republic of Hungary, the effect of Article 2 paragraph 5(a) of the *Extradition Treaty* is that conduct which was not a criminal offence under Hungarian law at the time the conduct occurred is not an "extradition offence", as defined by s 4 of the Act.

(d) Unlike other international instruments such as the *European Convention on Human Rights 1950 (ECHR), the International Covenant on Civil and Political Rights 1966* (*ICCPR*) and the Rome Statute establishing the International Criminal Court (where non-retrospectivity clauses are qualified by an exception in the case of war crimes) the *Extradition Treaty* contains no such exception.

(e) The alleged offence is therefore not an "extradition offence", and is therefore not an offence in relation to which the Minister may, under s 22 of the Act, order that the Applicant be surrendered to Hungary.

5. The Minister erred in law, in failing to give proper, realistic and genuine consideration to whether, in the exercise of the discretion conferred by Article 3 paragraph 2(a) of the *Extradition Treaty*, he should refuse extradition, having regard to the fact that the Applicant is a national of Australia, and all other relevant factors. Alternatively, his decision not to refuse extradition was one which no Minister, acting reasonably and giving consideration to those facts could, in the proper exercise of his discretion, make.

Particulars

(a) The Minister had a duty, imposed by Paragraph 2(a) of Article 3, to give primary consideration to the fact that the Applicant is an Australian citizen and national, given that Hungary may request Australia to submit the case to competent authorities in Australia, to consider whether to prosecute the Applicant in Australia.

(b) The Minister fettered the exercise of his discretion and disabled himself from properly and genuinely considering its exercise and the factors relevant to it, purportedly on the ground of a long-standing "policy" that Australia will not refuse extradition on the basis of Australian citizenship alone.

(c) The Minister further fettered the exercise of his discretion by giving undue precedence to Australia's obligation, under the *Extradition Treaty*, to respond to the Republic of Hungary's extradition request, without having a balanced or any regard to Australia's other obligations and responsibilities under that Treaty to the Applicant, as an Australian citizen.

(d) In so doing, the Minister failed to take into account the fact that Australia has a primary obligation to afford diplomatic protection to the Applicant, as an Australian national, and to save him from undergoing foreign criminal procedures unnecessarily, if either a Hungarian request is made under Article 3 paragraph 2(a), or Australia of its own motion considers whether, as an Australian national resident in Australia, the Applicant can and should be prosecuted under Australian law for the alleged war crime.

(e) The Minister further failed to satisfy himself as to whether Australia or Hungary had primary responsibility for prosecuting the Applicant, given that the Applicant had ceased to be, by force of Hungarian law applicable in 1944-1945, an Hungarian national, having failed to return to Hungary in response to an official summons to do so.

(f) The Minister should have had regard and failed to have regard to the fact that Australia has a primary obligation to afford the Applicant diplomatic protection, to prevent any unnecessary or disproportionate distress and disruption that his extradition would occasion if removed from Australia; or to the question of whether, as an alternative to Hungarian proceedings, the Applicant might be investigated and (if thought appropriate) prosecuted for the alleged war crime under Australian war-crimes legislation.

5A. The First Respondent erred in law and fact and made a jurisdictional error in deciding that there was no basis for finding that the competent Australian prosecuting authorities, the Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions (CDPP), had not, within the meaning of, and for the purposes of Article 3(2)(b) of the *Extradition Treaty*, decided to refrain from prosecuting the Applicant for the alleged offence in respect of which extradition is sought, thereby failing to give relevant and proper consideration under section 22 of the Act to whether Australia as the Requested State should refuse to surrender the Applicant for extradition.

Particulars

(a) According to paragraphs 112, 116 and 117 of Departmental Attachment C the AFP, having accepted a referral concerning an allegation of a war crime, considered the possibility of prosecuting the Applicant for an offence under the *War Crimes Act 1945* (Cth) and sought advice from the CDPP regarding whether such a prosecution could be initiated in Australia. Upon receiving advice from the CDPP that in the absence of any testimony from living witnesses to support the documentary evidence the CDPP was unable to conclude that there was a prima facie case to support a prosecution under the *War Crimes Act*, the AFP determined not to proceed further.

(b) Having regard to the exchange of information between the AFP and the CDPP and its outcome, there was in the circumstances an actual or constructive *refraining* by Australia's competent authorities from prosecuting the Applicant and. Article 3(2)(b) of the Treaty was therefore engaged.

(c) The First Respondent wrongly took into account the view of the Department (paragraph 118 of Departmental Attachment C) that the decision of the AFP to take no further action did not constitute a 'refraining' since it did not entail a positive decision not to prosecute the Applicant, thereby misdirecting himself on the legal meaning of

"refrain" in Article 3(2)(b).

(d) By concluding that there had not been a relevant refraining, he failed to consider, as required by Article 3(2)(b), whether he should exercise his discretion, acting on behalf of Australia, to refuse the Hungarian Request and thereby committed a jurisdictional error.

6. The Minister further erred in law, misdirected himself on a fundamental matter regarding whether in the terms of Article 3 paragraph (2)(f) of the *Extradition Treaty* the Applicant's extradition would be *unjust, oppressive, and incompatible with humanitarian considerations*, failed to take into account relevant considerations which he was bound to consider, and failed to properly exercise his jurisdiction under s 22 of the Act.

Particulars

(a) The Minister failed to satisfy himself of the *capacity* of the Military Division to provide procedures consistent with Australia's and Hungary's international obligations under Article 14 of the *ICCPR* with its two protocols and other relevant instruments, to ensure a fair trial if the Military Division were to charge and prosecute the Applicant for the offence of war crime.

(b) By virtue of s 11 and sub-paragraphs 22(3)(e)(i), (ii), (iii) and (iv), and 22(3)(f) of the Act, the Minister is required to have regard to the considerations specified in Article 3 paragraph 2(f) of the *Extradition Treaty*, namely, whether in the relevant circumstances it would be *unjust, oppressive, and incompatible with humanitarian considerations* to extradite the Applicant.

(c) In issuing the international arrest warrant for the Applicant's extradition to Hungary, the Republic of Hungary relied on the minutes and records of statements made in criminal proceedings before the Hungarian People's Court in 1946-1947 by the defendants and various witnesses in the trials of a Captain Mader and Lieutenant Nagy, which apparently will be the foundation on which any prosecution of the Applicant will be based. (Departmental Attachment C, para 33).

(d) So far as is known (and it is not contradicted by the Republic of Hungary) the relevant prosecution witnesses, on whose statements the Hungarian military prosecution authorities will apparently rely, are either no longer alive or are not available for examination.

(e) The Applicant has made submissions to the Minister that, if the Hungarian military prosecution authorities intend to rely on documentary evidence of Captain Mader, Lieutenant Nagy, and other witnesses including Jozsef Monori, Pal Marko, Zoltan Imre, and Janos Mahr, the Minister must be satisfied that the Applicant will have an opportunity to confront and question the witnesses, as required by Article 6 of the *ECHR* and Article 14 of the *ICCPR*, failing which to extradite the Applicant to Hungary would be *unjust* and *oppressive* within the meaning of Article 3 paragraph 2(f) of the *Extradition Treaty*.

(f) The Minister has also failed to discharge his responsibility of requiring the Hungarian Government to satisfy him that the Applicant will not be subjected to an unfair and unjust trial.

(g) The Hungarian authorities have failed to give an assurance that statements recorded by the People's Court in 1946-1947, coerced by torture, including any by Lieutenant Nagy, would not be produced as

evidence in proceedings before the Military Panel, contrary to Article 15 of the *UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984* (*CAT*)

(h) It is a fundamental requirement of a fair trial in accordance with the above international instruments that the Applicant should have the opportunity and ability to question the above-named witnesses as to whether their statements were voluntary or coerced by threats of torture, induced by promises of leniency, are consistent with other statements by relevant witnesses, or reliable and credible, particularly given that to a large extent the statements are those of alleged accomplices or based on hearsay.

(i) The Republic of Hungary has declined to provide any specific details about whether the named witnesses are alive and available to be called in any proceedings against the Applicant, failed to inform the Applicant or the Australian Government of any alternative procedures for the testing of the voluntariness, reliability, credibility and veracity of the statements of those witnesses, and has given the Minister no assurance as to how, the Military Panel would be able to provide fair procedures and a fair trial if it were to prosecute the Applicant.

(j) The Republic of Hungary has, further, refused and failed to inform the Applicant or the Minister how the Applicant would be able to have a fair trial in accordance with international standards, when he will be unable to access relevant official documentary evidence (destroyed in the time elapsed since 1944) about the movement of his unit of the Royal Hungarian Army that would enable him to establish that he was not in Budapest at the time of the commission of the alleged offence in Budapest.

(k) The Minister, in the absence of such information and assurances and without making any further enquiry, has made his determination that the Applicant should be surrendered for extradition, apparently because the Military Panel is *bound by* the provisions of the *ECHR* and *ICCPR* and that it is therefore not for the Australian Government to enquire into or make judgments about whether the Military Panel and its procedures will, in fact, be able to comply with the international standards for a fair trial (Departmental Attachment C paras 103, 219).

(l) In that regard, the Minister has been misled by the selective reference in the Departmental Attachment C (para 33, dot point 7 and para 190) to the decision of this Honourable Court in *Mokbel v Attorney-General for the Commonwealth* (2007) 162 FCA (sic-FCR) 278 at [58]-[59], said to be authority that in accordance with the principle of comity a degree of respect is to be accorded by a requested country to the laws and institutions of another country, but omitting reference to *Snedden v Republic of Croatia* [2009] FCA 30 (a decision of the Full Federal Court to which the Applicant referred in his Supplementary Submissions to the Minister dated 26 October 2009) in which the contrary proposition was stated, namely that Australian court *may*, in an appropriate case, determine that a country requesting the extradition of an Australian citizen cannot provide a fair and unbiased trial in the event of extradition, and if so, that extradition must be refused.

(m) The Minister, in accepting that "comity" prevents him from considering whether, having regard to the particular evidentiary problems presented by the non-availability of key witnesses, the

procedures of the Military Tribunal are *actually capable* of affording the Applicant a *just* and fair trial in accordance with relevant international standards has fettered his discretion and abdicated his responsibility to address that question.

(n) The Minister has in that regard asked himself the wrong question: the issue is not whether the Military Division is capable of providing a fair *trial because it is bound by the ECHR and ICCPR*; it is whether the Hungarian authorities can provide assurances to the Australian Government as to *how* they can, in fact, afford a fair trial to the Applicant in accordance with the *ECHR* and *ICCPR* in all the circumstances.

(o) The Minister has further erred in law and taken into account an irrelevant consideration, namely, that if the Hungarian authorities and the Military Panel fail to comply with the relevant international standards, the Applicant could appeal pursuant to procedures open, under Hungarian law, with the ultimate prospect of appealing to the European Court of Human Rights, and has concluded that he therefore has no responsibility to satisfy himself, before making a decision to extradite, that the Applicant will be able to be afforded a fair trial, complying with the relevant international standards.

Particulars

(oa) Further, the statement in Departmental Attachment C, paragraph 202, that advice received from the Attorney-General's Department's Office of International Law (OIL) (which is summarised in unredacted form in paragraphs 204 and 205 of that Attachment) suggests that there is "no information that establishes that the Military Panel would not be capable of providing a fair trial", and in paragraph 204 that: "We are not aware of any information to suggest that Hungry does not propose or is unlikely to provide Zentai with a fair trial", is inconsistent with the highly qualified advice given by the OIL that for a trial to be fair the Military Panel could only have regard to documentary evidence that was unsupported by viva voce evidence *so long as the documentary material was not the sole or decisive evidence.*

(ob) The First Respondent has therefore acted on a legally incorrect view of the apparently unsupported documentary evidence on which the Republic of Hungary proposes to rely (if a trial were to be instituted), and consequently, in the special circumstances of this case, erred in failing to take into account the fact that Hungary has not been able to produce any relevant live witnesses whose testimony would allow testing of the 1940's documentary records, given that the records cannot, in accordance with international standards of fairness, constitute the *sole or decisive evidence for the prosecution.*

(p) Contrary to the statement in the Departmental Attachment C, para 210, (that there is *no evidence* to suggest that Hungary will not afford the Applicant the protections and rights contained in its procedures and practices) there is evidence that the Military Panel, when issuing the international arrest warrant relating to the Applicant in 2005, failed to consider whether the statements and records of the People's Court were capable of being used in any criminal proceedings consistently with the Republic of Hungary's obligations under the *ECHR* and *ICCPR*, or whether a prosecution could comply with the requirement of a fair trial according to the standards of the *ECHR*

and *ICCPR*. The Minister has, in the result, failed to take into account a relevant consideration, namely, that the Military Panel has already failed to comply with the relevant international standards.

(q) The Minister, in relying on Departmental Attachment C, has apparently also been induced to misconceive the *nature* of the Applicant's submissions regarding the need to confront prosecution witnesses, given that there is objective evidence that the Hungarian prosecution authorities may be *incapable* of producing critical prosecution witnesses, whose evidence is proposed to be relied on.

(r) The Minister has also failed to have regard to a relevant factor, namely Australia's own international legal obligations under the *ICCPR*, irrespective of any other obligations of non-refoulement, not to surrender the Applicant, an Australian national, for extradition where there is objective evidence that he may not be afforded a fair trial, and a real risk that there will be a violation of Australia's international undertakings because of its failure to comply with Article 14 of the *ICCPR*.

7. In dealing with the Applicant's extradition objection pursuant to s 7(c) of the Act, that he may be prejudiced at his trial by reason of his nationality or political opinions, the Minister failed to give a fair, properly reasoned and informed consideration to the Applicant's claim that the issuance by the People's Court in 1948 of a warrant for his arrest was wholly or in part due to the fact that the People's Court and the Hungarian communist authorities then in power were biased against officers of the Royal Hungarian Army fleeing Russian occupation, so that there is a real risk that the Applicant was sought because of his national and political associations, and that the proceedings of the People's Court against Captain Mader and Lieutenant Nagy, to the extent that they implicated the Applicant, were influenced and tainted by that consideration.

Particulars

(a) Para 26 & 35 of Departmental Attachment C; states that there is *no information* in the Department's possession that the Applicant's prosecution will be influenced by his nationality or political opinion, notwithstanding that the Applicant made a submission relating to the continuing effect of any original prejudice affecting the decisions in 1947-1948 of the People's Court's.

(b) Departmental Attachment C, at para 37, denies that any taint arising from tainted political bias in the minutes and records of the proceedings of the People's Court and the warrant for the Applicant's arrest issued in 1948 is capable of having a continuing operative effect in any contemporary proceedings of the Military Panel.

8. The Minister made an error of law and a jurisdictional error in failing to give proper or any consideration to whether the Military Panel is a court or tribunal that is only *occasionally, or under exceptional circumstances, authorised* to try persons accused of the offence for which extradition is sought, or to whether to refuse extradition for that reason, as required by Article 3 paragraph (1)(f) of the *Extradition Treaty*.

Particulars

(a) The Minister failed to address and consider whether, with regard to

the jurisdiction of the Military Panel to try offences of the nature of the war crime, the Military Panel is only occasionally authorised to conduct such proceedings, in the legal sense of only being required to exercise its jurisdiction in exceptional circumstances, not commonly encountered within the normal criminal jurisdiction of a court or tribunal.

(b) The Republic of Hungary has failed to provide to the Minister information regarding the statistical frequency with which the Military Panel has conducted proceedings with respect to war crimes, so the Minister is unable to make relevant findings concerning this objection.

(c) Further, given the unusual circumstance that the war crime in question is alleged to have occurred 65 years ago, the Republic of Hungary has failed to provide any assurance to the Minister that in the absence of any witnesses able to give oral testimony confirming statements made for the purposes of the proceedings of the People's Court in 1946-1947, the Military Panel will not adopt exceptional procedures, not complying with relevant international law standards, and not ordinarily used in normal judicial proceedings.

(d) In the absence of such information, the Minister was unable to decide whether the nature of the Military Panel involves such a departure from traditional judicial proceedings as to be excluded from the operation of the *Extradition Treaty*.

9. The Minister erred in law, and committed jurisdictional error, by failing to take into account relevant considerations when considering whether, in accordance with Article 3 paragraph 2(f), it would be *oppressive* and *incompatible with humanitarian considerations* to surrender the Applicant for extradition, given his advanced age (88) and his ill health.

Particulars

(a) The Minister failed to give real and genuine consideration to whether,

(i) given the Applicant's age and medical condition, and

(ii) given the Hungarian Government's concession that the Applicant is only wanted in the first instance for investigation,

there are relatively more appropriate alternatives (which would give full force and effect to "humanitarian considerations") to surrendering him for extradition to Hungary, such as permitting the Hungarian authorities to conduct their enquiries in Australia, or, if requested by the Hungarian Government, asking the Australian prosecuting authorities to consider whether to charge the Applicant under the Commonwealth Criminal Code.

(b) The Minister further erred in evidently deciding to give greater effect to the fact that any anguish, stress and seriously adverse health impacts upon the Applicant resulting from his extradition, and possible lengthy incarceration in a foreign country, should be "balanced" against the seriousness of the offence and interest of the international community in having a suspected World War II criminal tried before Hungarian courts.

(c) In so doing, the Minister failed to take into account the fact that the Applicant is an Australian national who is entitled to the presumption of innocence, and that the relevant interests of the international

community could, proportionately and appropriately, be satisfied by such alternatives.

10. The Minister has also committed a jurisdictional error by taking into account, in his reasoning process, an inaccurate and misleading impression created in Departmental Attachment C, para 214, to the effect that the Minister should have little, if any, regard to the fact that the Applicant would be disadvantaged in his defence, if he were to be charged, by the long passage of time, because the relevant Hungarian authorities were unaware of the Applicant's presence in Australia until brought to their attention in 2004 by the Simon Wiesenthal Centre (whereupon they responded quickly) and further, (impliedly) that this delay was due in part to the fact that the Applicant had changed his name from Steiner to Zentai, thus preventing the Hungarian authorities from seeking his arrest and extradition at an earlier date.

Particulars

(a) The Applicant changed his name from Steiner to Zentai prior to World War II and was officially known by that name by all relevant Hungarian authorities thereafter including, relevantly, in proceedings before the People's Court.

(b) Any delay in pursuing an investigation and prosecution of the Applicant for the alleged war crime cannot be attributed to the Applicant, who lived openly in Western Australia from 1950 under the name of Zentai, by which he had been known when he left Hungary.

(c) His presence in Western Australia was known in the 1980s to the family of Peter Balazs, the victim of the alleged war crime, who claim to have brought it to the attention of a person associated with the Simon Wiesenthal Centre, which was therefore in a position to inform Hungarian or Australian authorities of the Applicant’s presence in Australia at that time.

(d) The Minister made a jurisdictional error by only taking into account (Departmental Attachment C paras 273-279) the fact that the Hungarian authorities have acted in good faith since 2004, without having regard to the earlier opportunities that the Hungarian Government could have had if Hungarian authorities or other informants and agencies had acted more diligently in the past, and by failing to take into account, and give proper weight to, the enormous prejudice to the Applicant occasioned by the delay.

(e) The Minister has, also, apparently taken into account, as a reason not to refuse surrender, the wrong and misleading statement of fact (Departmental Attachment C, para 275) that the Applicant “has lived under the false assumption that [he is] no longer wanted for prosecution”.

11. For the reasons stated in the above grounds, the Minister's decision was so unreasonable that it went beyond his jurisdiction under s 22 of the Act and is a nullity and of no legal effect,

12. The Minister further erred in law, and failed to comply with a fundamental legal requirement, by refusing to provide to the Applicant a statement of his relevant findings and the reasons for his determination under s 22 of the Act, in consequence of which his determination is a nullity and of no legal effect.

Particulars

(a) Section 22 of the Act requires the Minister, in exercising his statutory discretion and powers, to make various findings and to be satisfied regarding matters specified in that section.

(b) By necessary implication, for the purpose of judicial review of his decision, if requested by the person subject to the order for extradition, the Minister must provide a statement of relevant findings and reasons.

(c) On 17 and 19 November 2009, the Applicant's solicitors requested the Attorney-General's Department to provide a statement of the Minister's reasons for decision. By letter dated 20 November 2009 the Department replied that no such statement would be provided.

(d) The refusal constitutes a failure to comply with the Act, and therefore of itself vitiates the Minister's decision, and is a ground for quashing it.

EVIDENCE

102 It is unnecessary to discuss, in detail, all five affidavits in support of Mr Zentai's application. His solicitor has annexed a number of documents. The first is an unredacted form of Attachment C. This was the subject of consideration in *Zentai v Honourable Brendan O'Connor (No 2)*. The portions that are now disclosed, following orders I made in that case, gave rise to a further amendment made to the application dealing specifically with the question of whether or not the Australian authorities decided to refrain from prosecuting Mr Zentai for the alleged offence (the new ground 5A).

103 Also produced was a copy of the submission in relation to the extradition of Mr Zentai provided to the Commonwealth Minister for Justice and Customs prior to the Minister signing a Notice of Receipt of Extradition Request under s 16 of the Act. That submission was dated 8 July 2005. It was produced by the Commonwealth in response to a request by Mr Zentai's solicitors.

104 Also produced was the copy of Attachment K to the Department's submission to the Minister for the purposes of determining whether Mr Zentai was to be surrendered to Hungary under s 22 of the Act. It was advice from OIL dated 5 November 2009, again, produced following a request from the Commonwealth.

105 Also produced was a copy of written submissions from Mr Mark Ierace SC to Ms Kirsten Law, Director of Legislation and Policy Section, International Crime Cooperation Division, Commonwealth Attorney-General's Department of 21 September 2009. (These

have been briefly referred to above). Mr Zentai's solicitors became aware that Mr Ierace SC, Senior Public Defender of the Public Defender's Office in New South Wales, Visiting Fellow in International Criminal Law at the University of New South Wales and former prosecutor in the UN International Criminal Tribunal for the former Yugoslavia in The Hague had made the submission to the Department as a publicly available document on the internet. It would appear that the submission was in the possession of the Commonwealth (the International Crime Cooperation Division of the Department) at the time it was advising the Minister in relation to the s 22 determination.

106 The submission suggests that the grounds of refusal contained in s 7 of the Act should be extended to include the right to a fair trial in a procedural sense, noting that fairness and respect for human rights were the principles underlying the particular bases for an extradition objection under the Act. The absence of a legislative basis to contest extradition where the trial in the extradition country does not meet basic procedural requirements of a fair trial was an omission which required attention, according to the submission. That in turn was directly related to the application of Mr Zentai. The submission continued:

> If extradited, Zentai would be tried before a military tribunal, presumably because at the time of the alleged offence he was a member of the Hungarian Military, albeit fascist puppet forces overseen by the Nazi occupiers.
> …
> The compelling aspect of the case is that there are no living witnesses to the crime. Two accomplices were arrested shortly after the war, and made confessions which they later complained were extracted by torture; apparently a credible claim, given the notoriety of the police unit and particular prison where they were held at the time. Both are deceased. Consequently at any trial the prosecution case would not include any live testimony of contemporaneous witnesses or, as I understand it, any forensic evidence linking Zentai to the killing, or confessional evidence attributed to him.

107 The submission went on to observe that such a trial would contravene international human rights instruments including the ICCPR which prescribes minimum guarantees and full equality for everyone facing a criminal charge to be entitled to have the witnesses against him or her examined and to obtain the attendance and examination of witnesses on his or her behalf on the same conditions as witnesses against him or her. That provision in the ICCPR (Art 14(3)(e)) was replicated in Art 6(3)(d) of the *European Convention of Human Rights* (**the ECHR**).

108 Attachment C will be the subject of considerably more detailed analysis in the course of discussion of the grounds below.

109 Senior counsel for Mr Zentai was critical of Attachment C submitting that the reasoning in it was teleological in the sense that it was all directed to the one conclusion:

> It's as if the author of attachment C had decided what outcome was required and then went through and dismissed each and every consideration which should properly have been taken into account'.

110 He observed at one point that:

> For example in paragraphs 165, 169, 173 and 179, the department tends to diminish and trivialise the physical aspects of the applicant's medical condition, and there's more to it than that, that is, trivialising issues of emotional impact and stress of travel and awaiting and undergoing trial there. All of these matters, collectively, in our submission, point irresistibly to it being inconsistent or incompatible with humanitarian considerations to send this man to Hungary for investigation or even trial, if there were to be a trial, … it deals with cognitive impairment and says:
>
> > The department doesn't consider Zentai's claims he may suffer from a cognitive impairment which may or may not impair his ability to properly defend himself at trial are matters that should weigh heavily on your discretion because they're matters for Hungary, which has processes that address the issue.
>
> So there's not even a question of whether, on balance, this presents a problem. Not matters which should weigh heavily on your discretion, what is being said here connotes a misinterpretation of the requirements or the discretionary considerations in the treaty. It can only be that because to say that the fact that a man has cognitive impairment, as well as other physical disabilities, which may prevent him from fairly defending himself, shouldn't weigh heavily on the discretion raises the question, well, what should?

111 The separate advice from OIL on the questions of whether Hungary was a party to any relevant treaties and whether there was any relevant international jurisprudence regarding Hungary's capability of providing a fair trial and regarding adequacy of medical care available in Hungary's prison system was a detailed document (of 21 pages). Its content also falls for consideration in the course of the submissions advanced to support the grounds of appeal.

GROUNDS CONSIDERED INDIVIDUALLY

Ground 1 – the applicant is not 'accused' of an offence under Hungarian law and hence is not an 'extraditable person' within the meaning of the Act

112 Ground 1 is interconnected with grounds 2 and 3. They each ask two questions. The first is whether Mr Zentai was accused of an offence, rather than wanted for interrogation; and the second is, if he was wanted only for interrogation, does it follow that he is not an 'eligible person'?

113 There is a difficulty in relation to these two questions in that as originally framed, the argument was that it was impossible for Mr Zentai to be an eligible person and, therefore, the entire process was invalid and required quashing. However, the 2009 information (the material in support of the argument that Mr Zentai was wanted only for interrogation), was not before the Minister when the s 16 direction was made. I will return to this point.

114 It is not open to the Attorney-General to issue a notice under s 16 of the Act to direct a magistrate to commence proceedings under s 19 of the Act to determine whether a person is eligible for extradition to a requesting country unless the person is an 'extraditable person' within the meaning of s 6 of the Act. Section 6 of the Act provides as follows:

> **6 Meaning of *extraditable person***
>
> Where:
> (a) either:
> (i) a warrant is or warrants are in force for the arrest of a person in relation to an offence or offences against the law of a country **that the person is accused of having committed** either before or after the commencement of this Act; or
> (ii) a person has been convicted of an offence or offences against the law of a country either before or after the commencement of this Act and:
> (A) there is an intention to impose a sentence on the person as a consequence of the conviction; or
> (B) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served;
> (b) the offence or any of the offences is an extradition offence in relation to the country; and
> (c) the person is believed to be outside the country;
> the person is, for the purposes of this Act, an extraditable person in relation to the country. (emphasis added)

115 To be an extraditable person within s 6(a) of the Act, a warrant must be in force relevantly for his arrest in relation to an offence against the law of the requesting country, in this case, Hungary that he is accused of having committed before or after the commencement of the Act. 'Accused', Mr Zentai argues, means wanted with regard to criminal proceedings that have progressed beyond the purely investigative stage.

116 In *Kainhofer* (at [569]), Gummow J drew the relevant distinction between proceedings which are 'merely investigative or preliminary' as compared with those where 'one can suspect a person in a manner which is the product of a more advanced state of affairs, in particular, accusation by the laying of charges'. As this is an important

consideration I have set out the following passage in the judgment at some length (at 563-564) (footnotes omitted):

> However, in any event, I would not construe the term "accused" as including that which is described in the last sentence in the extract set out above from *Muller's Case*, namely, any proceeding in Austria in which evidence has been or might lawfully be taken with a view either to a future criminal prosecution or to making a decision as to whether to institute a criminal prosecution.
>
> First, the requirement in s 6 and s 19 for there to have been in force or issued by the extradition country a warrant for the arrest of the person in question marks the modern legislation off from that considered in the 19th century authorities to which I have referred. The course of legislative history which I have outlined indicates an increasing specificity in the procedures of the country requesting extradition. To treat as "accused" a person against whom there were on foot merely inquiries preliminary to the institution of a prosecution would be contrary to that trend.
>
> Secondly, in respect of aliens present in Australia whose surrender is sought by extradition processes, considerations of personal liberty are at stake. In a classic judgment upon extradition law delivered in the Supreme Court of the United States, the point was made:
>
> > "[U]nder our system of laws and principles of government, so far as respects personal security and personal freedom, I know of no distinction between the citizen and the alien who has sought an asylum under them."
>
> Hence, habeas corpus is available to an alien who has been wrongfully arrested, even by orders of the Crown. It is reasonable to expect that the legislature would express clearly an intention to authorise the executive surrender of such persons, not necessarily for trial, but rather to facilitate inquiries by the proper authorities in the extradition country as to whether a prosecution should be instituted.
>
> Thirdly, the term "extraditable person", as defined in s 6, is expressed as applying "for the purposes of this Act", that is to say, not only for the purposes of extradition from Australia (Pt II, ss 12-27), but also extradition to Australia from other countries (Pt IV, ss 40-44). This suggests that the phrase in the definition "the person is accused" has, with due allowance for the differing legal systems that may be involved, a broadly similar operation. Section 43 of the Act empowers the Attorney-General to authorise the taking of evidence in Australia for use in any proceedings for the surrender to Australia of a person suspected by the Attorney-General of being an "extraditable person" in relation to Australia. Section 40 states that a request by Australia for the surrender of a person from a country, other than New Zealand, in relation to an offence against a law of Australia "of which the person is accused or of which the person has been convicted", shall be made only by or with the authority of the Attorney-General. Further, where a person is surrendered to Australia in relation to an offence against a law of Australia "of which the person is accused or of which the person has been convicted", that person shall be brought into Australia and "delivered to the appropriate authorities to be dealt with according to law" (s 41).
>
> It would be an unlikely construction of these provisions that the references therein to persons accused of an offence against a law of Australia were treated as extending to cases merely where inquiries were on foot to decide whether to institute a prosecution.
>
> Further, the notion of reciprocity between Australia and other countries is, on the

> face of the statute, fundamental to the legislative scheme. A principal object of the Act, stated in s 3, is to enable Australia to carry out its obligations under extradition treaties and another is to facilitate the making of extradition requests by Australia. The Act in numerous provisions (eg, ss 6, 7, 10, 40, 41) distinguishes between those accused or prosecuted and those convicted. One would expect a clear indication in the statutory text if, by reference to "accusation", Australia was to give, as a matter not only of degree but of kind, greater recognition to the criminal processes of other countries than that which it could ever seek for itself.
>
> On the other hand, I would not accept the proposition that there must be an authorised public accusation of equivalent effect to what in common law systems would be treated as an indictment or the laying of an information. Care must be taken to allow, within the limits mentioned earlier in these reasons, what in the United States was called a "reasonable cosmopolitan interpretation". In particular, differences between denomination or categorisation of procedures should not be given too great a weight. The fundamental question is whether the person whose extradition is sought under Pt II is one in respect of whom there has been taken by the competent authorities in the extradition country a decision to invoke the operation of the criminal law by the taking of whatever steps are necessary to initiate what might fairly be described as a prosecution.

117 One of the points made for Mr Zentai is that this distinction made by Gummow J, although mentioned in passing in submissions made on behalf of Mr Zentai to the Department, was not drawn or adequately drawn to the Minister's attention in Attachment C.

118 In addition to this requirement, to be liable for extradition under the Treaty, the person must in accordance with Art 1 of the Treaty be 'wanted for prosecution' and, pursuant to Art 5(2)(a) be 'accused of an offence'.

119 After the Attorney-General has issued a notice to a magistrate under s 16 of the Act in relation to an 'extraditable person', the magistrate is required by s 19 to conduct proceedings to determine whether the person is an 'eligible person'. If the magistrate makes that finding, as her Honour did in this instance, the magistrate is then required to make an order under s 19(9) committing the person to prison. Each of these orders is a jurisdictional precondition to the exercise by the Attorney-General of a power under s 22 to surrender the person for extradition.

120 For Mr Zentai, it is argued that the Attorney-General (or his or her delegate, in this case, the Minister) can only make a determination under s 22 of the Act to surrender a person for extradition if, relevantly:

(a) there is a relevant 'qualifying extradition offence' in relation to which a magistrate or a court, pursuant to s 19 and s 21 of the Act respectively, has conducted final

proceedings, as the case requires, and determined that the person was eligible for surrender within the meaning of subs 19(2) of the Act;

(b) the person is therefore an 'eligible person' who has been committed to prison by an order of the magistrate made under subs 19(9) of the Act, or confirmed on review under subs 21(2);

(c) the Attorney-General is satisfied that there is no extradition objection in relation to the offence;

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

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

(ii) surrender of the person in relation to the offence may be refused;

in certain circumstances

and the Attorney-General is satisfied:

(iii) where (i) applies – that circumstances do not exist; or

(iv) where (ii) applies – either that the circumstances do not exist or that they do exist but that, nevertheless, surrender of the person in relation to the offence should not be refused; and

(e) the Attorney-General in his or her general discretion considers that the person should be surrendered in relation to the offence.

121 In the argument as initially framed on behalf of Mr Zentai, it was asserted that the Attorney-General acting through his delegate, the then Minister for Justice and Customs (joined as a fifth respondent by way of amendment at the commencement of the hearing) erred in law and fact and misdirected himself on a fundamental matter of law and made a jurisdictional error in deciding that Mr Zentai was an extraditable person and on that basis issuing on 8 July 2005 pursuant to s 16 of the Act a Notice of Receipt of Extradition Request.

122 This argument contends that to meet the statutory criterion under the Act of being 'accused' and the requirement in terms of the Treaty of being 'accused of an offence' or 'wanted for prosecution', an objectively verifiable administrative step of substance equivalent to the institution of criminal proceedings to determine guilt and punishment must occur. This submission is made notwithstanding that some allowance must be made for procedural differences between inquisitorial continental civil law systems such as that of Hungary and of

common law systems as in Australia regarding process of investigating and prosecuting criminal offences.

123 For Mr Zentai it is argued that where the prosecuting authority is merely conducting investigative inquiries that are at a preliminary stage with no decision made concerning whether there is a sufficient evidentiary or factual basis to proceed to prosecution, the statutory criterion cannot be satisfied.

124 In Black's Law Dictionary 'accuse' means 'to charge (a person) judicially or publicly with an offence; to make an accusation against', and 'accused' means:

> a person who has been blamed for wrongdoing; especially a person who has been arrested and brought before a magistrate or has been formerly charged with a crime (as by indictment or information).

125 Similar definitions appear in the Macquarie Australian Dictionary (3rd ed 1997).

126 Although the criminal law procedures of Australia and Hungary are quite different, the distinction between someone being 'wanted for prosecution' and merely being wanted for investigation in the sense that matters have not advanced to a stage where a decision can be made to institute a prosecution, is applicable also to extraditions under European Union law.

127 For Mr Zentai, it is contended that it is apparent from English decisions that the criterion of being 'wanted for prosecution' in European jurisprudence is equivalent to the notion of being 'accused' (*Jason McGoldrick and Michael Turner v Central Court, Pest (McGoldrick-Turner)* [2009] EWHC 2816 (ADM), per Collins J (at [25]); *Trenk v District Court of Pizen-Mesto, Czech Republic* [2009] EWHC 1132 (Admin) (at [18]) per Davies J). The distinction drawn in these cases between investigation and prosecution accords with the distinction made by Gummow J in *Kainhofer*.

128 The facts upon which the legal argument to support ground 1 are based are these. On 30 March 2005, the Australian Government received a formal Request from Hungary seeking the extradition of Mr Zentai in relation to the specified offence. The warrant for the arrest of Mr Zentai that accompanied the Request was issued in Hungary by the Military Division on 3 March 2005.

129 According to the information provided to Mr Zentai on 17 March 2009 by Brigadier General Dr Bela Varga, the leader of the Military Panel of the Budapest Municipal Court (**the Military Panel**) and accepted as being correct by the Hungarian Government on 31 October 2009, Mr Zentai's extradition was sought only for the purpose of preliminary investigation regarding his involvement in the alleged war crime and he was not charged with any offence.

130 Mr Zentai stresses that the Hungarian authorities have expressly acknowledged that he is merely wanted for investigation. That, it is contended, constitutes an extraordinary and unique feature of this case. Further, the communications with Hungary make it clear that although prosecution authorities in Hungary have based the extradition request on suspicion arising from recorded material that was before the People's Court in 1946-1948, they are not satisfied that there was sufficient admissible evidence to justify criminal proceedings against him.

131 It is argued for Mr Zentai that as the proceedings instituted in the Military Panel are by the Hungarian Government's own concession still essentially only investigative and preliminary, he is not a person who is relevantly 'accused' within the meaning of s 6(a) of the Act of having committed the alleged offence of 'war crime' in relation to which Hungary's request for extradition is made. Therefore, he is not and never was an 'extraditable person' within the meaning of the Act.

132 In Attachment C, Hungary's response was confirmed as being that the criminal proceeding against Mr Zentai is in an investigative phase and no indictment has been lodged so far. Consequently there are no criminal proceedings pending before the Military Panel. It continues that the request for extradition aims at enabling the criminal proceedings against Mr Zentai to be carried out. However, one would have to add to this aim the word 'possibly'. If an indictment is lodged against him, those criminal proceedings will also involve him having to stand trial for the offence for which his extradition is sought.

133 The evidence reveals that in Hungary, all international arrest warrants are issued by a judge on the motion of a prosecutor during the investigative phase of the proceedings. The prosecutor considers all available data, information and evidence and determines whether it is sufficient to make a motion to the court for the issue of an arrest warrant having satisfied himself or herself that a 'well-founded suspicion' is established. Based on those documents

presented by the prosecutor, the court then decides whether to issue an international arrest warrant subject to the court itself being satisfied that a well-founded suspicion is established.

134 Hungary make the point that under continental law, criminal proceedings are started when a well-founded suspicion (probable cause) of committing an offence arises.

135 Attachment C emphasised (at [261]) that in considering whether Mr Zentai was an accused person who was wanted for prosecution, the information provided by Hungary in response had to be considered in the context of Hungary's civil law system which was an inquisitorial system governed by written codes rather than an adversarial system based on judicial precedent. It continued 'in inquisitorial systems an examining magistrate serves two roles by developing the evidence and arguments for each side during the investigation phase'.

136 Attachment C did expressly (at [262]) refer to the remarks of Gummow J in *Kainhofer* but made the observation that *Kainhofer* supported the proposition that the differences in criminal procedure applicable in Hungary should be recognised and respected in considering whether or not Mr Zentai can be considered an 'accused' person who is sought for prosecution. It was said that a strict assessment against Australian criminal procedures and processes was misplaced. While there was no indictment lodged against Mr Zentai at that stage, there were proceedings pending before the prosecutor's office and the extradition was required in order to enable the 'criminal procedure to be carried out'.

137 The conclusion on this topic on Attachment C was that the Department considered that it was open to the Minister to be satisfied that Mr Zentai was an accused person who was wanted for prosecution within the meaning of Australia's extradition requirements and Art 1 of the Treaty. It was submitted that the argument for Mr Zentai should not be afforded such weight in the exercise of the Minister's discretion, as to refuse surrender.

138 Mr Zentai complains that Attachment C focused only on the element of suspicion rather than whether the Hungarian authorities have decided to prosecute and, in particular, failed to take into account the opening remarks of Brigadier General Varga to the effect that 'only when an indictment is brought before it, will the Military Panel … proceed in the matter'. Brigadier General Varga also made the point that no indictment for Mr Zentai's prosecution had been laid as yet.

139 Although Attachment C referred to the remarks of Gummow J in *Kainhofer*, it did not focus upon the main relevant point for the purpose of this issue which was the distinction made by his Honour between 'investigation' and 'accusation'. For Mr Zentai, it is complained that the Minister was misled by the erroneous view stated in Attachment C that Mr Zentai may be treated as an 'extraditable person' notwithstanding that the Hungarian authorities acknowledged he was not 'accused' but only 'suspected of' a war crime.

140 The original thrust of ground 1 was the argument that Mr Zentai was not an 'extraditable person' when Hungary made the Request of the Australian Government. It followed, therefore, that the Attorney-General never became authorised to act upon the Hungarian Request by the issue of the s 16 notice by his delegate, the then Minister.

141 However, when the question is whether an opinion has been *lawfully* formed, the decision for the Court is whether, *on the material that was before the decision-maker*, the opinion was formed. That is particularly relevant to ground 1 which challenges the decision of the Attorney-General which was made at the beginning of the extradition process. The difficulty for Mr Zentai is that the 2009 information (the correspondence from Hungary) arrived some years after the 2005 opinion was formed.

142 The Commonwealth argues that for the purposes of the relief sought, it is permissible to look only at the material which was before the decision-maker at the time of making the decision: see, for example, *Federal Commissioner of Taxation v Brian Hatch Timber Co. (Sales) Pty. Ltd.*(1972) 128 CLR 28 at 29 per Windeyer J and *Kolotex Hosiery (Aust) Pty Ltd v Commissioner of Taxation (Cth)* (1975) 132 CLR 535 per Gibbs J (at 566-567).

143 Although I understood Mr Zentai as fully accepting this approach (in reply), there may be a little more to the issue. In *Kajewski v Commissioner of Taxation* (2003) 52 ATR 455, Drummond J considered the law to be that once the Court was satisfied on the material that was before the decision-maker that the decision-maker's opinion was flawed with error of the kind identified in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, it was open to the Court in disposing of the appeal to determine it, by reference to all the material before the Court. His Honour said:

> [11] In *Kolotex*, the majority said that a court conducting an appeal under a precursor of s 14ZZ(c) of the TAA has exactly the same power. In that case, the

> taxpayer appealed against the Commissioner's assessment. The issue was whether the taxpayer company was wrongly denied a deduction in respect of previous year losses. The taxpayer's entitlement to this deduction depended upon a provision of the ITAA 1936 that required it to satisfy the Commissioner of certain matters. The majority each held that, once the court was satisfied on the material that was before the Commissioner that the Commissioner's opinion was flawed with error of the kind identified in *Avon Downs*, it was open to the court in disposing of the appeal to determine, by reference to all the material before the court, though that may be more extensive than that before the Commissioner, what opinion the Commissioner ought to have formed. See Gibbs J at CLR 567-568; ATR 232; ATC 4048-49 and Stephen J at CLR 576-77; ATR 239; ATC 4054. See also *FCT v Brian Hatch Timber Co (Sales) Pty Limited* (1972) 128 CLR 28 at 57-58, 59; 2 ATR 658 at 667-68, 669; 72 ATC 4003 at 4010, 4011-12. Such an approach is consistent with the approach of a court of appeal dealing with an appeal against the exercise of a judicial discretion. It is implicit in what their Honours said in *Kolotex* that, when the court exercises the special power to determine the opinion the Commissioner should have formed, the line between judicial and administrative or executive power is nevertheless not transgressed. But consistently with this court in its original jurisdiction exercising judicial power and not a power of administrative merit review, the court, in contradistinction to the tribunal on an appeal to it under s 14ZZ(a) or (b), cannot simply form its own opinion on the materials before it on matters confided 52 ATR 461 by the legislation to the opinion of the Commissioner: it can only exercise such a power if it has first determined that the Commissioner's opinion is vitiated by error of law of the kind described in *Avon Downs* and *House v The King* and should be interfered with in accordance with the principles stated in *Avon Downs*. And even where the court exercises that special power itself, the court does not engage in the administrative act of issuing the assessment amended to give effect to its judgment: that task remains one for the Commissioner under s 14ZZQ(1).
>
> [12] In *Amway of Australia Pty Ltd v FCT* (1998) 40 ATR 200; 98 ATC 5066, Foster J noted, at ATR 215; ATC 5050, that *Kolotex* was conducted by the parties on the basis that once it had been decided by the court that relevant error had been shown, then the appeal should be decided by reference to all the material before the court. But nothing in the judgments of Gibbs and Stephens JJ in *Kolotex* suggests that their Honours acted on this invitation while reserving the question whether that was the legally correct approach. Both their Honours considered the function of the court and independently came to the conclusions to which I have referred.

144 For present purposes (and absent submissions), I do not need, in light of my intended conclusions, to resolve whether this line of authority should be considered but it may be relevant to the ultimate relief in this proceeding.

145 The Commonwealth stresses, correctly, that under s 16 of the Act it is the Minister's 'opinion' that Mr Zentai is an 'extraditable person' that is the reviewable statutory criterion, not whether Mr Zentai is *in fact* an 'extraditable person'. While the opinion is reviewable on judicial review grounds, the Court cannot itself determine whether Mr Zentai is an extraditable person: *Cabal v Vanstone* (2000) 101 FCR 112 (at [61]).

146 It is not to the point that reasonable minds may differ as to whether Mr Zentai is an extraditable person within the meaning of s 6 of the Act.

147 The Commonwealth also relies on the fact that the opinion of the Minister was a requirement for the giving of a notice under s 16 of the Act. In conducting administrative proceedings under s 19, to determine eligibility for surrender by reference to a series of conditions or criteria, those conditions or criteria do not include whether Mr Zentai is an eligible person. The magistrate was, however, required to determine whether supporting documents in relation to the offence had been produced: s 19(2) of the Act. Supporting documents included a duly authenticated warrant for the arrest of Mr Zentai, issued by Hungary. This was held to s 19(3)(a) and the decision of the magistrate was confirmed on review under s 21.

148 The power of the Minister, therefore, under s 22 to determine whether Mr Zentai is to be surrendered arose on him being an eligible person under s 22(1). At the stage now reached in the extradition process, the Commonwealth argues that the notice under s 16 is spent. Setting aside the s 16 Notice of Receipt of the Extradition Request would not be productive of any remedy to Mr Zentai.

149 Taking these two points sequentially, it does not appear to me that the argument for Mr Zentai is that, as a fact, he was not an extraditable person (although that would be asserted). Rather, the argument is that it was not open to form the opinion that he was an 'extraditable person' in circumstances where the opinion was not formed on a correct understanding and application of the legal criteria including, relevantly, the fact that Mr Zentai was not accused of any offence. As I have observed, this argument does face the difficulty, in the form in which it was originally framed, that the 2009 information was not available to the Minister in 2005 when the s 16 notice was given. I do accept that (without more) this factor poses an obstacle in relation to ground 1 as it was originally formulated.

150 As to whether the s 16 notice is spent and has no current force, Mr Zentai's argument is that in his situation if the s 16 notice is not quashed, it will have continuing force to support the magistrate's determination and other orders which in turn should be quashed. If the Minister's determination alone were to be quashed as invalidly based on an incorrect

understanding of the test of eligibility, 'it would leave the magistrate's warrant committing Mr Zentai to prison in place indefinitely'.

151 On a substantive level, the difficulty in relation to ground 1 is that in considering whether a person is an extraditable person under s 6(a)(i) of the Act, it is necessary to bear in mind the statutory object of enabling Australia to carry out its obligations under extradition treaties with countries that adopt a variety of criminal procedures different from those adopted in Australia: *Kainhofer* at 540 per Brennan CJ, Dawson and McHugh JJ and at 562 per Gummow J. As has been repeatedly reinforced, extradition is a matter of comity between nations and precise equivalence of language and form between civil law and common law systems is not required. Consistently with the international obligations to which the Act gives effect, the Act is to be construed according to its broad generally accepted principles: *Cabal v United Mexican States (No 3)* (2000) 186 ALR 188 (at [126]-[134]) and *O'Donoghue v Ireland* (2009) 263 ALR 392 (at [39]-[41]).

152 The material before the Attorney-General demonstrated that a military judge of the Military Division the Budapest Metropolitan Court issued a warrant for the arrest of Mr Zentai and that warrant on its face is described as a 'warrant' and seeks Mr Zentai's arrest in respect of a specified offence. It also states that evidence against Mr Zentai has already been the subject of consideration by the Hungarian authorities to the point where they hold a 'grave suspicion against [Mr Zentai] of having committed the [following] crime'. It asserts that the 'contents of the above historical statement of the facts and the well-founded suspicion on the basis thereof, are duly established'. The Attorney-General was legitimately entitled to have regard to these matters in forming the opinion that there was a warrant in force for Mr Zentai's arrest.

153 In *Tervonen v Minister for Justice and Customs (No 2)* (2007) 98 ALD 589 (at [42]), Rares J said:

> Each warrant, on its face, was termed a 'warrant'. It was issued by a Finnish court for the arrest of Mr Tervonen who was stated to have been suspected on probable cause of having committed an offence. The Minister could reasonably form the opinion that each document was a warrant, issued by a Finnish Court, in force, for the arrest of Mr Tervonen in relation to an offence against the law of Finland that he was accused of having committed within the meaning of s 6(a)(i). While other persons may not have formed the same view, having regard to the significant differences between the laws of other countries and Australia, to which Mason CJ, Dawson and McHugh JJ referred to in *Kainhofer* 185 CLR at 540, I am of opinion that it was open

to Senator Ellison to form the view that each of the warrants was one which met the description in s 6(a)(i).

154 Mr Zentai was not accused of the offence in the sense of having been charged or indicted. However, the Commonwealth argues that the word 'accused' in s 6(a)(i) of the Act should be construed in the same way as 'accusation' in s 16 of the *Extradition (Commonwealth Countries) Act 1966* (Cth); when an information or other initiating process has been issued for a person's apprehension, the person can be said to be 'accused' and hence the subject of an 'accusation': *Vyner v Keeper of Her Majesty's Penitentiary at Malabar* (1975) 6 ALR 105 at 109. I do not think that *Vyner* is of great assistance to the Commonwealth. Yeldham J held (on an application for a writ of habeas corpus), that the motives of the complainant were not relevant. The plaintiff had been charged with stealing and dishonesty by the English Director of Public Prosecutions. As such he had been 'accused'.

155 The Commonwealth argues that if Mr Zentai wanted the Attorney-General to go behind the Hungarian Arrest Warrant and rely upon some principle of Hungarian criminal procedure which makes a relevant distinction between an 'accusation' and 'preliminary inquiry' then the onus was on him to provide evidence of Hungarian law. Otherwise, the maxim *omnia praesumuntur rite esse acta* applies: Shearer IA, *Extradition in International Law* (Manchester University Press, 1971) at 140-141.

156 Of all these matters, the most compelling is that this material is not shown to have been before the Attorney-General at the time of issuing the s 16 notice. It cannot be shown that the Attorney-General was aware that Mr Zentai was wanted only for questioning and that he had not been charged.

157 On that issue, the alternative approach put for Mr Zentai, if the challenge to the opinion must be based on information before the decision-maker at the time of making the decision, is that the Attorney-General, under the exercise of his general discretion in s 22, would be acting unreasonably if he nevertheless considered that Mr Zentai should be surrendered. It is argued that once that matter has been brought before him, as it was, the material in Attachment C, if the Minister (for the Attorney-General) nevertheless concludes that Mr Zentai should be surrendered, then (if he is not accused but only the subject of an investigation) it would be an unreasonable exercise of the discretion conferred upon him by

subpara (f). That would in turn mean the determination on that ground should be set aside or quashed.

158 It would then follow that in exercise of a discretion conferred under s 23 of the Federal Court Act that consequential orders could be made because the sole purpose of grounds 1 and 2 was to ensure that those orders did not remain extant, 'simply hovering'.

159 Tested another way, it is argued that it would be absurd, if, for example, Mr Zentai had been entirely the wrong 'Charles Zentai', to say that the s 22 determination had to follow because of the existence of the s 16 and s 19 actions.

160 I will consider grounds 1 and 2 together.

Ground 2 – that the magistrate's determination on 20 August 2008 that Mr Zentai was an eligible person under s 19 and her committing Mr Zentai to imprisonment were beyond jurisdiction, unlawful and void

161 This ground depends upon the outcome of ground 1. The learned magistrate on 20 August 2008 concluded that Mr Zentai was an 'eligible person' and made an order pursuant to s 19(9) of the Act committing him to imprisonment in Western Australia (*Commonwealth Director of Public Prosecutions v Charles Zentai* (PE 36608 of 2005), Magistrates Court of Western Australia, Perth, 20 August 2008).

162 The argument on this ground is brief. For the reasons advanced in support of ground 1, Mr Zentai says that the s 16 notice was a nullity and the magistrate therefore had no lawful authority to conduct eligibility proceedings under s 19 of the Act. It followed, as a consequence of law, that she erred in finding that Mr Zentai was an 'eligible person'. As that finding was a precondition to her making any committal order, she had no power to make the order committing Mr Zentai to prison. The argument is that the magistrate's decision and order went, therefore, beyond jurisdiction and were unlawful, void and of no legal effect.

163 The concession made in respect of ground 1 was extended to ground 2. In any event, in conducting the proceeding under s 19 of the Act, it is not open to the learned magistrate to go behind a notice under s 16 of the Act. Her Honour was acting administratively and was obliged to proceed on the basis that the notice, if not invalid on its face, was a valid document: *Kainhofer* at 538; *Vasiljkovic v Commonwealth* (2006) 227 CLR 614. I accept

the submission for the Commonwealth that the scheme of the Act is that the powers other than those conferred on a court under s 21 are *administrative* in nature, exercised in sequence, with none of the decision-makers being authorised to review the exercise of a power earlier in the sequence: *Kainhofer* at 538.

164 Equally though, the question before me now in exercise of *judicial* power as conferred by the *Constitution* and in turn s 39B of the Judiciary Act, is whether there is scope for review of any of the previous decisions including the decision of the learned magistrate. The question is not so much whether the magistrate erred, as her Honour did not. The question, rather, is whether it is appropriate, having regard to the ultimate outcome of the several grounds of appeal and relief, if any, granted pursuant to s 23 of the Federal Court Act that the decision of the learned magistrate in light of other conclusions reached in the decision needs to be, in effect, set aside.

165 As stand alone grounds, grounds 1 and 2 cannot succeed. Ground 2 does not afford the opportunity for the quashing of the decision of the learned magistrate. Depending upon orders, if any, made in respect of other grounds of appeal, the consequences which should follow in the interests of justice, will fall for consideration.

166 I nevertheless accept the submission for Mr Zentai that in Attachment C, the Minister was incorrectly advised that Mr Zentai was 'accused' under the Act. (I will discuss this further under ground 3). This was an issue that was central to his determination (otherwise it would not have been canvassed in Attachment C in the way that it was).

Ground 3 – the Minister's order to surrender Mr Zentai for extradition under s 22 was beyond jurisdiction and void

167 Ground 3 is also a consequential ground which depends upon the s 16 notice being a nullity. It also depends upon the order of the learned magistrate committing Mr Zentai to prison being a nullity and void. On that basis it is argued that the Minister made errors of law and fact and misdirected himself on a fundamental matter, namely, whether Mr Zentai was capable of being surrendered under the Act. It is argued that the Minister made a jurisdictional error in finding that Mr Zentai was, for the purposes of s 22 of the Act, an eligible person within the meaning of s 19(2). As he was incapable of being found to be an

extraditable person or an eligible person, there was no power for the Minister to make a determination under s 22 of the Act.

168 The Commonwealth makes the point that s 22 makes no reference to a notice under s 16 of the Act. The Minister's decision under s 22 was conditioned upon there being a determination under s 19 or an appeal under s 21 that Mr Zentai was a person eligible for surrender in relation to specified extradition offences.

169 It is argued that the Minister had only to satisfy himself that Mr Zentai was an eligible person within the meaning of s 22(1) before embarking upon the determination referred to in s 22(2). On this basis, the Commonwealth contends that the Minister 'could not but be satisfied' that Mr Zentai was an eligible person as defined as the learned magistrate had made an order under s 19(9) which had been confirmed on appeal. Although the learned magistrate's order under s 19 was an administrative act, the orders of the Federal Court under s 21 were exercises of judicial power: *Pasini* (at [18]). The fact that s 22 of the Act confers a discretion does not detract from the finality of a determination made by the Federal Court that Mr Zentai was eligible for surrender (*Pasini* at [69] per Kirby J).

170 This submission suggests, in effect, that the Minister had no choice but to be satisfied that Mr Zentai was an eligible person. The fact that s 22 makes no mention of s 16 would not preclude the Minister making a fresh and, in this case, negative assessment of Mr Zentai's eligibility if it were appropriate to do so. It is not the case that the making of an order by the learned magistrate under s 19(9) legally estopps or prevents the Minister (or the Attorney-General) finding that the eligibility qualification is not satisfied if new information to hand contradicts the basis on which earlier determinations were made.

171 There is force in the submission made for Mr Zentai that '… there is no immutable law of the Medes and Persians…' that once determined to be eligible at one of the earlier stages of the extradition process, the Minister or the Attorney-General has no option other than to robotically act on those earlier determinations in the face of his positive knowledge that he lacks the proper legal authority for surrender.

172 I have accepted the argument that Mr Zentai was not 'accused' for the purposes of the Act.

173 By 2009, the Minister by Attachment C became aware from Hungary that the '*criminal proceeding against Mr Zentai is in the investigative phase and no indictment has been lodged so far and consequently there are no criminal proceedings pending … at present*.'

174 This situation is not like that of *Kainhofer* where Ms Kainhofer was variously described as 'wanted for prosecution' and 'charged' and in fact had pled guilty to a number of the elements of the offences for which her extradition was requested.

175 While the first two grounds suffer from the difficulty that the 2009 information was not before the Minister at the time of the s 16 notice in 2005, there is no position at law which means that the Minister or the Attorney-General could not take into account the new information at the time of acting pursuant to s 22 of the Act late in 2009. In reality, the submission made to him in Attachment C quite properly worked on that assumption as it did refer to the new information. Indeed, a Minister is not entitled to ignore new material that has come to hand and which may have a direct bearing on the 'justice' of making the decision. As a general principle the High Court made clear in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 that a decision-maker should make the decision on the most current material available to the decision-maker.

176 But the argument for the Commonwealth appears to work on the assumption that it was not open to the Minister to revisit the earlier steps in the process, although it is not apparent why this should be so. He was not told that he could not do so.

177 The entire premise of the earlier actions was, by the time of the s 22 determination, known to be incorrect. The fundamental purpose of the Act by reference to s 3 and s 6 is to provide for extradition of people who are 'accused' (or convicted), not people 'suspected'. The Act does not authorise the extradition of persons who are only suspected of committing an offence (assuming that the offence existed at the relevant time). To decide to surrender someone for a purpose not authorised by the Act is invalid *per se* in the sense that it is beyond power. This is so regardless of the criteria in s 22 otherwise having earlier been established, albeit on the false premise that Mr Zentai was extraditable.

178 As Mr Zentai was, as a matter of fact, not ever capable of being found to be an 'eligible person' under s 19(2) of the Act, the Minister had no power to make a determination for his surrender for extradition under s 22 of the Act. In consequence, the Minister's determination that Mr Zentai should be surrendered for extradition is not authorised by law and is a nullity.

179 Alternatively, the Minister's discretion miscarried.

180 The enumerated considerations in s 22 that are to be taken into account by the Minister in determining whether a person should be surrendered or not do not expressly require the Minister to consider any new material going to the question of whether the person requested is an 'extraditable person' pursuant to s 6 of the Act. Nevertheless, a consideration of the subject matter, scope and purpose of the Act, with reference to the Treaty, as intended to facilitate the extradition of extraditable persons for extraditable offences, reveals that such a requirement is implied.

181 In *Peko-Wallsend*, s 50(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) required the Minister to give consideration to matters enumerated in s 50(3)(a)-(d). Those requirements did not include an express requirement that the Minister consider a Commissioner's report which addressed the same matters as enumerated in s 53(a)-(d). At [44]-[45] Mason J said:

> The Act does not expressly state that the Minister is bound to take into account the Commissioner's comments on the matters in paras (a) to (d) of s 50(3) in exercising his power under s 11(1)(b) to decide whether or not he is satisfied that a land grant should be made. But a consideration of the subject matter, scope and purpose of the Act indicates that such a finding is necessarily implied by the Statute. The factor that leads irresistibly to this conclusion is the specific requirement in s50(3) that the Commissioner comment in his report on each of the four matters enumerated in the subsection, including of course detriment. The provision recognises that the granting of land to a Land Trust may adversely affect the interests of many people, in some cases in a very substantial way. The legislature was clearly concerned that the Minister not overlook crucial considerations which might counterbalance or outweigh the fairness and justice of granting the land when making his decision under s 11(1)(b)... Once it is accepted that the subject matter, scope and purpose of the Act indicate that the detriment that may be occasioned by a proposed land grant is a factor vital to the exercise of the Minister's discretion, it is but a short and logical step to conclude that a consideration of that factor must be based on the most recent and accurate information that the Minister has at hand.

See also *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

182 In the present case, it is clear from the Act and the Treaty that a fundamental element of any extradition application is that the person be accused or convicted of an extraditable offence and not merely 'suspected' of committing one.

183 It is entirely reasonable to imply into s 22 a requirement that the Minister consider any new material that comes to light which elucidates the status of a person who has been wrongly classified as an 'extraditable person' at the first stage. To ignore such material and approve the surrender of a person despite actual or constructive knowledge that that person is not an 'extraditable person' would be to defeat the purpose of the Act

Ground 4 – war crime was not a 'qualifying extradition offence' for which Mr Zentai is liable to be surrendered for extradition – retrospectivity not permitted

184 Pursuant to s 22(2) of the Act, the Attorney-General may only determine that a person be surrendered in relation to a 'qualifying extradition offence'. 'Extradition offence' relevantly means an offence against a law of the requesting country for which the maximum penalty is imprisonment for a period of not less than 12 months. The Act is modified by Art 2 para 5(a) of the Treaty so as to prevent certain retrospective offences from constituting an extradition offence. This is achieved by s 11 of the Act. The Article 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:
> (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 Requesting State at the time of the making of the request for extradition have constituted an offence against the law in force in that State.

185 Mr Zentai seizes on the words in para (a) that the offence must be an offence at the time of the acts constituting the offence.

186 'War crime' was not an 'extradition offence' for the purposes of the Act by virtue of Art 2 para 5(a) of the Treaty as the offence was first created in 1945 under s 11 of the Prime Minister's Decree No 81 of 1945 (**PJD**), re-enacted by the 1978 Criminal Code of Hungary.

187 The PJD also provided for retrospective operation in the same way as the substantive provision in s 11 of the Act. The acts Mr Zentai is alleged to have done became subject to

criminal liability and punishment *ex post facto*, even though the particular statutory offence did not exist on 8 November 1944.

188 For Mr Zentai it is argued that the interpretation of Art 2 para 5(a) depends on the objective intention of the parties to the Treaty and should be interpreted in light of Art 31 and Art 32 of the *Vienna Convention on the Law of Treaties* (signed in Vienna on 23 May 1969, came into force in Australia on 27 June 1980: Australian Treaty Series 1974 No 2) (**the Treaties Convention**) which require that treaties 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'. It should not be interpreted unilaterally by one party to the Treaty (M Dixon, *Textbook on International Law*, 5th ed, 2004 at p 69).

189 In considering the effect of retrospectivity, regard must be had to the operation of the law in question: *Baker v The Queen* (2004) 223 CLR 513 (at [30] per McHugh, Gummow, Hayne and Heydon JJ. To the extent that Art 2 para 5(a) of the Treaty modifies the definition of 'extradition offence' in s 5 and the operation of s 22 of the Act, Mr Zentai argues it should be read in the light of the maxim *nullum crimen sine lege* (there is no crime without [breach of] a law) and the presumption against retrospective operation: *Chang v Laidley Shire Council* (2007) 234 CLR 1.

190 Article 2 para 5(a) is directed to excluding from the operation of the Treaty and hence the Act, true cases of foreign legislation with retrospective application. It deals with the creation of substantive criminal liability as in the case of the specified offence of *war crime*. Such laws can be distinguished from those affecting procedural matters, the validation of *ultra vires* administrative acts or declarations that rights in issue in legal proceedings shall be the subject of legislative declaration or action.

191 Article 2 para 5(a) of the Treaty gives expression not only to the principle of *nullum crimen sine lege* requiring the existence of criminal liability at the relevant time but also principle of *nulla poena sine lege* (no punishment without law) as incorporated in to Art 22 and Art 23 of the *Rome Statute of the International Criminal Court 1998*. Article 22 provides that the definition of war crime should be strictly construed and should not be extended by analogy. In case of ambiguity the definition should be interpreted in the favour of the person being investigated, prosecuted or convicted. From this it follows that 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. This presupposes that the offence of war crime was both clearly defined in the relevant Hungarian written law and that the penalty was publicised in that statute or decree.

192 Both those conditions were absent on 8 November 1944 when the 'crime' was alleged to have been committed.

193 To have retrospective application the language of enactment must be such that no other conclusion is possible than that was the intention of the legislature (*Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 183 CLR 595 (at 622-624 per Deane, Dawson, Toohey and Gaudron JJ). Given the transient and evolving nature of the concept of war crimes, the elements of which may vary at different periods of time, this principle of construction is important. Unlike other international instruments such as the ECHR, the ICCPR and the Rome Statute Establishing the International Criminal Court where retrospectivity is qualified by an exception in the case of war crime, the Treaty contains no such exception.

194 Had it been intended to qualify that exception to exclude 'war crimes', it would and should have done so in clear, direct and unequivocal terms. That is not only an Australian drafting approach but is also well known to international humanitarian law pursuant to the various conventions discussed above.

195 It follows therefore that the proviso to Art 2 para 5(a) unqualified by any reservation in the case of war crimes should be read strictly and according to its plain meaning so that extradition must not be ordered unless the nominated offence existed in domestic and Hungarian law at the time of the relevant accepted acts.

196 The evidence discloses that the Department advised the then Minister that 'all relevant Treaty requirements had been met' in July 2005. Additionally, it advised that although the PJD provided that war crimes were punishable in cases where the conduct was not punishable under statutory provisions at the time of the alleged conduct, the Minister could be satisfied that the requirements of Art 2 para 5(a) had been met on the basis that the alleged '*conduct*' would have constituted the offence of murder under the Hungarian Criminal Code 1978 at the

relevant time. No other reason for dispensing with Art 2 para 5 was presented to the Minister.

197 Similarly, in Attachment C, the Department advised that the provision of Art 2 para 5(a) does not apply where the conduct constituting the war crime was otherwise an offence under Hungarian law at the relevant time. The Department advised that the provision was inserted at the suggestion of the Department of Foreign Affairs to ensure that the acts or omissions for which extradition is sought must have constituted an offence at the time the acts were committed. The provision, it was noted, appeared in identical terms in a significant number of Australia's bilateral extradition treaties.

198 It is argued for Mr Zentai that should there be any continuing ambiguity about the parties' intent in not including in Art 2 para 5 an express reservation, Art 32 of the Treaties Convention permits recourse to supplementary means of interpretation such as *traveaux preparatires*. The advice to the Minister, however, did not proffer any such materials to aide him (or the Court) to support the Department's interpretation of the provision as being 'conduct-based'.

199 The fact that Hungary might have sought his extradition for an offence of murder for acts committed in November 1944, does not operate as a *de facto* or *de jure* surrogate for the war crime for which Mr Zentai's surrender (for interrogation) is actually sought.

200 Significantly, the offence of 'war crime' requires additional elements such as, relevantly, the killing of civilians by a military person during war or occupation. It imposes a different penalty. Mr Zentai argues that if Hungary relies on an equivalent offence of murder under the Hungarian Criminal Code, it should have requested extradition for prosecution of that offence.

201 Further, the fact that other bilateral extradition treaties that Australia concluded after 1985 do not incorporate the well known reservations in respect of retrospective war crimes, does not explain the failure of Art 2 to include such a reservation in Art 2 para 5(a) or assist in its construction.

202 According to Mr Zentai, the fact that the Treaty was being concluded at the time when Australia was engaged in negotiations anticipating the establishment of the International Criminal Court under the Rome Statute 1998, lends support to this contention. Having included war crimes in Div 268 of the Commonwealth Criminal Code consistently with Australia's obligations under the statute to prosecute, in universal jurisdiction, war criminals in Australia, Australia refrained from making those offences retrospective. Mr Zentai argues that given the equivocal attitude of the Australian Government to retrospectivity at the relevant time, compelling justification would be necessary before reading into Art 2 para 5(a) an exception clause to cure the ambiguity.

203 Once again, the Commonwealth argues that to the extent that Mr Zentai relies on this ground as a basis for review of the decision and notice under s 16, the argument is not available for the reasons given above. It was only necessary for the Minister to satisfy himself that Mr Zentai was an 'eligible person' in the meaning of s 22(1) of the Act before embarking upon the determination referred to in s 22(2). It is contended that the Minister '*could not but be satisfied*' that Mr Zentai was an eligible person once the learned magistrate had made an order under s 19(9) of the Act which, in turn, was confirmed by the Full Federal Court.

204 The Commonwealth contends that the question posed by s 22(3)(e) of the Act is whether because of s 11 and the Regulations the surrender of Mr Zentai in relation to the offence should be refused in certain circumstances and, if so, whether the Minister was satisfied that the circumstances did not exist. In that regard, the material before the Minister was that the alleged conduct of Mr Zentai would have constituted the offence of 'murder' in Hungary at the time of the alleged conduct. Secondly, the advice of the Department was that in the context of Art 2 para 5(a) and its background, the question was whether the conduct constituting the offence was an offence at the time of the act or omission and it did not require that the precise offence provision was in force at the time. As a result, it is contended for the Commonwealth that having regard to that material being before the Minister at the time, the question of retrospectivity does not arise.

205 The terms of the Treaty should be interpreted fairly and liberally: Shearer *Extradition in International Law* at 207-208 citing *Re Arton (No 2)* [1896] 1 QB 509. Further, this is required under the Treaties Convention. Article 31 of the Treaties Convention provides:

> 1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding interpretation of the treaty or the application of provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

206 The Commonwealth asserts that Art 31 of the Treaties Convention should be interpreted in a holistic manner so that the text of a Treaty provision is given primacy, but the Court should, none the less, look to the context, object and purpose of the provision (*QAAH v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363 (at [91]) per Madgwick J).

207 Article 2(5)(a) should therefore be construed in the manner which gives effect to Australia's obligation under other treaties (see Art 31(3)(c) of the Treaties Convention).

208 However, the position advanced for Mr Zentai, once again, is that it was and is not open to the Minister to close his eyes to the reality that the magistrate's order was, in retrospect, based on a false premise. The Minister must independently satisfy himself that the preconditions of eligibility in which his s 22 determination is based were originally satisfied. Mr Zentai contends that it is not open to the Minister simply to rely on the formal existence of the s 19 order and to ignore the fact that the s 22 process is founded on what is, in its legal effect, a nullity.

209 I accept that if Art 2(5)(a) is ambiguous, nothing has been produced to resolve the ambiguity. On its face, it reflects an important international human rights principle against retrospectivity. There is no modifying clause equivalent to well known provisions in the

ECHR and ICCPR that seek to counterbalance the international human rights principle of protection of the individual against arbitrary punishment with a premium placed by international humanitarian law in punishing war crimes and crimes against humanity.

210 Murder is not the same thing as a war crime. It may be that killing someone is an element of the offence of murder and the offence of war crime involves killing someone. It does not necessarily mean that they are the same. The penalties, also, are different.

211 Making every possible allowance for the obligations of co-operative, sensible, purposive and liberal interpretation contended for by the Commonwealth, Mr Zentai's argument is well made in my view. An offence of 'war crime' is a different *offence* from the offence of murder. That is so under Australian law and, on the evidence, on Hungarian law. Secondly, the penalties are different.

212 The Treaty deals with offences. It does not deal with 'conduct' as the Department advised the Minister.

213 While it is not surprising that at the end of the war Hungary made the offence of war crime retrospective so that those charged with war crimes during the war might be prosecuted with war crimes, not with murder, that does not overcome the plainest of language in the Treaty. The offence of war crime did not exist in Hungary at the time it was allegedly committed.

214 In my view the Minister was incorrectly advised on this central issue and I would reach the same conclusion as for ground 3. It 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. The fact that by the time of exercising his discretion, earlier decisions by others had been made which were pre-cursors to the surrender decision does not give power to the Minister to surrender someone whose alleged possible offence was expressly excluded from the Treaty and the Act.

Ground 5 – nationality of applicant as a basis for discretionary refusal

215 Mr Zentai contends that the Minister erred in law in failing to give proper, realistic and genuine consideration (in the language of Gummow J in *Khan v Minister for Immigration*

and Ethnic Affairs (1987) 14 ALD 291 at 292) to whether in the exercise of the discretion conferred by Art 3 para 2(a) of the Treaty he should refuse extradition having regard to the fact that Mr Zentai is a national of Australia taken together with other relevant factors. Alternatively, it is argued that his decision not to refuse extradition was one which no minister acting reasonably and giving consideration to those facts ought in the proper exercise of his discretion make.

216 Ground 5 is to be considered together with the new ground 5A.

217 Art 3 para 2(a) and (b) of the Treaty, relevantly provide that extradition may be refused in any of the following circumstances:

> (a) if the person whose extradition is sought is a national of the Requested State. Where a Requested State refuses to extradite a national of that State it shall, if the other State so requests and the laws of the Requested State allow, submit the case to the competent authorities in order that proceedings for the prosecution of the person in respect of all or any of the offences for which extradition has been sought may be taken;
> (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.

The nationality of Mr Zentai

218 Mr Zentai became an Australian citizen on 28 May 1958. He has been an Australian national since that date. He argues (and it does not seem to be disputed), that it is not the case as is asserted by the Department in Attachment C, the submission to the Minister, that he holds dual Australian and Hungarian citizenship. Mr Zentai contends that he is exclusively an Australian citizen.

219 Mr Zentai's Hungarian nationality was lost, he argues, as a result of three events:

(a) he failed to return to Hungary when required to do so under Hungarian Act No X of 1947;

(b) in 1954 as the consequence of residing outside of Hungary for more than 10 years by virtue of Act No XIII of 1939; and

(c) on 29 May 1958, when he became an Australian citizen, Mr Zentai also lost his Hungarian nationality.

220 The Minister was advised by the Department that on the basis of information provided by Hungary, despite Mr Zentai's contentions, that Hungary still regards him as a Hungarian citizen. The Department also advised that whether or not Mr Zentai is also a Hungarian national does not impact upon the merits of Australia's consideration of Hungary's Request. Further, the Department advised that 'the protections afforded to Zentai as an Australian citizen do not, however, as a matter of long standing policy, extend to refusal of his extradition by reason of that citizenship if extradition is otherwise considered appropriate'.

221 Regardless of whether the second and third grounds asserted by Mr Zentai for losing his Hungarian citizenship apply, the information provided by Hungary concerning his deprivation of citizenship under the 1947 law (the refusal to return after fleeing the communist regime in Hungary) has not been addressed in any of the content of the Department's submission in Attachment C. If the Minister took into account as a relevant fact that Mr Zentai was a Hungarian national (which he says he is not) as well as an Australian national, then he has relied upon the wrong information. Mr Zentai says in those circumstances, the Minister has erred both in fact and in law.

222 The central argument on this ground of appeal is that the Minister had a duty to accord primacy to Mr Zentai's Australian nationality in exercising his discretion. The duty is imposed by para (2)(a) of Art 3. It is argued that Mr Zentai's claim to Australian nationality was comparatively superior to that of Hungary on the basis of the *Nottebohm Principle* (*Lichtenstein v Guatemala* (1955) 22 ILR 349).

223 In *Sykes v Cleary [No 2]* (1992) 176 CLR 77 (at 105-107), Mason CJ, Toohey and McHugh JJ said (footnotes omitted):

> The common law recognizes the concept of dual nationality, so that, for example, it may regard a person as being at the same time a citizen or national of both Australia and Germany [53] . At common law, the question of whether a person is a citizen or national of a particular foreign State is determined according to the law of that foreign State. This latter principle is, in part, a recognition of the principle of international law, restated in the *Nottebohm Case*, that:
>
> > "it is for every sovereign State ... to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation."
>
> This rule finds expression in Art 2 of the Hague Convention of 1930, to which Australia is a party:

> "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

And Art 3 of that Convention acknowledges that a person having two or more nationalities may be regarded as its national by each of the States whose nationality he or she possesses.

In the *Nottebohm Case*, Liechtenstein sought to exercise its right of diplomatic protection in respect of acts of Guatemala with respect to the person and property of Nottebohm, a naturalized Liechtenstein citizen. The question considered was whether the naturalization conferred on Nottebohm by and under the law of Liechtenstein could successfully be invoked against Guatemala. The International Court of Justice pointed out that, where the question had arisen with regard to the exercise of diplomatic protection, international arbitrators had recognized the "real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved" as that which gave rise to a right to exercise diplomatic protection. The majority went on to say that, in determining the real and effective nationality:

> "[d]ifferent factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."

They said:

> "[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connexion of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than that with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-a-vis another State, if it constitutes a translation into juridical terms of the individual's connexion with the State which has made him its national."

224 This discretionary ground for refusal appears as the first of the discretionary grounds in Art 3 and it is argued, highlights the responsibility of Australia to have regard to the fact that a person requested for extradition is an Australian citizen. It is not contended that this fact is a block to extradition. Clearly, Australian citizens are extradited from time to time.

225 However, Australia may refuse extradition of an Australian national but if does so refuse, it *must*, if requested by Hungary, submit the case to the competent authorities in order that proceeding for the prosecution of the person in respect of the offence for which extradition was sought may be taken.

226 There was no serious suggestion, if at all, in Attachment C that this option should have been explored. It was barely mentioned.

227 It must be inferred that the Minister has given no separate consideration to this Treaty ground and it follows that the Minister has failed to take into account a relevant consideration under the Treaty. For Mr Zentai it is contended that the Minister appears to have foreclosed consideration of whether to exercise the discretion to refuse on the basis of a so called 'long-standing policy' that Australia will not refuse extradition on the basis of Australian citizenship alone, and failed to have regard to the merits including Mr Zentai's nationality at all as a reason for refusal.

228 The Minister, it is argued, thereby (as a result of this omission in Attachment C) fettered the exercise of his discretion and disabled himself from properly and genuinely considering its exercise and the factors relevant to it.

229 By not considering this factor properly on its merits, it is argued that the Minister also compounded his failure by apparently adopting the advice of the Department that the principle of comity required Australia to give paramount consideration when determining these discretionary grounds to the clear objective of the law and Treaty.

230 However, by not giving individual consideration to the special and unique features of Mr Zentai's case, the Minister failed to give a balanced or any due regard to Australia's other obligations and responsibilities under the Treaty to its own nationals if the Minister acted on the advice contained in Attachment C.

231 In particular, it is asserted that the Minister failed to take into account the fact that because Mr Zentai is an Australian citizen and national, Australia has a primary obligation to afford diplomatic protection to him and to save him from undergoing foreign criminal procedures unnecessarily. When considering what may be necessary or unnecessary, it is argued that this included not taking administrative action that, given Mr Zentai's age and health, may cause any unnecessary or disproportionate distress and disruption that his extradition would occasion if he were removed from Australia. This is argued to be particularly so where, as an alternative to Hungarian proceedings, Mr Zentai might be prosecuted for the alleged war crime in Australia under Australian war crimes legislation.

232 Mr Zentai argues that the failure to have regard to these matters gives rise to jurisdictional error as a consequence of which the determination under s 22 is without proper legal foundation and void.

233 I will now consider ground 5A of the appeal as it is, in effect, linked with ground 5.

Ground 5A – article 3(2)(b) of the Treaty – the Australian Federal Police and the Commonwealth Director of Public Prosecutions did *decide to refrain from prosecuting Mr Zentai for the alleged offence*

234 It is argued in support of this ground that the Minister erred in law and in fact and made a jurisdictional error in deciding that there was no basis for finding that the competent Australian prosecuting authorities, the Australian Federal Police (**the AFP)** and the Commonwealth Director of Public Prosecutions (**CDPP**) had not, within the meaning of and for the purposes of Art 3(2)(b) of the Treaty, decided to refrain from prosecuting Mr Zentai, for the alleged defence in respect of which extradition is sought, thereby failing to give relevant and proper consideration under s 22 of the Act as to whether Australia should refuse to surrender Mr Zentai for extradition.

235 On this ground, the crucial issue is whether the AFP and the CDPP 'decided to refrain from prosecuting the person for the offence in respect of which extradition is sought' within the meaning of the Article.

236 'Refrain' is defined in the Macquarie Australian Dictionary, 3rd ed, as being to forebear or to hold back.

237 The evidence shows that the AFP, having accepted a referral concerning an allegation of a war crime, considered the possibility of prosecuting Mr Zentai for an offence under the *War Crimes Act 1945* (Cth). The AFP sought advice from the CDPP about whether such a prosecution could be initiated in Australia. The CDPP advised that in the absence of any testimony from living witnesses, not even a prima facie case existed to support a prosecution under the *War Crimes Act*. The AFP did not pursue the investigation following the CDPP's advice.

238 For Mr Zentai, it is contended that when a prosecuting authority, like the AFP, is asked to investigate an allegation, reports to the CDPP that the only evidence which has been

made available are statements of two witnesses who are now deceased, is advised by the CDPP that there would not be sufficient evidence to establish a prima facie case against Mr Zentai and neither the AFP nor the CDPP takes any further step and in fact do not prosecute Mr Zentai, it is 'sophistry' to suggest that the competent authorities (the AFP and CDPP) have not *yet* 'decided to refrain from prosecuting' Mr Zentai.

239 I agree with this submission.

240 It is unhelpful and inaccurate to characterise the interchange between the AFP and the CDPP as being merely preliminary or amounting only to limited steps. It is quite clear on the evidence that as a matter of substance, the CDPP was requested to determine the sufficiency of the evidence available to support a prosecution. There was none in admissible form. The Treaty and the Act can only possibly have regard to what has occurred historically when it uses the expression 'have decided to refrain from prosecuting'.

241 The Treaty and the Act does not betray an intention on the part of Parliament or the parties to the Treaty that some evidence might come to light at some future date which could have a bearing on Art 3(2)(b). The intent is to direct consideration to what has previously occurred. What has occurred falls squarely within subpara (b).

242 On grounds 5 and 5A, the Commonwealth correctly stresses that the Australian citizenship is simply a circumstance by which a discretion *may* be exercised to refuse extradition. The Commonwealth takes issue with the submission that the Act or the Treaty gives 'primacy' to citizenship or nationality. The Commonwealth correctly makes the point that the advice was entirely correct that Australia does not refuse extradition on the basis of Australian citizenship ***alone*** *if extradition is otherwise considered appropriate.*

243 The Commonwealth says that the connection with Australia has been overstated in Mr Zentai's submissions and that Attachment C made it clear to the Minister that Mr Zentai was an Australian citizen. Accordingly, it was entirely open for the Minister to make the judgement of whether, nevertheless, surrender should not be refused.

244 Significantly, as a matter of law, the Commonwealth argues that the claim of unreasonableness in relation to the exercise of this discretion is no more than a merits

challenge 'dressed up' as a *Wednesbury* unreasonableness claim (*Associated Provincial Picture Houses v Wednesbury Corporation* 1948] 1 KB 223). In any event, as a matter of law, the scope for a *Wednesbury* challenge is extremely limited.

245 As to ground 5A, the Commonwealth argues that the Minister was entitled on the material before him in Attachment C to conclude that the Australian authorities had not (yet) decided to refrain from prosecuting Mr Zentai for the offence in respect of which the extradition was sought. It is argued that the steps which had been taken by the AFP or CDPP could properly be considered as merely preliminary to any decision. Perhaps more importantly, the Commonwealth stresses that even if that is wrong, the Minister was nevertheless entitled to conclude that surrender should not be refused. I accept the latter submission but not the former.

246 For Mr Zentai it is argued in connection with these grounds that Art 3 para (1)(a) and (1)(b) need to be read together not separately. The correct reading then is that if a person is an Australian national, the Attorney-General is required to consider first the person's particular circumstances in a context where Australia has a special diplomatic relationship with that person. In forming his or her general assessment of whether extradition should be refused, the Attorney-General is required to go through a sequence of findings which include, first, whether the person as a national should be investigated and prosecuted in Australia. This is necessarily so where the Attorney-General is inclined to refuse but the requesting country requires him to submit the matter to Australia's competent authorities to decide whether to prosecute. The second question is, if the matter is actually submitted to those authorities, whether he should refuse, in any event, to accede to the request on the basis that those authorities have made an assessment to refrain from taking further steps towards prosecution in Australia. It is suggested that there is no response from the Commonwealth in submissions indicating any form of engagement by the Minister in that systematic process.

247 Mr Zentai does not claim that the Minister had no regard at all to the fact that he is an Australian national as the Commonwealth suggests. Rather, he claims that the Court can infer that on the balance of probabilities, the Minister was induced by Attachment C to close his mind to any real possibility of refusing the Hungarian Request (thus, in closing his mind, fettering his discretion) by accepting the Department's representation as to the legal effect of Art 3 para (1)(a). This submission was, of course, that Australia's longstanding policy not to

refuse extradition on the basis of nationality should be the Minister's primary consideration, implying that unless there were other and compelling considerations that might override the Treaty's dominant purpose of facilitating extradition, the Request should, in fact, *be granted* without *first considering in the case of a national, the viability of domestic prosecution*.

248 Mr Zentai claims that his objection relies on an argument as to the Minister's legal misconstruction of the relevant Treaty provisions or a misapplication of the law to the facts. It is neither a disguised merits claim nor a disguised *Wednesbury* claim although, it is argued, that the approach taken or apparently taken by the Minister may contribute to establishing a *Wednesbury* objection.

249 In consideration also of ground 5A, the argument for Mr Zentai is that the Minister, properly advised on the construction of Art 3 para (1)(b), was not *entitled to conclude* that Australia's competent authorities had 'not decided to refrain' from prosecuting Mr Zentai. While, ultimately, the Minister was required by that provision to make a factual evaluation about the character of the AFP's and the CDPP's actions and advice, he was nevertheless obliged to apply a correct understanding of law to the relevant events. The description given by the Department to the notion of 'refraining' should properly be inferred as causing the Minister to be misled as to the requirements of the provision.

250 It is argued that a consequence of accepting the incorrect view expressed by the Department was that the Minister failed to go on to consider whether, given that Australia's authorities had decided that there was insufficient evidence to prosecute, he should in his general discretion refuse the request.

251 It was not the case that the Australian authorities had not yet refrained from prosecuting Mr Zentai.

252 Nor does it appear to be the case that Mr Zentai retained Hungarian citizenship.

253 In my view, the foundational complaints for grounds 5 and 5A of the application are made out. But the difficulty remains that the Minister had a discretion to consider those matters but conclude that surrender for extradition was still appropriate.

254 It is inconceivable in all the circumstances that the Minister would have ignored Mr Zentai's very advanced age, his considerable ill-health, the decades that had passed since the war, the non existence of war crime as an offence at the relevant date and the complete lack of what would be considered in Australia as admissible evidence for a possible offence on which he was in any event only wanted for questioning.

255 In those circumstances, it is equally inconceivable that the Minister would not have been anxious to turn his mind to the range of possibilities open to him under the Act other than agreeing with the Department's recommendation that Mr Zentai be surrendered for extradition, especially if it meant strict compliance with the Treaty, resulting in prosecution of Mr Zentai within Australia.

256 Yet the Minister was not adequately, if at all, advised by the Department that it was open to him to consider as a real possibility the option of declining to surrender but acceding, as Australia must, to a requirement by Hungary that Mr Zentai be submitted to Australian authorities for prosecution. The only passing and very brief reference to that option (at [315] of Attachment C) was immediately countered and dismissed with a repetition of the reminder that it is long-standing practice that Australian citizenship 'alone' is not a sufficient basis to decline surrender for extradition. The policy has been allowed to override any genuine and real evaluation of the totality of the merits which were not confined only to Mr Zentai's citizenship.

257 Ground 5 points to what I consider to be further errors in the advice to the Minister. At this stage, it is in the context of the Minister exercising his own discretion. As noted elsewhere in these reasons, errors alone in the advice to the Minister would not necessarily vitiate a decision.

258 However, at this point, when the Minister exercises his or her discretion, he or she is expected to give real and genuine consideration to the merits of the claims being made rather than simply to apply policy.

259 The difficulty, however, as it appears to me with these two grounds (5 and 5A) is that notwithstanding what is now an accumulation of errors, it remained open to the Minister to take into account Mr Zentai's nationality but still not conclude that that was an adequate

discretionary basis for refusing surrender. Similarly, while the authorities of Australia had decided to refrain from prosecuting Mr Zentai, it was only a discretionary consideration and it was open to the Minister to not refuse extradition. I do not consider these grounds can succeed.

Ground 6 - article 3 para 2(f) of the Treaty – Mr Zentai's extradition would be *unjust, oppressive and incompatible with humanitarian considerations because of the Minister's failure to be satisfied that Hungary is capable of providing a fair trial*

260 This ground for Mr Zentai is substantially more challenging than some. The circumstances in which one sovereign nation would reach a conclusion to this effect with another treaty country will be rare indeed. In *Mokbel v Attorney-General for the Commonwealth of Australia* (2007) 162 FCR 278 Gordon J said (at [59]-[60):

> [59] **The courts of one country will not sit in judgment on the acts of the government of another done within its own territory. This principle of non-adjudication is consistent with the international rule of comity which refers to the respect or courtesy accorded by a country to the laws and institutions of another**. This was made clear in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-41: (emphasis added)
>
> > The rule is associated with a related principle of international law, which has long been recognized, namely that, in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign's own territory. The statement of Fuller C.J. in *Underhill v Hernandez* [(1897) 168 U.S. 250, at 252] that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory" has been repeated with approval in the House of Lords (*Buttes Gas v Hammer* [[1982] A.C. 888, at 933]) and the Supreme Court of the United States: *Banco Nacional de Cuba v Sabbatino* [(1964) 376 U.S. 398, at 416]. So, in *Oetjen v Central Leather Co.* [(1918) 246 U.S. 297, at 304] the Supreme Court said:
> >
> > > "To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations".
> > >
> > > As Lord Wilberforce observed in Buttes Gas v Hammer [[1982] A.C., at 931-932], in the context of considering the United States decisions, the principle is one of "judicial restraint or abstention" and is "inherent in the very nature of the judicial process".
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> See also *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559 (Mason CJ, Deane, Dawson and Gaudron JJ); *McCrea v Minister for Customs and Justice* (2004) 212 ALR 297 at [27]-[30] (North J) and *Gamogab v Akiba* (2007) 159 FCR 578 at [32] (Kiefel J).
>
> [60] French J made the following observations on the application of non-adjudication to extradition cases in *Cabal v United Mexican States (No 3)* 186 ALR

188 at [104]:

> "[I]t is important to bear in mind that the general functioning of the judicial system of an extradition country is not a matter for this court. Such judgments, no doubt, have a part to play in the decision of the executive government in entering into the treaty. They may also, at least in theory, have a bearing upon the legislative decision whether or not to disallow particular treaty regulations and in the ultimate decision of an Attorney-General whether or not to surrender a requested person. The acceptability to Australia of the system of criminal justice in an extradition country is an issue "... to be determined by the Government of the Commonwealth when deciding to extend the application of the Extradition Act to the State in question, whether by treaty or regulation, and, in a given case, perhaps before ordering the surrender of the fugitive ... in exercise of the discretion ... given the Attorney-General": Wiest v Director of Public Prosecutions (1988) 23 FCR 472; 86 ALR 464 at 514 per Gummow J. That is not to say that governments and judicial systems of requesting countries may not have changed significantly since a treaty of extradition was entered into. But the continuance of the treaty and ultimate surrender decisions are still matters for the executive and not for the courts." (Emphasis added.)

261 The submission on this ground is effectively that the Minister failed to satisfy himself as to the actual capacity of the Military Division to provide procedures consistent with the international obligations held by both Australia and Hungary under Art 14 of the ICCPR with its two Protocols and other relevant instruments to ensure a fair trial if the Military Divisions were to charge and prosecute Mr Zentai for the offence of war crime.

262 The Minister is required to have regard to the considerations specified in Art 3 para (2)(f) of the Treaty, namely, whether in the relevant circumstances it would be unjust, oppressive and incompatible with humanitarian considerations to extradite [Mr Zentai]. This obligation arises by virtue of s 11 of the Act and subparas 22(3)(e)(i), (ii), (iii) and (iv) together with s 22(3)(f) of the Act.

263 Mr Zentai argues that Hungary relied on the minutes and records of statements made in criminal proceedings before the Hungarian People's Court in 1946-1947 by the then defendants and various witnesses in the trials of a Captain Mader and Lieutenant Nagy. These records will be, apparently, the foundation on which a prosecution, if any, of Mr Zentai would be based. This is disclosed in Attachment C.

264 At no time has Hungary suggested that there is other evidence or that there are relevant live witnesses available to support the central elements of the allegation.

265 Article 6(3) of the ECHR imposes an obligation only on Hungary but both Hungary and Australia are bound by Art 14 of the ICCPR as Australia is also a party to the latter including the two Protocols to it. The ICCPR came into force for Australia on 13 November 1980. By virtue of the first Protocol to the ICCPR, if Australia were to violate Art 14 in surrendering Mr Zentai to Hungary in circumstances where he could not be afforded a fair trial, Australia would be answerable to a complaint lodged by Mr Zentai with the United Nations Human Rights Committee. Mr Zentai contends that Australia, accordingly, has a duty under the ICCPR to consider whether surrender in circumstances where it is virtually certain that Mr Zentai cannot be afforded a fair trial would be lawful under international human rights law.

266 Mr Zentai points to the fact that it is a fundamental requirement of a fair trial in accordance with the international instruments, that Mr Zentai should have the opportunity and ability to confront and question all witnesses as to whether their statements were voluntary or coerced by threats of torture, induced by promises of leniency, are consistent with other statements by relevant witnesses, and are reliable and credible, particularly that given, to a large extent, the statements are those of alleged accomplices or based on hearsay.

267 No evidence has been advanced or indication given by Hungary that the relevant prosecution witnesses on whose statements the Hungarian Military prosecution authorities will apparently rely are alive or available for examination including Captain Mader and Lieutenant Nagy and the other witnesses referred to in the evidence.

268 A strong inference is that there are no witnesses at all whom Mr Zentai will be able to question as guaranteed by Art 6 of the ECHR and Art 14 of the ICCPR. In those circumstances, he argues that to extradite him to Hungary would be unjust and oppressive within the meaning of Art 3 para (2)(f) of the Treaty. Mr Zentai contends that the Minister has failed to discharge his responsibility of requiring the Hungarian Government to satisfy him that Mr Zentai will not be subjected to an unfair and unjust trial by explaining how, if the prosecuting authorities cannot produce and make available for cross-examination such witnesses, Mr Zentai will be able to test the written accounts of their trial evidence before the People's Court for veracity, voluntariness and reliability.

269 Although Hungary has furnished Australia with assurances of a general nature that the Military Panel is obliged by Hungarian law to comply with international standards of a fair trial and 'equality of arms' under the ECHR and ICCPR, Mr Zentai argues that it has otherwise failed to provide any specific details about whether the main witnesses are alive and available to be called in any proceedings against Mr Zentai, has failed to inform Mr Zentai or the Commonwealth of any alternative procedures for testing the voluntariness, reliability, credibility and veracity of the statements of those witnesses and has given the Minister no assurances as to how the Military Panel would be able to provide fair procedures and a fair trial if it were to decide to prosecute Mr Zentai. Further, Mr Zentai complains that Hungary has failed to give an assurance that statements recorded by the People's Court in 1946-1947 that may have been coerced by torture including those of Lieutenant Nagy would not be produced in evidence in proceedings before the Military Panel in breach of Art 15 of the *UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984* (**CAT**). (*A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221).

270 Additionally, Mr Zentai contends that Hungary has refused to inform him or the Minister how Mr Zentai would be able to have a fair trial in accordance with international standards when he will be unable to access relevant official documentary evidence destroyed during the time which has elapsed since 1944 about the movement of his unit of the Royal Hungarian Army. He says that such records would enable him to establish that he was not in Budapest at the time of the commission of the alleged offence in Budapest.

271 The effect of Art 3 para (2)(f) of the Treaty is that the Minister and the Attorney-General are obliged to ensure that any proceedings instituted by Hungary will not be unjust or oppressive. In the absence of information or assurances of any nature other than a general assurance from Hungary and without having made any further inquiry, the Minister has determined that Mr Zentai should be surrendered for extradition. Mr Zentai contends that this appears to be solely on the assurance that the Military Panel is *bound* by the provisions of the ECHR and the ICCPR and it is, therefore, not for the Australian Government to enquire into or make judgements about whether the Military Panel and its procedures will *in fact be able comply with the international standards for a fair trial*. In Attachment C the Minister was advised that he should accept that because Hungary is bound by international fair trial standards, that there is no onus on the Minister to confront the reality that in the known

circumstances of this case which suggest that unless relevant witnesses are able to be produced, no reliance can be placed on the documentary records of the People's Court.

272 Mr Zentai complains that the Minister has been misled by the selective references in Attachment C to the decision of this Court in *Mokbel* (at [58]-[59]). Attachment C generally and, in particular, on the topic under consideration in ground 6 relies heavily on 'comity' as providing a reason for not pursuing further inquiries from Hungary. This, however, would not appear to accord with the views expressed by a Full Court of this Court in *Habib v Commonwealth of Australia* (2010) 113 ALD 469 where the Court rejected that argument and, at least in the limited context in which the consideration arose, rejected the notion that the 'act of state doctrine' would preclude embarrassing inquiries of the conduct of officials of a foreign State in relation to allegations, for example, of torture.

273 Mr Zentai argues that the Minister in accepting that 'comity' prevented him from considering whether, having regard to the particular evidentiary problems presented by the non-availability of key witnesses, the procedures of the Military Tribunal were *actually capable of affording Mr Zentai a just and fair trial in accordance with relevant international standards*, fettered on his discretion such that he abdicated his responsibility to address that question.

274 Further, it is contended that it may be inferred in the circumstances that the Minister has asked himself the wrong question as the issue is not whether the Military Division is capable of providing a fair trial because it is bound by the ECHR and ICCPR. Rather, it is whether the Hungarian authorities can provide assurances to the Australian Government as to how they can in fact afford a fair trial to Mr Zentai in accordance with the ECHR And ICCPR in the circumstances of this case.

275 Mr Zentai argues that the Minister has further erred in law in taking into account an irrelevant consideration, namely, that if Hungary and the Military Panel fail to comply with the relevant international standards, Mr Zentai could appeal pursuant to procedures open under Hungarian law with the ultimate prospect of appealing to the European Court of Human Rights. The Minister has concluded that because of that right, he therefore has no responsibility to satisfy himself before making a decision to extradite that Mr Zentai will be able to be afforded a fair trial complying with all the relevant international standards. The

point made for Mr Zentai is that the appropriate test is whether the Minister can be satisfied that at the threshold of any first instance trial in Hungary and despite the known facts concerning apparently unavailable witnesses, the Military Panel has a certain and definite evidentiary procedure which would ensure that Mr Zentai can still have a fair trial despite the circumstances.

276 It is argued that the Minister has further acted on an illegally and factually incorrect view of the apparently unsupported documentary evidence on which Hungary proposes to rely if it does institute a prosecution. This is because, in Attachment C (para 202), advice received from OIL which was summarised in an unredacted form in para 203 and para 205 of the Attachment C following *Zentai v Honourable Brendan O'Connor* (No 2) [2010] FCA 252 suggests that there 'is no information that establishes that the [Military Panel] would not be capable of providing a fair trial' and in para 204 that 'we are not aware of any information to suggest that Hungary does not propose or is unlikely to provide Zentai with a fair trial' are patently inconsistent with heavily qualified advice given by OIL that for a trial to be fair the Military Panel could only have regard to documentary evidence that was unsupported by viva voce evidence where the documentary material was not the sole or decisive evidence. Mr Zentai points out that where reliance is placed to 'a decisive extent' on statements by anonymous witnesses, the European Court has held that defendants to criminal charges must have reasonable means of testing the witnesses' reliability or credibility, particularly where a witness' identification is the only evidence indicating a defendant's presence at the scene of a crime: *Windisch v Austria* (1990) 13 EHRR 281 and *R v Davis* [2008] 1 AC 1128 (at [24]-[25] and [44] per Lord Bingham; [75]-[90] per Lord Mance. See also *Secretary of State for the Department v AF* [2009] UKHL 28 in relation to the opportunity to test evidence of a decisive character under Art 6 ECHR).

277 Mr Zentai complains that contrary to the statement in Attachment C (at para 210) that there is no evidence *to suggest that Hungary will not afford the applicant the protections and rights contained in its procedures*, in fact there is evidence that the Military Panel when issuing the international arrest warrants relating to Mr Zentai in 2005 failed to consider whether the statements and records of the People's Court were capable of being used in any criminal proceeding consistently with Hungary's obligations under the ECHR and ICCPR or whether a prosecution could comply with the requirements of a fair trial according to standards of the ECHR and the ICCPR. As a result the Minister has failed to take into

account a relevant consideration, namely, that the Military Panel has already failed to comply with the relevant international standards.

278 The Minister, it is argued, in relying on Attachment C as it appears that he has, has apparently also been induced to misconceive the nature of the submissions from Mr Zentai regarding the need to confront prosecution witnesses given that there is objective evidence that the Hungarian prosecution authorities will be incapable of producing critical prosecution witnesses whose evidence is proposed to be adduced. It is also argued that the Minister has failed to have regard to a relevant factor, namely, Australia's own international legal obligations under the ICCPR regardless of any other obligations of non-refoulement not to surrender Mr Zentai, an Australian national for extradition where there is objective evidence that he may not be afforded a fair trial and a real risk that there will be a violation of Australia's international undertakings because of its failure to comply with Art 14 of the ICCPR.

279 However, the Commonwealth makes the point that the 'satisfaction' required by s 22 read with Art 3(2)(f) is in respect of matters described in qualitative terms which call for the making of value judgments about which reasonable minds may differ: *Timar v Minister for Justice and Customs* (2001) 113 FCR 32 at [13] and *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at [38].

280 The information before the Minister on this topic in Attachment C (contained in paras 128-251) was detailed and comprehensive. It is impossible to argue, the Commonwealth says, on that material that the Minister could not reasonably be satisfied that notwithstanding the matters raised by Mr Zentai that extradition should not be refused.

281 In particular, it is argued that where there is a treaty in force, its existence no doubt reflects a degree of mutual trust and confidence between the contracted parties as to their bona fides and the fairness of treatment that will be meted out by one or the other to a fugitive who has been surrendered: *Hempel v Attorney-General (Cth)* (1987) 77 ALR 641 at 659. Further, in extradition cases, the courts of the requested country should not sit in judgment on the acts of the government of the requesting country done within its own territory or the general functioning of the judicial system of the requesting country: *Cabal v United Mexican States (No 3)* (at [104]).

282 The Commonwealth also, once again, points to the fact that although ground 6 is expressed in terms of misdirection, the argument and the particulars in support of the ground when read against Attachment C are no more than a merits challenge.

283 The Commonwealth says that the unstated premise of some of the particulars to para (c) of the amended grounds of review (for example, paras (a) and (k)) is that Minister was under a duty to make very specific inquiries about various matters. The Minister, however, had no such duty to inquire: *Foster* 200 CLR 442 (at [26]-[30]) and *Minister for Immigration and Citizenship v SZIAI* (2009) 111 ALD 15 (at [20]-[25]).

284 If ground 6 were just a merits review, it would fail. It has not been put as a merits review. The question is one of legal obligation. What is in issue is the submission for Mr Zentai that each particularised objection is framed on the premise of a distinct failure of the Minister to act lawfully in the manner required or authorised by the Act. Mr Zentai challenges the 'defective' manner in which the Minister's determination was made. The challenges do not ask the Court to decide that the Minister made the wrong decision. Rather, the challenge relevant to this ground is that the decision has not been made 'according to law'.

285 An example of this is that it should be inferred from the content of Attachment C that the Minister relied on the Department's view that the principle of comity supporting treaty arrangements virtually obliged Australia to accept and acquiesce in Hungary's Request rather than to go behind the documentation, information and assurances furnished by that country. In *Foster v Minister for Customs & Justice* (1999) 164 ALR 357 (at [39]-[40]) Drummond J said:

> There is support for the Minister's submission that this is not a justiciable issue: See *Royal Government of Greece v Governor of Brixton Prison* [1971] AC 250 at 278 and 280; *R v Governor of Brixton Prison; Ex parte Kolczynski* [1955] 1 QB 540 at 549 and *Re Arton* [1896] 1 QB 108 at 111 - 12 and 114 - 15. The principle referred to in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40 – 1; 78 ALR 449 may also support the argument. The narrow inquiry required of the Minister by reg 7(b) - cf *Narain v Director of Public Prosecutions* (1987) 15 FCR 411 at 414, 420 – 3; 70 ALR 697 - is not inconsistent with the submission. **But the law is not all one way. Considerations of comity (and other aspects of public policy) that appear to underlie the principles referred to in these authorities do not require an Australian court to automatically defer to even such a formal exercise of sovereign authority by a foreign state as the enactment of legislation that prohibits the disclosure of information by its nationals when that information is demanded by subpoena of an Australian**

> **court or required by other demands made under Australian law**: see *Bank of Valletta Plc v National Crime Authority* (1999) 164 ALR 45.
>
> Moreover, although the Parliament has excluded decisions under the Extradition Act 1988 (Cth) from review under the Administrative Decisions (Judicial Review) Act 1977 (Cth), it has, by s 39B(1) and (1A) the Judiciary Act 1903 (Cth), given this court's jurisdiction to review such decisions: see *Attorney-General v Foster* (1999) 161 ALR 232 at [3]. Parliament has not placed any limitations on the ambit of the court's powers of review that are intended to ensure that Australian officials act within the authority conferred on them by Australian law. The justification for restraint by an Australian court in pronouncing upon the actions of a foreign sovereign is absent if the Australian Parliament invests the court with authority to do just that: see *Heinemann Publishers* (CLR at 53). And since the court has only powers of judicial review in respect of extradition decisions, it could not, irrespective of how strong it thought the evidence to be of bad faith with respect to the assurance given (and subject only to whether an extradition decision is reviewable for unreasonableness), deprive the Minister of the final say in whether, after he or she had identified and considered all relevant considerations, the person should nevertheless be surrendered. That s 22(3)(d) is not concerned only with matters affecting Australia's national interests but also with the protection of the fugitive from injustice in the extradition country also tells against the submission. **Given all this, it is not apparent why the Court should not insist that the minister advert to such evidence where it exists, while necessarily leaving it to the minister to determine where the balance lies in the particular case, in exercising the discretionary power conferred by s 22(2)**. (emphasis added)

286 Mr Zentai stresses that there is sufficient to demonstrate that there is a high probability that acting on a false appreciation of the legal significance of comity that the Minister failed to engage in a 'proper, genuine and realistic consideration' of Mr Zentai's representations. It was jurisdictional error on the part of the Minister and a failure to properly discharge his statutory responsibility to Mr Zentai to fail to pursue further inquiry to ascertain what evidentiary and procedural measures Hungary could take to overcome the inability to produce the witnesses.

287 The argument points to the advice of OIL in the now unredacted version of the documentation produced by the Commonwealth which confirms Mr Zentai's main argument that unless such documentary records are not the sole or decisive evidence, witnesses implicated in the materials must be available for cross-examination. In other words, Mr Zentai argues that there is a legal obligation on the Minister under the Act and the Treaty to satisfy himself that Hungary has the ability to provide Mr Zentai with a trial that is fair and just and not oppressive.

288 Put in another way, Mr Zentai would ask whether the Minister is free to ignore the fact that the Hungarian Military prosecutors cannot possibly produce the witnesses for cross-examination.

289 Additionally, Mr Zentai contends (in the alternative) that this limb of the challenge can be posed as a *Wednesbury* objection, that is, is the Minister's decision in those circumstances so perverse, outrageous and unreasonable that no minister properly aware of Australia's legal obligations to an Australian national could have reasonably made it?

290 In my view, the challenge does not reach the level of near absurdity necessary for *Wednesbury* unreasonableness. Nor does it meet the requirements under the test in *Khan* to which I refer at the conclusion.

291 I do not think it is open on the materials before the Minister to infer that he failed to seriously consider the fair trial question. Analysis of the topic in Attachment C was reasonably fulsome. While it did contain references to comity, that subject was very relevant. I do not consider that there were errors on this topic as there were on some. On the fair trial point it was appropriate to assume that Hungary would make suitable provision for the very unusual circumstances.

292 This grounds fails.

Ground 7 – section 7(c) of the Act – Mr Zentai may be prejudiced at his trial by reason of his nationality or political opinions

293 Mr Zentai submits that he has a valid extradition objection under s 7(c) of the Act that was not properly considered by the Minister. Section 7(c) provides that a person has an extradition objection (and hence is not liable to be surrendered) if on surrender the *person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions*.

294 Whether a person's circumstances will fall within s 7(c) is essentially a matter of establishing a relevant causal link, connection or contribution between the element of nationality or political opinion and the possibility of prejudice: *Cabal v United Mexican States (No 3)* (at [243]-[244]).

295 In the recent decision of *Republic of Croatia v Snedden* (2010) 265 ALR 621, French CJ said (at [12] and [22]-[23]) (footnotes omitted):

> [12] The only extradition objection in issue in this appeal is that defined in s 7(c) by the words "punished, detained or restricted in his ... personal liberty, by reason of his ... political opinions". It is useful to refer briefly to the ancestry of that statutory collocation.
>
> …
>
> **The application of s 7(c) in the present case**
>
> [22] The causal connection between punishment and political opinion in s 7(c) is defined by the words "by reason of". Those words have appeared in more than one statutory setting including the definition of "refugee" in Art 1A(2) of the Refugees Convention, effectively incorporated by reference into the criteria for the grant of protection visas under the *Migration Act 1958* (Cth), and various anti-discrimination and equal opportunity statutes. In those contexts and others they have been equated to terms such as "because of", "due to", "based on" and "on the ground of". Generally speaking "by reason of" has been held to connote a cause and effect relationship.
>
> [23] **The words of s 7(c) require attention to be given to the existence of a causal connection between apprehended punishment and the political opinions of the respondent**. It is not necessary in this case to explore the range of matters covered by the term "punishment". The apprehended risk, as asserted on behalf of the respondent, is a term of imprisonment enhanced by reference to the respondent's political opinion. Imprisonment is well within the meaning of "punishment" in s 7(c). In so saying I do not dissent from the general proposition in the joint judgment that the absence of a mitigating factor which could lead to a lesser sentence does not necessarily mean that the offender is punished or punished more because of its absence. The respondent does not really argue to the contrary. Rather he contends that the mitigating factor of prior service in the Croatian army was so connected to his political opinions that he could be said to be at risk, because of those opinions, of a heavier punishment than he would otherwise have suffered. In considering that argument, it can be accepted that a negatively expressed mitigating factor referring to or implying the absence of some attribute could be regarded as giving rise to a risk of greater punishment on account of the presence of that attribute. (emphasis added)

296 Gummow, Hayne, Crennan, Kiefel and Bell JJ said (at [66] and [69]-[72]) (footnotes omitted):

> **The provenance of s 7(c)**
>
> [66] Article 3.2 of the 1957 European Convention on Extradition provided that extradition was not to be granted:
>
> > if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.
>
> This provision informed the text of s 14(b) of the *Extradition (Foreign States) Act 1966* (Cth) and s 11(1)(b) of the *Extradition (Commonwealth Countries) Act 1966* (Cth) (the 1966 Acts). These were the immediate predecessors to s 7(c) of the

> Extradition Act. As explained in *Vasiljkovic*, prior to the 1966 Acts extradition law in Australia was governed by the *Extradition Act 1870 Imp* for extradition to foreign states as defined, and the *Fugitive Offenders Act 1881 Imp* for extradition between countries of the British Commonwealth.
>
> …
>
> **Construction of s 7(c)**
>
> [69] There was no dispute between the parties that s 7(c) requires a causal connection between the punishment the respondent might suffer on trial, after surrender, and his political opinions. The phrase "by reason of" means that the person may be punished, detained or restricted in his or her personal liberty because of his or her political opinions. Section 7(c) relevantly requires the respondent to show that on trial, after surrender, he may be punished because of his political opinions. This construction is consistent with statements in this Court interpreting the similar phrase "for reasons of" in the context of the definition of a refugee in Art 1A(2) of the Refugee Convention. There, the term "refugee" applies to a person having a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".
>
> [70] As to context and purpose, the provenance of s 7(c) discussed above reveals that the intention of the predecessors to s 7(c) found in the 1966 Acts was to enlarge the "political offence" exception to extradition by reference to Art 3.2 of the European Convention on Extradition. There is nothing in the history of the current Extradition Act to suggest that any different intention applied to s 7(c). The express intention to enlarge the political offence objection was achieved by a requirement that a court take into account the future possibility, on trial after surrender, of prejudice, punishment, detention or restriction in personal liberty by reason of political opinions.
>
> [71] **In this case, that inevitably requires consideration, not only of a person's political opinions, as emphasised in argument by the respondent, but also of the position of the requesting State in respect of potential punishment**.
>
> [72] **Political opinions may be the reason why a person refuses to serve in a particular force. However, if such a person is liable for punishment, not for political opinions, but for failure to enlist, political opinions are not the reason why they will be punished**. (emphasis added)

297 Against the background of those considerations, it is necessary to consider the material on this topic that was before the Minister. In Attachment C, this issue is addressed at paras 14-46 in these terms:

> 14. Under section 7 of the Extradition Act an extradition objection would arise if:
>
> (a) the extradition offence is a political offence in relation to Hungary
>
> (b) Zentai's surrender, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions or for a political offence in relation to Hungary
>
> (c) on surrender to Hungary in respect of the extradition offence, Zentai may be prejudiced at his trial. or punished, detained or restricted in his personal liberty, by reason of his race, religion. nationality or political opinions
>
> (d) assuming that the conduct constituting the extradition offence, or

equivalent conduct, had taken place in Australia at the time the request for Zentai's extradition was received, that conduct or equivalent conduct would have constituted an offence under the military law, but not also under the ordinary criminal law, of Australia, or

(e) Zentai has been acquitted or pardoned by a competent tribunal or authority in Hungary or Australia, or has undergone the punishment provided by the law of Hungary or Australia, for the extradition offence or another offence constituted by the same conduct as the extradition offence.

15. Extradition objections are considered at three stages of the extradition process:
- by you in determining whether or not to issue a section 16 notice,
- by the magistrate in conducting section 19 extradition proceedings to determine whether or not the person is eligible for surrender, and
- by you in determining under section 22 whether or not a person should be surrendered to the requesting country.

16. No arguments on behalf of Zentai were advanced in the section 19 proceedings to seek to satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection. On conclusion of the extradition proceedings, Magistrate Lane commented:

`There is no material before me that [Zentai's] surrender is sought on account of his race, religion, nationality or political opinions or that his trial may be prejudiced by reason of any of those matters.'

17. However, representations made to you on behalf of Zentai for the purposes of your section 22 determination appear to assert that surrender should be refused on grounds relating to alleged extradition objections. We are not aware of any circumstances that would give rise to an extradition objection in this case. Each extradition objection is examined in turn below.

Subsection 7(a)-the extradition offence is a political offence

18. A 'political offence' in relation to a country is defined in section 5 of the Act as 'an offence against the law of the extradition country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country)' (subject to a number of specific exceptions).

19. It is evident from the warrant (and attached documents in support of Hungary's request) that the offence for which Zentai's extradition is sought is an offence against Hungarian criminal law: that is, an offence referred to in section 165 of Hungary's Criminal Code. The offence is alleged to have occurred in circumstances resulting in the death of a young Jewish man, Peter Balazs, during World War 11.

20. While the offence for which extradition is sought does not have the requisite character to constitute a political offence, the Department also submits that in addition as a matter of Australian law a war crime is not a political offence. Murphy J held in *R v Wilson; Ex parte Witness* (1976) 135 CLR 179 at 190-191 that `war crimes and crimes against humanity are not offences of a political character'. War crimes are not crimes which can be considered

political offences as they do not harm the political interest of a particular State, nor a political right of a particular citizen.

21. You can therefore be satisfied that the alleged offence for which Zentai's extradition is sought is not a political offence.

Subsection 7(b)-surrender is actually sought for the purpose of prosecuting or punishing Zentai on account of his race, religion, nationality or political opinions or for a political offence in relation to Hungary

Zentai's representations

22. No arguments on behalf of Zentai were advanced in support of this (or any) extradition objection in the section 19 proceedings before the magistrate. However, the representations provided by Zentai's son, Ernie Steiner, on his behalf for the purposes of your section 22 determination appear to assert that there is material to satisfy you that Zentai's prosecution and extradition are politically motivated because he is actually wanted in relation to his involvement in the reporting of his Commanding Officer, Major Endre Tarnay, in December 1944, for dereliction of duty and failing to accompany his unit.

23. Steiner claims that the other two officers involved in making the report were Zentai's co-accused Captain Bela Mader, and Lieutenant Lajos Nagy, and that Captain Bela Mader was later convicted for political offences in relation to the making of the report. Steiner claims that because of Zentai's `professional association' with Captain Mader, he was deemed to be a political enemy and that like Captain Mader he is wanted for retribution and his political opinions at the time.

Departmental comment

24. This extradition objection requires establishment of a causal link between the prohibited purposes and the extradition request (see *Cabal v United Mexican States* (2001) 108 FCR 311 at [242]). The seriousness of the offences for which extradition is requested can be an important consideration in determining whether or not a request has been motivated by a prohibited purpose (see *Cabal v United Mexican States* (2001) 108 FCR 311 at [243-244]).

25. No information or evidence has been provided on behalf of Zentai to support this bare assertion and/or to satisfy you that a prohibited purpose actually motivates Hungary's request for his extradition.

26. We are not in possession of any information suggesting that the extradition request or Zentai's prosecution or punishment in Hungary is or will be influenced by Zentai's race, religion, nationality or political opinions.

27. The material provided by Hungary, on its face, is consistent with a request made for the legitimate purposes of the administration of criminal justice. The request from Hungary states that Zentai is wanted for the offence of war crime, in relation to his involvement in the murder of a Jewish man. The seriousness of the offence of war crime remains undiminished by the fact that in this case the allegations relate to the death of a single person rather than a number of people.

28. For the reasons set out in paragraphs 18-20 above, the Department does not consider that the war crimes offence for which Zentai's surrender is sought is a political offence in relation to Hungary. The Department has no information which would suggest that Hungary intends to prosecute Zentai for any offence other than the offence stated in the request. The Department notes that Hungary has, by virtue of the Treaty provisions, provided a speciality assurance in the required terms (see below at paragraphs 51.53). There is no reason to doubt the veracity of Hungary's assurance and it is appropriate to assume that Hungary is acting in good faith.

29. You can therefore be satisfied that Zentai's surrender is not sought for a prohibited purpose or for a political offence within the meaning of subsection 7(b) and this objection is not made out in this case.

Subsection 7(c)-Zentai may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions

Zentai's representations

30. No arguments on behalf of Zentai were advanced in support of this (or any) extradition objection in the section 19 proceedings before the magistrate. However, the representations provided for the purposes of your section 22 determination appear to assert that Zentai could be prejudiced at his trial by reason of his political opinions. The allegation appears to rely on claims that:
    - the issue of the original arrest warrant in 1948 by the People's Court was 'arbitrary' in the international law sense because it was based on a perception of the People's Court (which is said to be a politically biased institution) about Zentai's political status and opinions (namely, that Zentai was non-Communist and a member of the Royal Hungarian Army fleeing Russian occupation), and
    - to the extent that later proceedings are parasitic upon or derivative from that warrant, including any reliance on tainted documents on which the People's Court acted, Zentai would be prejudiced at his trial by reason of his political opinions.

31. Zentai claims that he will be prejudiced at his trial because both the 2005 arrest warrant issued by the Military Division and any Hungarian prosecution rely upon material obtained by the People's Court which was a politically biased institution. Zentai has produced a large volume of material to support his claim that the People's Court was corrupt, politically biased and admitted unreliable evidence obtained from witnesses who it is suspected were tortured or threatened.

32. These representations also form the basis of Zentai's claim that he will not be able to receive a fair trial and are discussed further (in that context) in paragraphs 189-214 and 287-295.

Departmental comment

33. The words `by reason of' in subsection 7(c) indicate that a causal connection is required. Zentai's representations on this matter are premised upon an assumption of continuity (or at least a lack of independent process and consideration) between the People's Court of the 1940's on the one hand and

today's Budapest Metropolitan Court and Military Prosecutor's Office of Hungary on the other hand. In this regard, the Department notes the following:

- The Communist influence over Hungary in the wake of World War 11 which governed institutions such as the People's Court are matters of historical fact. Hungary has functioned as a democracy since its first free parliamentary elections in 1990.
- following Hungary's transition to a democratic state based on the rule of law, it became on 6 November 1990 a member of the Council of Europe and on 1 May 2004 Hungary (sic-became) a member of the European Union.
- Hungary's Budapest Metropolitan Court and Military Prosecutor's Office of today is a distinct and independent institution from the People's Court of the 1940's. Hungary has advised that the People's Court of Budapest ceased to operate under Decree No. 4172/1949 (19 October) of the Council of Ministers with effect from 1 November 1949.
- Hungarian authorities independently considered the matter around 2005. Hungary has advised that the Military Prosecutor's Office examined the material obtained in 1948 and considered that it was sufficient to apply, by way of a motion before a court, for a fresh arrest warrant in 2005.
- Hungary has advised that the Military Division of the Metropolitan Court considered the material presented in support of the motion for a fresh warrant and stated that "*the contents of the historical statement of facts and well-founded suspicion on the basis thereof, are duly established by the minutes of the hearing of witnesses...*".
- The criminal trial procedures applicable in the Military Panel of the Metropolitan Court comply with the procedures and protocols set out in international instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR). The procedures, as set out further in paragraph 198 below in the context of fair trial considerations, allow amongst other things for the independent judicial assessment and evaluation of evidence.
- Australian courts have repeatedly held that a court in a foreign country should not comment on or interfere with the domestic procedures in another State. As was said by Gordon J in *Mokbel v Attorney-General for the Commonwealth of Australia* (2007) 162 FCR 278 at [58]-[59]:

  '[The] courts of one country will not sit in judgment on the acts of the government of another done within its own territory. This principle of non-adjudication is consistent with the international rule of comity which refers to the respect or courtesy accorded by a country to the laws and institutions of another'.

34. The Department is not in possession of any information which suggests that modern day Hungarian prosecuting authorities or the modern day Military Panel of the Metropolitan Court is politically biased. In this regard, see below paragraphs 189-214 and 287-295 relating to the ability of Hungary to provide Zentai with a fair trial.

35. Nor is the Department otherwise in possession of any information suggesting that on surrender to Hungary pursuant to the extradition request Zentai will be prejudiced at trial, punished, detained or restricted in his personal liberty

by reason of his race, religion, or nationality.

36. The Department considers that in light of the above it cannot be inferred that any trial of Zentai in Hungary today, will be prejudiced by reason of his political opinions, merely by virtue of the fact that in conducting any prosecution in the Military Panel of the Metropolitan Court, consideration may be given to material from 1948 in accordance with processes and procedures which comply with the ICCPR and the ECHR.

37. You can therefore be satisfied that it is not the case that Zentai may be prejudiced or punished within the terms of subsection 7(c).

38. To the extend that the representations on this matter could also be referable to an alleged extradition objection under subsection 7(b), the matters outlined in paragraphs 22-29 above are equally applicable.

Subsection 7(d)-the extradition offence is a military offence only

39. While the term military offence is not otherwise defined in the Act, the explanatory memorandum to the Act states that this extradition objection is directed to an offence known exclusively to military law and therefore not an offence known to the ordinary criminal law. The range of military offences (exclusive to military law) include offences such as desertion, being absent without leave and disobedience of a direct order.

40. Zentai is wanted in Hungary for prosecution for a war crimes offence under the Hungarian Criminal Code for his alleged involvement in the death of a man while providing patrol service in Budapest as a member of the Hungarian Royal Army. Hungary has confirmed that under Hungary's Criminal Procedure Code Zentai is to be prosecuted for the offence before the Military Division of the Budapest Metropolitan Court (a county court) by reason of his membership of the armed forces at the time the alleged conduct took place, not because the offence of war crime is a military offence.

41. The CDPP have advised that if the conduct constituting this offence had taken place in Australia at the time the extradition request was received from the Hungary (sic), that conduct would have constituted an offence under the ordinary criminal law of Australia.

42. Zentai has not made any representations that the offence is a military offence only and the objection does not arise in this case. You can therefore be satisfied that Zentai's surrender is not sought for a military offence within the meaning of subsection 7(d) and this objection is not made out in this case.

Subsection 7(e)-double jeopardy

43. The documents in support of the request for Zentai's extradition show that the offence for which Zentai is wanted for prosecution in Hungary is the same offence for which his extradition is sought.

44. There is no information available to the Department to support a conclusion that Zentai has been acquitted or pardoned in Hungary or Australia, or has undergone the punishment provided by the law of Hungary or Australia, for the offence for which his extradition is sought or another offence constituted by the same conduct.

> 45. You can therefore be satisfied that Zentai's surrender is not sought in respect of conduct that gives rise to double jeopardy concerns within the meaning of subsection 7(e) and this objection is not made out in this case.
>
> ***Conclusion on extradition objections***
>
> 46. You may be satisfied that there is no extradition objection for the offence which the (sic) Hungary has sought Zentai's extradition.

298 For Mr Zentai, it is submitted that the issue of a warrant for his arrest in the People's Court in 1948 was wholly or in part due to the fact that the People's Court and the Hungarian communist authorities then in power were biased against officers of the Royal Hungarian Army fleeing Russian occupation because they were regarded as a sector of the Hungarian population that was reviled by the pro-Soviet occupying forces, so that there is a real risk that at that time, when the People's Court sought Mr Zentai's arrest it was because of his actual perceived national and political associations and that the proceedings of the People's Court against Captain Mader and Lieutenant Nagy to the extent that they implicated Mr Zentai were influenced and tainted by that consideration.

299 In Attachment C it will be recalled that the following appears at para 26 and para 35:

> 26. We are not in possession of any information suggesting that the extradition request or Zentai's prosecution or punishment in Hungary is or will be influenced by Zentai's race, religion, nationality or political opinions.
> …
> 35. Nor is the Department otherwise in possession of any information suggesting that on surrender to Hungary pursuant to the extradition request Zentai will be prejudiced at trial, punished, detained or restricted in his personal liberty by reason of his race, religion, or nationality.

300 From the contents of para 26 and para 35, the Department, in stating that there is no information in its possession that Mr Zentai's prosecution will be influenced by his nationality or political opinion wrongly assumes, it is said, that Mr Zentai's objection based on prejudice relates solely to the contemporary disposition of the Hungarian prosecution authorities towards him.

301 Rather, his submission is predicated on the continuing effect of any original prejudice affecting the decisions in 1946-1948 of the People's Court and prosecution. It is said to be based on the fact that the arrest warrant issued by the Hungarian Military Panel in 2005 is to a significant degree parasitic on the original 1948 arrest warrant and the minutes and records of

the People's Court associated with the proceedings against Captain Mader and Lieutenant Nagy. Further, Attachment C reveals the following at para 37:

> You can therefore be satisfied that it is not the case that Zentai may be prejudiced or punished within the terms of subsection 7(c).

302 This content denies that any taint arising from political bias in the warrant for Mr Zentai's arrest issued in 1948 is capable of having a continuing operative effect in any contemporary proceedings of the Military Panel. Mr Zentai complains that this proposition is unsupported by any reference as to how any bias in the 1946-1948 proceedings could be addressed and compensated by the Military Panel. As such, it does not discount the fact that a current prosecution may be prejudiced by Mr Zentai's political and national characteristics in 1948.

303 In essence, for Mr Zentai, this is a 'poisoned root' argument. It is submitted that Attachment C offers no reasons for rejecting the information provided by Mr Zentai and the great volume of material provided by his son, Mr Ernie Steiner, particularly as to the characteristics of the People's Court. As such, it presents an incorrect presentation of the substance and force of Mr Zentai's objection based on s 7(c) of the Act. The Minister, it is said, in dealing with the extradition objection must be inferred to have failed to give a fair, properly reasoned and informed consideration of Mr Zentai's claim that any current proceedings against him may be prejudicially affected by the political bias against members and officers of the Royal Hungarian Army. As such, this would constitute jurisdictional error, vitiating the Minister's determination.

304 Once again, the Commonwealth points out that the appropriate question here is whether the Minister was satisfied that there was no extradition objection in relation to the offence. Although Mr Zentai claims that some elements of that material misunderstand his argument, the Commonwealth says that it cannot be contended from that material and the decision that there was an error going to jurisdiction. In particular, it cannot be concluded that there was a failure to properly consider the issue arising under s 7(c) of the Act.

305 The question is whether the Department's expression of opinion regarding this objection entailed an error of law and whether the Minister is likely to have acted on that view and thereby misled himself into rejecting Mr Zentai's contention of prejudice.

306 In my view the conclusion as to the absence of an extradition objection was validly open and is not capable of review. There is no evidence or reason to conclude that any political opinion held by Mr Zentai at any time may cause the requesting state to now punish him *by reason* of that opinion.

307 Against the obligation to accord respect for the procedures of a court in another Treaty country, it is inappropriate to expect that the Military Tribunal would blindly accept the content of the documents which are said to constitute the 'poisoned root'.

308 This ground must fail.

Ground 8 – article 3 para 1(f) – offence cannot be tried by the Military Panel

309 Paragraphs 74-87 of Attachment C addressed this argument as follows:

> 74. Article 3(1)(f) provides a mandatory ground for refusal where upon surrender Zentai would be liable to be tried or sentenced in a court or tribunal that has been specially established for the purposes of trying Zentai's case, or that is only occasionally or exceptionally authorised to try persons accused of the specific war crimes offence for which Zentai's extradition is sought.
>
> *Zentai's representations*
>
> 75. Zentai claims that the Military Division of the Budapest Metropolitan Court is, by virtue of its nature, composition, procedures and special jurisdiction with respect to war crimes, a special court that is `only occasionally' or `under exceptional circumstances' authorised to try persons accused of war crimes, within the meaning of Article 3(1)(f)(ii).
>
> 76. Zentai's representations say that the Military Division exercises a 'special jurisdiction' when hearing war crime offences because its jurisdiction extends to civilians on the basis of past military service, and in this regard its jurisdiction is exercised `only occasionally' or 'under exceptional circumstances'. In particular Zentai's representations say he should be regarded now as an Australian civilian for the purposes of any contemporary trial by a military tribunal, and that the war crimes jurisdiction of the Military Division applies only exceptionally and occasionally to someone like Zentai (now a non-Hungarian civilian) on the basis of his past Hungarian military service.
>
> 77. In particular, Zentai says:
>
> - In determining whether the specific offence of war crimes is one triable by a court that is *only occasionally* or under exceptional circumstances authorised to try persons accused of the offence for which extradition is sought the court's specialised jurisdiction, the frequency with which it has required to adjudicate on war crimes, its composition and constitution, and its procedures are relevant.
> - While the Military Division may have a general jurisdiction over

members of the military forces in relation to matters of military discipline and criminal offences committed by such persons to the extent it has a separate war crimes jurisdiction over civilian persons it should be regarded as a specialised court established to try people with a special legal status for a particular category of offences.

- The nature of war crimes jurisdiction is such that the authority of the military tribunal to try persons *accused of the offence* for which extradition is sought is one that is only capable of being exercised, in textual terms, under exceptional circumstances.

78. Zentai's representations states that the following considerations are relevant:
    - Whether the military judges are autonomous of their superiors in their judicial capacity (notwithstanding that they may remain subject to hierarchical authority in all but the administration of justice)
    - Whether the military judges have appropriate training or qualifications in law or are sufficiently trained and competent to deal with serious matters of complex law such as war crimes that only occasionally come within its jurisdiction
    - Whether the Military Division uses exceptional procedures in conducting trials of war crimes, especially if its procedures do not comply with normal standards of justice and may violate the guarantees of equality of arms and of fair trial prescribed in relevant international instruments
    - The extent that the Military Division is 'specially comprised' because it is presided over by a military judge, and may be subordinate to a higher military authority and possibly lacks the relevant competency to hear 'complex' war crime offences given its `occasional' jurisdiction.
    - Hungary's unilateral claim that the Military Division is not a special tribunal for the purposes of the Treaty should not be taken to represent Australia's view of the matter nor the true meaning of Article 3(1)(f) and wider policy considerations, including that the parties must have intended that any tribunal hearing charges against persons extradited from Australia to operate consistently with *normal* judicial procedures and international law standards.

Hungary's response

79. Hungary has provided the following information:
    - Military Panels were established in 1992 as permanent panels of Hungary's county courts with jurisdiction to try military criminal offences committed by members of the armed forces. (Military Panels replaced the independent military courts which operated as part of the Hungarian Defence Force.)
    - The county court in Budapest is the Budapest Metropolitan Court and its Military Panel was established as at 1 January 1992.
    - Appeals from the military panels of the county courts are heard by the Military Panel of the Budapest Court of Appeal which was established on 1 July 2003.
    - The jurisdiction of Military Panels is not confined to war crimes. They adjudicate criminal cases identified by Chapter XXII of Act XIX of 1998 (Hungarian Criminal Procedure Code).
    - The Military Panel's jurisdiction to try Zentai for war crimes is established by the fact that he was a soldier at the time when he allegedly committed the offence on 8 November 1944. It is irrelevant

that he is no longer a serving member of the Hungarian armed forces or that he has acquired Australian citizenship and left Hungary 60 years ago. (According to Hungarian law, Zentai is still a Hungarian citizen - see paragraphs 104-110 below).

- The Military Panel may proceed against civilians where at least one defendant is subject to military proceedings because they are a soldier and the close connection between the facts does not permit separate proceedings.
- The Military Panels apply the general rules of the Hungarian Criminal Procedure Code which fully comply with all the requirements originating from the international commitments of Hungary, including the ICCPR and ECHR.
- The Military Panel trial court comprises a single military judge or in cases involving an offence punishable by a period of imprisonment greater than 8 years, a military judge and two military associate judges.
- Military judges are members of the county courts and Budapest Court of Appeal. They are legally qualified (university law degree and bar exam), professional officers of the Hungarian Home Defence Forces and are appointed and relieved from duty by the President of Hungary. The Judges are independent and shall decide according to their best conviction under the law and may not be influenced or instructed in relation to their adjudicative action.
- Decisions of the Military Panels can be appealed to the Budapest Court of Appeal, and the appeal can be subject to review.

Departmental comment

80. Article 3(1)(f)(ii) is concerned with the authorisation of the court or tribunal to try persons accused of the relevant offence rather than the frequency of the actual exercise by the tribunal of that authorisation or jurisdiction. In the case of Zentai proceedings upon any surrender would be progressed in (sic) Military Panel of the Budapest Metropolitan Court.

81. The Military Panels (including Military Panel of the Budapest Metropolitan Court) were established as at 1 January 1992 and have been vested since that time with authorisation to adjudicate criminal cases identified in the Hungarian Criminal Procedure Code, including war crimes offences allegedly committed by persons who are soldiers at the time of the alleged conduct.

82. In circumstances where this authorisation, or jurisdiction, has existed and continued since 1992 the Department considers that it cannot be said that the Military Panel's authorisation is only *occasional*.

83. Hungary's response confirms that:

- The Military Panel of the Metropolitan Court is a regularly constituted and permanent court within the Hungarian court system.
- The Military Panel of the Metropolitan Court operates consistently with *normal* judicial procedures in that it complies with the Hungarian Criminal Procedure Code and is subject to appeal as other courts exercising criminal jurisdiction in Hungary.
- The Military Panel does not apply *special* or *exceptional procedures* by virtue of it being a military parcel with jurisdiction to try Zentai for a war crimes offence.

- The Hungarian Criminal Procedure Code applied by the Military Panel of the Metropolitan Court is consistent with the international law standards set out in the ICCPR and ECHR.
- The Military Panel is not authorised to proceed according to exceptional procedures that do not meet internationally accepted standards.
- The Military judges are legally qualified professional officers and are autonomous of their superiors in a judicial capacity. Their impartiality and integrity is not questioned.

84. Advice from the Office of International Law dated 5 November 2009 indicates that there is no available information to suggest that the Military Division of the Metropolitan Court is not capable of providing Zentai with a fair trial in accordance with the international fair trial standards of protection set out in Article 6 of ECHR and Article 14 of ICCPR. An analysis of fair trial considerations, including Zentai's representations regarding the capacity of Hungary to afford him a fair trial is at paragraphs 189-214 and 287-295 below.

85. The purpose of Article (3)(l)(f)(ii) is to ensure that the person will be tried in accordance with normal judicial procedures and international law standards rather than applying *exceptional procedures* which do not meet internationally accepted standards.

86. In light of the above, the Department considers that the Military Panel is not a court or tribunal which falls within the description of Article 3(1)(f)(ii) either by reason of it nature, (sic) composition, procedures or by reason of it exercising `special jurisdiction' in relation to determining war crime offences.

87. You may therefore be satisfied that the mandatory ground for refusal set out in Article 3(1)(f) is not made out in this case.

310 Mr Zentai contends that Australia cannot grant the Hungarian Request for his surrender on the ground that under Art 3 para 1(f) of the Treaty, on being extradited to the requesting State, he would be liable to be tried or sentenced in that State by a court or tribunal:

[(i) that has been specially established for the purpose of trying the person's case]; or

(ii) that is only occasionally, or *under exceptional circumstances*, authorised to try persons accused of the offence for which extradition is sought.

311 The Treaty rules out extradition if the person who is being tried in a court or tribunal that is only occasionally or under exceptional circumstances, authorised to try the question. Mr Zentai does not press the ground that the Military Tribunal is only 'occasionally' authorised.

312 Mr Zentai submits that Art 3 para (f) of the Treaty should be primarily construed having regard to the plain meaning of its words but also having regard to the purpose to which the provision can be seen to be directed. Relevantly, 'exceptional' in its ordinary sense implies something that is a significant departure from the normal or usual, something that is not often encountered. Read purposively, Mr Zentai submits that the provision may be seen, first, as intended to exclude from the operation of the Act, extradition for trial before tribunals that in some way represent a departure from the normal curial system or using procedures that are not characteristic of the normal judicial process. Secondly, the provision may be read sensibly, he argues, as preventing extradition for trial before a specially constituted tribunal that only occasionally is empowered to hear matters with respect to the kinds of offence for which extradition is requested. The provision exhibits an international concern that special military tribunals are prone to adopt exceptional evidentiary procedures that are specially adapted to a command and disciplinary regime (see the Report of the Working Group on Arbitrary Detention, UN Doc E/SCN.41996/40, at 26).

313 Mr Zentai argues that the existence of international concern about special military tribunals is evidenced by the rejection and condemnation of the US Military commissions set up to try detainees at Guantanamo Bay in Cuba. While the Hungarian Military Division is not directly comparable to those commissions, such defects as the inability to confront one's accusers, the resort to hearsay evidence when the makers of original statements are not available to give evidence, coerced confessions and evidence of people who might be accomplices and with a strong motive to give false evidence were a prominent factor in criticisms of the special United States Executive Military Commissions. The US Supreme Court found those Commissions to be in breach of relevant international law principles. The Supreme Court said in *Hamden v Rumsfeld* 548 US 557 (2006) that the right of an accused to 'be present for his trial and privy to the evidence against him, absent disruptive conduct or consent' is 'indisputably part of customary international law'.

314 Mr Zentai argues that although the Military Panel is part of the Hungarian Municipal Court system, it falls within the ambit of Art 3 para 1(f) of the Treaty, if its procedures in hearing war crime prosecutions could permit it to dispense with safeguards that are required of normal municipal courts. Equally, if jurisdiction over war crimes is so infrequently invoked that it would be inappropriate to try the case before a normally constituted military court. Mr Zentai argues that Hungary has not provided to the Minister any precise

information regarding the statistical frequency with which the Military Panel has conducted proceedings with respect to war crimes. It follows that the Minister is therefore unable to make relevant findings concerning this objection.

315 Particular reliance is placed on the unusual circumstance that the war crime in question is alleged to have occurred 65 years ago. In those circumstances, Hungary has failed to provide any assurance to the Minister that in the absence of any witnesses able to give oral testimony confirming statements made for the purposes of the proceedings of the People's Court in 1946-1947, the Military Panel will not adopt exceptional procedures not complying with relevant international law standards and not ordinarily used in normal judicial proceedings. In other words, the procedural possibility of those courses being taken has not been excluded.

316 In the absence of such information, Mr Zentai argues that the Minister was unable to decide whether the nature of the Military Panel involved such a departure from traditional judicial proceedings as to be excluded from the operation of the Act by Art 3 para 1(f) of the Treaty. Unless the possibility of adapted procedures is excluded by the Hungarian authorities, Australia should not relax the prohibition against extradition expressed in that provision.

317 Again, the Commonwealth stresses that the appropriate question is whether the Minister was satisfied that the Court was under exceptional circumstances authorised in the sense indicated in the Article. The Commonwealth argues that the material before the Minister in paras 74-87 of Attachment C shows that the court in which Mr Zentai will be tried is an ordinary court established in 1992 with jurisdiction to try military criminal offences and that its jurisdiction is not confined to war crimes. Its jurisdiction for present purposes is established by Mr Zentai having been a member of the armed forces at the time of the alleged offence. Moreover, there is nothing to suggest, the Commonwealth argues, that the court when so composed will follow any exceptional procedures.

318 The Commonwealth stresses that on the material before the Minister, he could reasonably be satisfied within the terms of s 22(3)(e). That is the only question.

319 The parties, again, are at odds over the correct approach. For Mr Zentai, it is argued that the response of the Commonwealth does not deal with the issue. To say that the fact there is nothing to suggest that the Military Panel will adopt exceptional procedures is not capable of producing the 'satisfaction' required of the Minister on this point. It is argued that Hungary has provided no information to the Minister to indicate how the tribunal can confront the problem of non-available witnesses without adopting the non-standard procedures.

320 I do not consider there is merit in this ground. I have set out at some length the Department's reasoning in Attachment C. Of significance are the factors that Military Panels were established in 1992 as permanent panels of Hungary's county courts with jurisdiction to try military criminal offences committed by members of the armed forces. (Military Panels replaced the independent military courts which operated as part of the Hungarian Defence Force). The jurisdiction of Military Panels is not confined to war crimes. They adjudicate criminal cases identified by Ch XXII of Act XIX of 1998 (Hungarian Criminal Procedure Code). The Military Panels apply the general rules of the Hungarian Criminal Procedure Code which fully comply with all the requirements originating from the international commitments of Hungary, including the ICCPR and ECHR. The Military Panel trial court comprises a single military judge or in cases involving an offence punishable by a period of imprisonment greater than 8 years, a military judge and two military associate judges. Military judges are members of the county courts and Budapest Court of Appeal. They are legally qualified (university law degree and bar exam), professional officers of the Hungarian Home Defence Forces and are appointed and relieved from duty by the President of Hungary. The judges are independent and shall decide according to their best conviction under the law and may not be influenced or instructed in relation to their adjudicative action. Decisions of the Military Panels can be appealed to the Budapest Court of Appeal, and the appeal can be subject to review.

321 In my view there was a proper basis on which the Minister might reasonably be satisfied that the conditions mandating surrender refusal by Art 3(1)(f)(ii) were not enlivened.

Ground 9 – article 3 para 2(f) – failure to consider properly whether it would be *oppressive and incompatible with humanitarian considerations* to surrender Mr Zentai for extradition given his advanced age, ill-health and other factors including the severity of the sentence in the circumstances

322 A substantial portion of Attachment C dealt with this issue. In particular, the analysis appears in paras 141-188 inclusive. Paragraphs 165, 169, 173 and 179 record acknowledgements by the Department of those features of Mr Zentai's unique circumstances on which reliance is placed (although they are not so described by the Department). Senior counsel for the Commonwealth did accept, rightly, that the circumstances were 'quite properly described as novel'.

323 The Department did not suggest that the totality of those circumstances was such as should cause the Minister to exercise a discretion against surrender.

324 In fact it recommended to the contrary. The advice was as follows:

> Zentai's age, health and other personal circumstances (humanitarian considerations)
>
> *Zentai's representations*
>
> 141. Zentai is 88 years old. His representations claim he is in poor health, and that while he is capable of maintaining a quiet and manageable standard of existence in Australia where he can access adequate medical services and family support, his health would be detrimentally affected by the extradition process, in particular:
> - the trauma of travel to Hungary consequent on extradition:
> - incarceration awaiting investigation; and
> - the strain of a trial in a foreign court.
>
> 142. Representations made by Ernie Steiner claim 'sending Charles Zentai to imprisonment and to face the Military Court in Hungary would be a virtual death sentence ... the stress and mental anguish to an 87 year old man in this condition would be a terminal act of inhumanity'.
>
> 143. Steiner's representations provide a detailed history of the ailments and conditions Zentai is said to suffer from and his medication (**Attachment G** pages 10 - 14, Volume 1). The table below summarises the information contained in Steiner's representations some of which is supported by the medical reports to the representations.

Medical condition	**Medication**
Blood pressure and peripheral oedema	Coversyl arginine plus (perindopril, indapamide hemihydrate) and Dithiazide
Transient Ischaemic Attacks (transient & localised reduction of blood supply to the	

myocardium – often associated with coronary heart disease)	
Peripheral neuropathy	Vitamin B
Degeneration of small blood vessels in brain	Soluble Aspirin
Paroxysmal Atrial fibrillation (palpitations)	Sotalol hydrochloride
Angina	Nitrolingual-glyceril trinitrate
Arthritic degeneration of the spine, shoulder and Hands	Panadol forte
Meniere's disease	
Benign lung tumours	
Sleeplessness	Nitrazepam
Severe Depression	Amitriptyline
Stress	
Reflux	Acimax
Migraine	Sandomigrani
Prostate gland disorder	Prazosin

144. In support of Zentai's claims the following medical reports are provided (**Attachment J**):
- Reports dated 4 May 2009 and 8 May 2009 from Dr Latchem (Cardiologist)
- Report dated 11 May 2005 from Dr Ian Guy (General Practitioner)
- Reports dated 24 January 2005 and 26 July 2005 from Dr James S Robinson (Cardiologist)
- Report dated 8 March 2005 from Dr Keith Grainger (Neurologist)

145. An analysis of the reports appears below. The reports are to the effect that Zentai is suffering from a number of medical complaints of which the primary one appears to be `atrial fibrillation', which is described as an abnormality of the heart rhythm where the hear (sic-heart) beats in an irregular fashion.

Reports dated 4 May 2009 and 8 Way 2009 from Dr Latchem (cardiologist)

146. In Dr Latchem's opinion, Zentai suffers from chronic paroxysmal atrial fibrillation. The opinion expressed in his report is that:
- It is `*likely to get worse with time and is likely to cause Mr Zentai ... recurrent symptoms ...[and] also places him at risk of complications of stroke and heart failure*'..
- There is no evidence that Zentai's chest pains are ischaemic in origin
- While incarceration might exacerbate Zentai's condition there is '*no conclusive evidence that this would be the case*'
- Although Zentai is likely to require ongoing treatment, including possibly admission to hospital to settle ongoing rhythm disturbance, it is likely that he would he able to access such treatment if a tertiary hospital was within `*close proximity*'

Report dated 11 May 2005 from Dr Ian Guy (General Practitioner)

147. Dr Ian Guy is said to have been Zentai's General Practitioner (GP) for 30 years. In his report dated 11 May 2005, Dr Guy states that Zentai has ongoing problems of:
- Peripheral neuropathy - causing a loss of sensation in Zentai's lower legs, absent knee and ankle jerks and reduced muscle strength. In his opinion the cause of the peripheral neurotherapy is unknown
- Ischaemic heart disease with intermittent episode of atrial fibrillation
- Oesophageal reflux
- Abnormality of the voice

148. Dr Guy describes the condition of artrial fibrillation as 'an abnormality of the heart rhythm which causes the heart to go fast and irregular and has the capacity for causing chest pain related to his ischaemic heart disease, shortness of breath, low blood pressure and which confers on him a slight increase of stroke. These episodes when they occur are very disabling if prolonged'.

149. He further states in respect of the artrial fibrillation: `I would have to express my concern that the stress of all the current legal proceedings and uncertainties with respect to possible extradition are likely to adversely affect this condition and should if possible be avoided.'

Reports dated 24 January 2005 and 26 July 2005 from Dr James S Robinson (Cardiologist)

150. Dr Robinson was Zentai's treating cardiologist from 1972 to October 2004. The earlier report of Dr Robinson provides a detailed history of his treatment of Zentai during this period. Dr Robinson began treating Zentai following his admission to hospital for an episode of acute myocardial ischaemia in 1972. Following this event, until 1988, no further significant events occurred. In May 1988, Zentai began complaining of heart palpitations which Dr Robinson concluded were `due to isolated but frequent atrial premature beats there being no evidence of obstructive coronary artery disease'. Zentai continued to be monitored by Dr Robinson in relation to symptoms of palpitations, which suspected in January 1994 was due to paroxymal atrial fibrillation. In June 1995, Zentai was admitted to Fremantle hospital with rapid atrial fibrillation and Dr Robinson continued to treat him intermittently for this condition until 19 October 2004. On this date, Dr Robinson reports that Zentai reported being well, and remained free of angina, palpitation, presyncope and migraine.

151. In his report of 26 July 2005, Dr Robinson states:
"there is now significant evidence to prove that prolonged emotional stress is harmful to one's cardiovascular condition. Therefore the current emotional stress that this elderly man has been subjected to must put him at risk or a cardiac event."

152. Dr Robinson states that he would be prepared to swear that `the ongoing subjection of the elderly Mr Zentai to extreme emotional stress is harmful to his health and should be discontinued'.

Report dated 8 March 2005 from Dr Keith Grainger (Neurologist)

153. Dr Keith Grainger is Zentai’s treating neurologist and reports that Zentai has

suffered symptoms of numbness of his right side, vertigo associated with Meniere's, blurred vision, progressive hearing reduction in his right ear and severe migraine headaches.

154. He arranged for Zentai to have an MRI scan and magnetic resonance angiogram which in his opinion did not show any abnormality which suggests that Zentai's sensory symptoms and hearing reduction are migraine related rather then as a result of transient ischaemic attacks or strokes.

Department arranged medical examination - report dated 8 October 2009 from Dr Geoffrey Lane

155. In order to assist in a consideration of Zentai's claims and the impact of any surrender upon his health, the Department arranged for Zentai to be examined in Perth by Dr Geoffrey Lane, a cardiologist whose specialties include atrial fibrillation. Dr Lane examined Zentai on 29 September 2009 and again on 8 October 2009. The purpose of the second appointment was to follow up on the results of a 7 day heart monitor Dr Lane arranged for Zentai to wear.

156. A copy of the Department's letter of instruction to Dr Lane, and Dr Lane's report dated 8 October 2009 are at **Attachment J**.

157. In preparing his report, Dr Lane obtained a detailed history from Zentai, reviewed the notes of Dr Latchem and discussed in detail Zentai`s case with Dr Ian Guy (Zentai's general practitioner). The opinion expressed in Dr Lane's report is that:
- The diagnosis of symptomatic paroxysmal atrial fibrillation is confirmed
- There is no evidence that Zentai suffers from cardiac failure or significant coronary disease
- Zentai is fit to travel to Hungary on a normal commercial flight without medical assistance
- To minimise the risks of deep vein thrombosis and pulmonary embolisation associated with his age and history of cardiac problems Zentai would be encouraged to ambulate and it is recommended that Zentai's flying time be limited to a maximum continuous period of 12 hours
- He is unable to predict what effect, if any, pre-trial incarceration or the stress of prosecution might have on Zentai's health but that given Zentai's age and "significant but not life threatening medical problems" this could be possible.

Hungary's response

158. In response to Zentai's representations about his medical conditions and medical treatment requirements, Hungary has advised the following:
- if required, Hungary can provide a cardiologist for Zentai while travelling from Australia to Hungary.
- Hungary is not in a position to provide a travel route until details of the surrender are known, however, that it may be possible to make travel arrangements involving routes limiting continuous flying to 12 hour periods or less although this would require obtaining approvals from transit countries.
- Hungary has medical facilities to deal with Zentai's medical

complaints.

- If Zentai is held in custody while awaiting trial, Zentai will have access to specialist medical care in the Central Hospital of the Prison Services with the cooperation of the appropriate specialist institutions. Furthermore, if Zentai should require permanent medical attention, he can be placed in the Chronic Illness Post Treatment Rehabilitation Unit, in the city of Nagyfa.
- In accordance with Hungarian criminal procedure Zentai is entitled to request to be released on bail while awaiting trial. In determining whether to release a person on pre-trial bail, Hungarian courts consider matters such as the criminal offence and the personal circumstances of the defendant and risk of flight.

Departmental comment

159. Zentai submits his extradition should be refused on the basis that he is 88 years old, accesses family support and suffers from a number of medical conditions which would be detrimentally affected by the extradition process (such process said to involve the trauma of travel to Hungary, incarceration while awaiting trial and the strain of a trial in a foreign court).

160. The Department recognises that age is a relevant factor. The Department also accepts that Zentai suffers from a number of medical complaints requiring ongoing care and attention and that his chief medical condition is *symptomatic paroxymal atrial fibrillation* resulting in heart palpitations and chest pain. The Department notes, however, comments made by Dr Lane that while this condition is serious it is not life threatening. The Department also notes that other than the assertion that Zentai accesses or needs the assistance and support of his family no further information in that regard is provided.

161. While it is not possible to specify the precise or likely impact of extradition upon Zentai's health with any certainty, a consideration of Zentai's claims against the available medical evidence is set out below.

Fitness to travel

162. As an initial matter, the Department considers that the available medical evidence supports the view that Zentai is fit to travel to Hungary. In particular, the medical report of Dr Lane records his opinion that Zentai is fit to travel on a commercial flight to Hungary without the assistance of medically trained escorts. Notwithstanding, the Department notes that Hungary has indicated that it can, if required, arrange for a cardiologist to travel with Zentai from Australia to Hungary.

Trauma of travel to Hungary

163. While it appears that Zentai's risk of developing complications as a result of air travel, namely deep vein thrombosis, is higher given his age and heart condition the medical reports do not appear to be (sic) identify travel as a particular risk to deterioration of his heart condition (which Dr Latchem has reported is likely to worsen with time). According to Dr Lane, the risk of Zentai developing deep vein thrombosis can be managed by Zentai being encouraged to move about during the flight and limit his continuous flying to 12 hour stretches. Again, Hungary has indicated that it may be possible to arrange a travel route that limits continuous flying to 12 hour periods.

164. It is not uncommon for persons who are the subject of a foreign extradition request to have ties to the Australian community. It is not surprising that Zentai has achieved a level of connectedness and integration during his approximate 60 years in Australia with his family. Representations on behalf of Zentai assert that in the last 59 years he has been a highly respected member of the Western Australian community, including being an active member of his Catholic parish and voluntary worker for the St Vincent de Paul Society along with other voluntary community service involvement.

165. The Department accepts that the extradition of Zentai would have an emotional impact upon Zentai and on his family members and other persons close to him. However, the Department considers that this emotional impact or trauma of travel on Zentai is not so significant that extradition would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment so as to warrant the exercise of your discretion to refuse surrender on this ground.

Incarceration while awaiting trial

166. Hungary has advised that Zentai would be eligible to apply for bail. In the event Zentai was not granted hail, the Department recognises that it is possible that incarceration while awaiting trial in Hungary may have an impact upon Zentai's health.

167. Dr Latchem has indicated that while incarceration might exacerbate Zentai's condition there is `no conclusive evidence that this would be the case'. Dr Latchem considers that Zentai's condition is likely to worsen with time and places him at risk of complications of stroke and heart failure. His report does not address whether any such worsening is likely to occur at a faster rate than otherwise if Zentai were surrendered. Dr Latchem considered it likely that Zentai would be able to access required ongoing treatment (including possibly admission to hospital to settle ongoing rhythm disturbance) if a tertiary hospital was within close proximity. In this regard, Hungary has advised that Zentai will have access to specialist medical care in the Central Hospital of the Prison Services with the cooperation of the appropriate specialist institutions.

168. Dr Lane reported that he was unable to predict what effect, if any, pre-trial incarceration or the stress of prosecution might have on Zentai's health but that given Zentai's age and 'significant but not life threatening medical problems' this could be possible. Dr Lane further stated that is (sic-it) was impossible to predict to what extent this could occur.

169. The Department accepts that Zentai may have more limited access to the support of family members assuming none is prepared to travel to Hungary to assist him. However, the Department considers that this emotional impact of incarceration while awaiting trial on Zentai is not so significant that extradition would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment so as to warrant the exercise of your discretion to refuse surrender on this ground.

The strain of trial in a foreign court

170. The Department accepts that it is possible that prosecution in a foreign court

may give rise to emotional stress and associated physical concerns for Zentai.

171. Dr Lane reported that he was unable to predict what effect, if any, the stress of prosecution might have on Zentai's health but that given Zentai's age medical problems this could be possible. Dr Lane further stated that is (sic-it) was impossible to predict to what extent this could occur.

172. In their medical reports, Dr Robinson and Dr Guy both note that emotional stress is harmful for patients with atrial fibrillation. The Department notes that Dr Guy's report dated 11 May 2005, and Dr Robinson's first report dated 24 January 2005, preceded the commencement of extradition proceedings in Australia. The section 16, formally receiving Hungary's extradition request was signed on 8 July 2005; this was also the date that Zentai was arrested under a section 12 arrest warrant. Accordingly, Dr Robinson's second report dated 26 July 2005 was written during the very early stages of extradition proceedings.

173. Again, the Department notes Zentai's access to family support will be more limited assuming none travel to Hungary. However, the Department considers that emotional stress and associated physical concerns of trial in a foreign court on Zentai is not so significant that extradition would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment so as to warrant the exercise of your discretion to refuse surrender on this ground.

Hungary's capability of providing appropriate medical care and treatment

174. In the event following any surrender Zentai is incarcerated while awaiting proceedings, Hungary has advised (see paragraph 167 above) that Zentai will have access to specialist medical care in the Central Hospital of the Prison Services with the cooperation of the appropriate specialist institutions. Furthermore, Hungary has advised that if Zentai should require permanent medical attention he can be placed in the Chronic Illness Post-Treatment Rehabilitation Unit, in the city of Nagyfa.

175. It is not possible to conclusively evaluate the adequacy of the medical care that would be available to Zentai in Hungary should he require medical care and treatment. However, Hungary is a party to the International Covenant on Economic, Social and Cultural Rights, which obliges Hungary to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and to take steps necessary for the creation of conditions which would assure to all medical service and medical attention in the event of sickness (Article 12.).

176. We are not aware of any information to suggest that if incarcerated in Hungary Zentai would not receive appropriate and adequate medical care. There is nothing to suggest that there is a real risk that Hungarian medical care and treatment will be so inadequate or inappropriate that extradition would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment so as to warrant the exercise of your discretion to refuse surrender on this ground.

Consideration of impact of surrender on health

177. As noted above, Zentai claims that individually (and collectively) the factors

provide compelling reasons for the exercise of your discretion to refuse surrender,

178. Taking into account the nature of the offence and Hungary's interest (see paragraphs 128-132 above), the Department does not consider that the potential impact of surrender upon Zentai's health is such as to warrant the exercise of your discretion to refuse surrender on grounds that it would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.

179. The standards denoted by these concepts are high. The medical evidence is that Zentai suffers from a condition that is expected to deteriorate. The potential impact of surrender upon Zentai's condition and the anguish and stress resulting from separation from family must be balanced against the seriousness of the offence that he is alleged to have committed and the interests of Hungary, and the international community, in having a suspected World War II criminal tried before Hungarian courts.

180. In the Department's view, it is open to you on the basis of the medical evidence and other material put forward on behalf of Zentai in relation to this ground, to consider that these matters are not so significant that extradition would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment so as to warrant the exercise of your discretion to refuse surrender on this ground.

Zentai's ability to properly participate in any, trial or appeal proceedings in Hungary by reason of his health and age

181. Further representations made on behalf of Zentai by Steiner claim that Zentai is cognitively impaired and that by reason of his cognitive impairment his ability to defend himself in court would be compromised. The argument appears to be that Zentai's present health impairs his ability to properly and physically participate in any proceedings in Hungary, including if necessary, the ability to initiate appeals to Hungarian superior courts or the European Court of Human Rights, if he were ever to be found guilty of the offence. Therefore; it is claimed on behalf of Zentai, regarding fair trial, that there are questions about his ability to properly defend himself.

182. To support this claim, Steiner has provided a clinical and forensic psychologist report dated 6 February 2006 from Ms Leonie Coxon. Dr Coxon conducted neuropsychometric testing on Mr Zentai on 26 August 2005, 31 August 2005 and 7 September 2005. The results of the testing are in Dr Coxon's report, and in her opinion:

- Zentai suffers from a number of cognitive impairments which would `render Zentai incapacitated in situations of a complex nature, despite his high average to superior intelligence'
- 'Mr Zentai's capacity to give evidence in court, to understand the effects of evidence, or follow the court process, I think would be significantly compromised due to his cognitive impairments. The cognitive deficits which would hinder him most significantly are those of executive functioning; verbal new learning; and the capacity to recall information about people places and sequences of events.'

Hungary s response

183. Hungary has indicated that the Hungarian Criminal Procedure Code which applies in the Budapest Metropolitan Court complies with the protections and guarantees set out in the ICCPR and ECHR. Relevantly and consistent with the principle of `equality of arms' the prosecution and defence are afforded equal rights and duties in legal proceedings, and both parties have equal chance and opportunity to form opinion and takes the stand on both factual and legal questions during the criminal procedures.

184. The right to a fair trial is interlinked with a right to a defence and the requirement that defence be given proper time and means for the preparation. This is discussed further below in paragraphs 189-214 and 287-295.

185. More specifically, in relation to assessing fitness for trial Hungary advises:
- The defendant is entitled to the presumption of being innocent and is entitled to legal counsel. The presumption of innocence, as well as the right to defence are provided for the defendant during the whole procedure.
- In criminal proceedings, the proceeding authority appoints a forensic medical expert to assess the defendant's medical condition and to ascertain whether such condition prevents his participation in proceedings.
- The investigation and court proceedings are suspended if any serious long-term disease prevents the defendant from participating in the proceedings.
- The investigation and proceedings are re-opened if circumstances change and the reason for the suspension of the proceedings no longer exists.
- In some circumstances, an order can be made which restricts the person from leaving their place of residence.

Departmental comment

186. Allegations that Zentai's health, age and mental state will affect his ability to defend himself at trial **would be a matter for the Hungarian court to address** in accordance with its legal processes and procedures. In this regard, the Department notes that the applicable procedures contain safeguards for ensuring the right to a fair trial (see further paragraph 198 below). According to Hungary's response, if Zentai were extradited, a forensic medical expert would be appointed to assess Zentai's fitness to stand trial. If the medical expert found that Zentai lacked the capacity to stand trial, the criminal investigation and prosecution would be suspended until such time, if any, Zentai was fit to stand trial.

187. Where relevant procedural and substantive safeguards exist, the Department considers that it is for the courts of the requesting state to determine issues such as the fitness and capacity of a person at any particular point in time to stand trial. **Issues of fitness for trial are questions of fact for determination by the trial court** of the requesting country, not for the executive or for doctors of the requested country (*R (Warren) v Home Secretary* [2003] EWHC 1177).

188. As such, **the Department does not consider Zentai 's claims that he may suffer from a cognitive impairment, which may or may not impair his ability to properly defend himself at trial, are matters that should weigh heavily on your discretion because they are matters for Hungary which**

> **in any event has processes, which do not, appear inappropriate, that address the issue**. The Department does not consider the potential effect of this claim to be so significant that extradition would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment and does not consider this claim warrants the exercise of your discretion to refuse surrender on this ground. (emphasis added)

325 Senior counsel for Mr Zentai in the course of his address in relation to this issue twice made the point that in all the circumstances of Mr Zentai's ill-health and advanced age (he will be 89 by October this year), the extradition 'could be a death knell for him'.

326 Senior counsel for the Commonwealth, who provided very considerable assistance in the course of argument, did not raise objection to or submit that an expression of that nature was unfounded, fanciful or farfetched.

327 These issues are very real considerations. While I would not take lack of contradiction to be an acceptance of the submission, it would also be difficult in the circumstances for senior counsel for the Commonwealth to deny that Mr Zentai's extradition could have the outcome suggested.

328 It requires only normal experience of life and awareness of the frailty of those who are elderly and quite unwell to accept that this is not just a remote possibility. Yet it was one very substantially discounted by the Department in its analysis. Amongst other points made, the Department suggested that these considerations could be taken into account by Hungary.

329 The Department made the point that the health and age factors should be balanced against the seriousness of the alleged offence but did not suggest that the Minister should, in his very broad discretion, consider the weakness of the evidence which might support the suspicion as to the offence.

330 Clearly, the nature of the offence and Hungary's interest in the matter and the fact that Australia does not want to protect or be seen to protect war criminals from prosecution are very important considerations but when they are considered, they must also be weighed against the totality of the extraordinary factors in this situation.

331 Although the Department was appropriately cautious to avoid a conclusion that there could be said to be no real medical risks, it approached this topic as it did others. Rather than

weighing the totality of the factors, the Department has considered whether or not Mr Zentai has positively established each individual concern. As a result, in a number of instances the Department has reported that it has no knowledge of problems with, for example, health care during incarceration.

332 Mr Zentai contends that the Minister erred in law and committed jurisdictional error by failing to take into account relevant considerations when considering whether in accordance with Art 3 para 2(f) it would be oppressive and incompatible with humanitarian considerations to surrender him for extradition given his advanced age and ill-health. In particular, the Minister, it is said, failed to give real and genuine consideration to whether, given the applicants age and medical condition and Hungary's concession that he is only wanted in the first instance for investigation, there are more appropriate alternatives (which would give full force and effect to 'humanitarian considerations') to surrendering him for extradition such as permitting the Hungarian authorities to conduct their inquiries in Australia or, if requested by the Hungarian Government, asking the Australian prosecuting authorities to consider whether to charge Mr Zentai under the *War Crimes Act*.

333 It is argued that the Minister further erred in giving disproportionally greater weight to the seriousness of the alleged offence and the interest of the international community in having a suspected World War II criminal tried in Hungary over the stress and seriously adverse health impacts upon Mr Zentai resulting from his extradition and the possibly lengthy incarceration in a foreign country.

334 The analysis by the Department in Attachment C of the concepts of 'unjust' and 'oppressive' and 'incompatible with humanitarian considerations' and 'too severe a punishment' while erudite and extensive, may tend to confuse (and mislead) as to just what the Minister was to understand by the conclusion that the terms have 'a broad connotation' rephrased as 'the standards denoted by these concepts are high'. Mr Zentai says that vagueness of this nature appearing in the advice was likely to have misled the Minister to apply an unduly rigid standard of evaluation when making his determination.

335 It is also argued for Mr Zentai that the Department's observations on Mr Zentai's objection to extradition on this health and age ground is subjugated to the primacy accorded by the Department to extradition as 'virtually an imperative consideration', combined with an

undue pre-emptive concern to avoid questioning conditions in Hungary for reasons of comity. Mr Zentai argues that rather than balancing the factors relating to Treaty obligations against alternative procedures, including Australia's other obligations to Mr Zentai under the Treaty and at international law to itself investigate and, if warranted, prosecute alleged war criminals including Australian nationals resident in Australia, the balance in Attachment C is skewed overwhelmingly toward the seriousness of the alleged offence and 'the interests of Hungary and the international community' (presumably including Australia) in having a suspected World War II criminal extradited in response to Hungary's Request.

336 Mr Zentai argues that a truly proportionate calculation of the balancing process must include consideration of realistic and available alternatives. In that regard, no explanation has been given as to why the alternative of prosecution before an Australian court, with greatly reduced risk to Mr Zentai's health, is not compatible with the Treaty. In my view, it is this argument that is significant.

337 Mr Zentai argues that the refusal of the Australian Government to make further substantive inquiries about:

- Just how satisfactory medical services are in Hungarian prisons;
- How long it is likely to be before Hungarian military prosecution authorities complete investigation procedures;
- Whether there will be further delays in deciding whether to formally charge Mr Zentai; and
- Whether the non-availability of evidence during the passage of time will affect his defence,

amounts to another failure by the Minister to have regard to relevant factors that should be included in the Minister's balancing process of weighing Australia's international obligations against potential detriments to Mr Zentai. (I note that Art 7 does provide for this).

338 It is argued that some preliminary investigations should have been made independently by Australian diplomatic officers regarding these matters. Those investigations may well have revealed, it is said, that the assurances given by Hungary, in particular, as to the conditions in which Mr Zentai would be incarcerated should be accorded

little weight. Reliance was placed (without objection) on extradition of two persons from the United Kingdom to Hungary and publicity concerning both the conditions of their pre-trial incarceration, and the delay they experienced pending their prosecution. The information was relied upon not as evidence of the truth but to demonstrate that the information was in the public arena and should have alerted Australian authorities to make proper inquiries to satisfy themselves on those issues.

339 Once again, the argument advanced for Mr Zentai is that the entirety of the content of Attachment C by placing the requirement of comity paramount to all other issues, relies upon assertion from the Department that there is no evidence to support the complaints as distinct from positive evidence resulting from making inquiries, that the problems of which complaint is raised in the unusual circumstances of this case do not in fact exist.

340 Again, the Commonwealth responds that this is simply a merits challenge. The considerations that are or are not relevant to a decision-maker's task are to be identified primarily, perhaps entirely by reference to the statute under which the decision is to be made rather than to the particular facts of the case: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (at [73]-[74]), where McHugh, Gummow and Hayne JJ said (footnotes omitted):

> [73] It is, of course, essential to begin by considering the statutory scheme as a whole. To that extent the submission is right. On analysis, however, the asserted duty to make findings may be simply another way of expressing the well-known duty to take account of all relevant considerations. The **considerations that are, or are not, relevant to the [Tribunal's] task are to be identified primarily, perhaps even entirely, by reference to the Act rather than the particular facts of** the case that the [Tribunal] is called on to consider. In that regard it is important to recall, as Brennan J said in *Attorney-General (NSW) v Quin*:
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> > "The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison*: `**It is, emphatically, the province and duty of the judicial department to say what the law is.' The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power**. If, in so doing, the court avoids administrative injustice or error, so be it; **but the court has no jurisdiction simply to cure administrative injustice or error**. **The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone**."
>
> [74] This does not deny that considerations advanced by the parties can have some importance in deciding what is or is not a relevant consideration. It may be, for

> example, that a particular statute makes the matters which are advanced in the course of a process of decision-making relevant considerations for the decision-maker. What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with **whether the decision-maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-maker acts**. (emphasis added)

341 In order to invoke an error of law based upon a failure to take account of relevant considerations, it is necessary to identify matters the consideration of which is mandated by law: *Saville v Health Care Complaints Commission* [2006] NSWCA 298 (at [54]-[58]), where Handley JA, Tobias JA, Basten JA said:

> **Relevant and irrelevant considerations**
>
> 54 In a sense, the complaint that the Tribunal failed to take into account certain identified relevant considerations is little more than a complaint that it did not deal with certain matters in its reasons. Thus the first matter relied upon is described as "the absence of any need for an order precluding the plaintiff from solo general practice". (Other considerations were identified in similar terms.) This complaint is, however, misconceived. Given the conditions imposed on the registration of the practitioner, being the very subject matter of the challenge in this Court, it is clear that both the Committee and the Tribunal thought that there was such a need. To say that the Tribunal failed to take into account the absence of such a need is really to assert that the Tribunal was in error in thinking that there was such a need. However, put in those terms, the complaint is revealed as an attempt to challenge the merits of the decision made by the Tribunal. That is something which cannot be done in circumstances where it is a precondition to relief that error of law be demonstrated. An appropriate ground in relation to the review of a discretionary power may be identified as manifest unreasonableness, commonly referred to as Wednesbury unreasonableness, as discussed by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [123]- [126]. No reliance was placed on that principle in this case, and it would, in any event, have been doomed to fail.
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> 55 **To invoke error of law based upon a failure to take account of relevant considerations, it is necessary to identify matters, the consideration of which is mandated by law**: see generally *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at [22]- [23] (Gleeson CJ and McHugh J) and at [45] (Gaudron and Hayne JJ): see also at [102] (Kirby J), dissenting but not in relation to this principle.
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> …
>
> **Irrelevant considerations**
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> 57 Finally, the practitioner seeks to complain that the Tribunal took into account a number of irrelevant considerations. It is not necessary to identify each of the considerations in this category either. **Legal error is demonstrated only where a matter is taken into account which the law prohibits**: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J). Each of the matters identified was similar to that which said "there was a need for supervision of the plaintiff in his general medical practice". Whether, as a matter of evaluative judgment, there was such a need is a question of inference and fact, and not a

> question of law. If there was such a need, it was patently relevant. So much is demonstrated by the practitioner's own complaint that the absence of such a need was a relevant consideration in the sense of a mandatory consideration, albeit one said not to have been taken into account.
>
> 58 Most matters taken into account in judicial or quasi-judicial proceedings, and even in administrative decision-making, are permissible considerations. Some may be elevated to the status of mandatory considerations, so that to ignore them would demonstrate legal error, but one would rarely expect a specialist tribunal, especially when assisted by experienced counsel, to fail to take such matters into account. It will also be rare that such a tribunal, assisted by experienced counsel, will be misled into giving weight to matters which lie so far beyond the purpose of its functions as to be legally irrelevant. The practitioner has demonstrated no such error in the present case.

342 The principles in these binding authorities are clear.

343 The Commonwealth says that matters relevant to Art 3(2)(f) of the Treaty were put before the Minister in detail in Attachment C at paras 128-250. Matters of weight are for the Minister and do not give rise to reviewable error.

344 However, in my view the Commonwealth's response overlooks the fact that in the obligation to consider the humanitarian considerations, the Minister must give realistic, proper and genuine consideration to the merits rather than allow them to be overridden by a policy objective. This is not a question of weight but a question of obligation at law.

345 In the very unusual nature of this case, to in effect totally ignore the Art 2(a) option of declining surrender but accepting a request for prosecution of Mr Zentai within Australia, as expressly contemplated by the Treaty indicates that realistic, genuine and proper consideration to the merits of Art 3 para 2(f) was not given.

346 In my view, Mr Zentai has succeeded in showing that the Minister erred in law, and committed jurisdictional error, by failing to take into account relevant considerations when considering whether, in accordance with Art 3 para 2(f), it would be oppressive and incompatible with humanitarian considerations to surrender Mr Zentai for extradition, given his advanced age and his ill-health given that there were more appropriate alternatives under Art 2(a) (which would give full force and effect to 'humanitarian considerations') and to the Treaty than surrendering him for extradition to Hungary.

347 This ground is made out.

Ground 10 – misapprehension that Hungary was unaware of Mr Zentai's presence in Australia due to his name change from Steiner to Zentai

348 Mr Zentai complains that the Minister has also committed a jurisdictional error by taking into account an inaccurate and misleading impression created in Attachment C in paras 214 and 273-279 which read as follows:

> 214. There are also a number of Australian cases that are authority for the proposition that the `passage of time' argument is less likely to result in the refusal of extradition where the offence is very serious or where it was committed in an aggravated form. Many of the cases in which an argument of `passage of time' has been rejected are where the circumstances of the case involved a relatively serious offence, or circumstances where the delay was the fault of the fugitive. Both of these circumstances are relevant to assessing the affect (sic-effect) of delay in Zentai's circumstances. In particular, in the case *Re Gorman* [1963] NZLR 17 at 18, the accused had been living under an assumed name and his whereabouts was unknown to authorities. The court commented that for him to rely on the length of time which has elapsed would be to `claim a benefit from success in escape and concealment'. This counters claims made by Zentai that he has been living openly in Australia for the past 60 years and never sought to conceal his identity. **On the basis of *Re Gorman,* Zentai's claims should be given less weight on the basis that he also changed his name from Steiner to Zentai and Hungarian authorities have advised that they had no knowledge of Zentai's whereabouts until 2004**. This issue is further discussed at paragraphs 273-276, but for the purposes of Article 3(2)(f) you can be satisfied that when having regard to the other circumstances of the case, in particular the nature of the offence and conduct involved, the effect of the passage of time would not make extradition so oppressive or unjust as to warrant the exercise of your discretion to refuse surrender.
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> …
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> *Departmental comment*
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> 273. Hungary has advised that it had no knowledge of Zentai's location (or even if Zentai was still alive) until informed in December 2004 through the Simon Wiesenthal Centre's project. It is appropriate to assume the bona fides of the Hungarian investigation and extradition of Zentai and the Department considers that there is no information to suggest culpable or negligent delay or bad faith on behalf of Hungary, which would require evidence that Hungarian authorities knew of Zentai's whereabouts but nonetheless did nothing.
>
> 274. The Department also recognises the distinct roles and responsibilities of government agencies and offices and considers that knowledge held by an embassy or immigration arm of the Hungarian bureaucracy should not necessarily be imputed to a separate arm. It does not follow from the fact that **Hungarian immigration authorities processed Zentai's mother's Australian visa application in 1955** that Hungarian law enforcement authorities would have also been alerted.
>
> 275. Further, just because a person has lived under the false assumption that they are no longer wanted for prosecution is not reason enough to deny surrender. It should be noted that **while Zentai might have lived openly and**

> **accessibly in Australia for the last 59 years, he has also lived under a different surname (Zentai) to the surname (Steiner) in which the arrest warrant for him was issued. The Department understands that during the time Zentai resided in Germany prior to arriving in Australia he changed his name to Zentai**.
>
> 276. Further, once Hungarian authorities were informed of Zentai's location in December 2004, it appears they acted quickly. The international arrest warrant was issued by the Metropolitan Court on 3 March 2005 and an extradition request was made by Hungary to Australian (sic-Australia) on 23 March 2005. As noted above, nor is prosecution for the offence in Hungary statute barred.
>
> 277. To the extent there is any allegation that the lengthy progress of extradition proceedings in Australia give rise to delay that would make extradition arbitrary or unfair, it must be recognised that such delay is at least in significant part attributable to the numerous legal challenges taken by Zentai at various stages of the process. Zentai is, of course, free to oppose the extradition proceedings to the fullest extent available to him under the law. However, resolution of proceedings has been prolonged as a result of actions taken by Zentai and the Department considers it is not sufficient to warrant the exercise of your discretion to refuse to surrender Zentai.
>
> 278. The Department recognises the significant passage of time in this matter and recognises the difficulties and complexities associated with war crimes prosecutions for war crimes allegedly committee years ago. The relevance of such delay to a consideration of Hungary's ability to provide Zentai with a 'fair trial' is addressed in paragraphs 189-214 (in particular, paragraphs 211-214) which concludes that in light of the nature of the offence and conduct involved, the effect of the passage of time would not make extradition so oppressive or unjust as to warrant the exercise of your discretion to refuse surrender.
>
> 279. In these circumstances the Department considers it is open to you to consider that these assertions regarding delay do not warrant the exercise of your discretion to refuse the request for Zentai's extradition. (emphasis added)

349 The Department says, in effect, that the Minister should have little if any regard to the fact that Mr Zentai would be disadvantaged in his defence by the long passage of time because the relevant Hungarian authorities were unaware of Mr Zentai's presence in Australia until brought to their attention in 2004 by the Simon Wiesenthal Centre and that this delay was due in part to the fact that Mr Zentai had changed his name from Steiner to Zentai thereby preventing the Hungarian authorities from seeking his arrest and extradition at an earlier date.

350 For Mr Zentai it is contended that any proper analysis of those materials available to the Department would reveal that at all times he was officially known by the name Zentai by all relevant Hungarian authorities including, particularly relevantly, in proceedings before the

People's Court. It follows that any delay in pursuing an investigation and prosecution of him for the alleged war crime over a good number of decades cannot be attributed to Mr Zentai who lived openly in Western Australia from 1950 under the same name of Zentai which he had been known by when he left Hungary, not when in Germany after leaving Hungary, as the Minister was advised.

351 He says that his presence in Western Australia has been known since the 1980s to the family of Peter Balazs, the victim of the alleged war crime and who claimed to have brought it to the attention of a person associated with the Simon Wiesenthal Centre which was therefore in a position to inform Hungarian or Australian authorities of Mr Zentai's presence in Australia at the time (see paras 269-271 of Attachment C).

352 It is argued that the Minister fell into jurisdictional error to only take into account the assertion in Attachment C that the Hungarian authorities acted in good faith since 2004 without also having regard to the earlier opportunities that the Hungarian Government had to charge him, if authorities or other informants or agencies had acted more diligently in the past. The Minister was required to take into account and give proper weight to the enormous prejudice to Mr Zentai occasioned by the delay which he has not caused.

353 Further, the observation at para 274 of Attachment C that knowledge of one arm of the Hungarian Government should not necessarily be imputed to a separate arm does not accord with the view of Australian law expressed at an appellate level in *Western Australia v Watson* [1990] WAR 248.

354 The Commonwealth again submits that this is no more than a merits challenge rather than jurisdictional error.

355 The Commonwealth contends that there is no basis raised in the ground for asserting that the Minister failed to exercise the power in accordance with law.

356 In particular, 'the passage of time' issue was properly dealt with in the context of consideration of Art 3(2)(f). The issue was whether the Minister was satisfied that there was no circumstance under which the surrender of Mr Zentai 'shall be refused'. Arguments now advanced do not show that satisfaction to have been unreasonable or unlawful.

357 It is contended for the Commonwealth that to the extent that Mr Zentai relies upon any error of fact in the material before the Minister, there can be no reviewable error simply because a decision-maker acting under s 22 of the Act makes a wrong finding of fact and, factual error, if any be found in the material before the Minister does not render the decision invalid (*McHugh* at 41 and *Oates* at 133).

358 Mr Zentai accepts that factual error may not be a ground for invalidating a decision *per se* but can be where it involves irrationally taking information and facts where they are patently misleading and incorrect. He argues where a decision-maker, as here, engages in a process of determination that is based on demonstrably false and misleading information, the decision can be judicially reviewed for jurisdictional error on a number of grounds including that:

- because the decision-making process is so irrational and perverse, it cannot be said that the decision-maker has performed the statutory function in the way defined by the statute;
- no realistic and genuine consideration has been given to the matter; or
- the conclusion is so unreasonable that no reasonable minister could properly have made it (***Wednesbury* unreasonableness**).

359 The complaint is that the Department in Attachment C, presented demonstrably false information about Mr Zentai's change of name from Steiner to Zentai and the lack of diligence or interest by Hungarian authorities prior to 2005.

360 It is said that the suggestion from the Department to the Minister was that Mr Zentai was a fugitive seeking to hide from the authorities by changing his name. This information could easily have misled the Minister as to Mr Zentai's character and motivations and the non-responsibility of Hungary for any prejudice resulting from the 65 year hiatus since the alleged offence was committed. It is on that basis that Mr Zentai contends that in light of the incorrect information he received, the Minister must be inferred to have failed to determine the matter according to law. Or put anther way, he was disabled from giving proper consideration to his determination under s 22 of the Act because he was not presented with a true and undistorted account of the relevant facts.

361 It is clear that Attachment C was wrong on the name change point of view. It is something the Minister might well have taken into account. It would support an assertion of a person being a fugitive in order to escape prosecution. The Minister has not provided any other reasons. It may be inferred that he did take into account that material.

362 The impression that the delay in prosecution was caused by a deliberate name change was unfortunate. It is capable in the context of suggesting that Mr Zentai was a fugitive seeking to avoid prosecution. However, taken alone, if the Minister relied upon that erroneous impression in exercising his discretion, I do not consider, on the authorities dealing with factual error that it would be sufficient to constitute jurisdictional error. Erroneous information must have been supplied deliberately and in effect, in bad faith. That is not demonstrated in this instance. While it is arguable that this factual error may have tipped the discretionary balance against Mr Zentai, that seems improbable given that the weight of Attachment C was generally strongly against all of the arguments he had raised. This factual error could not be relied upon to support a successful argument under any of the three grounds listed in [354].

363 It follows, in my view, that this ground can not succeed

Ground 11 – the Minister's flawed, illogical and irrational conclusion is so manifestly unreasonable that it cannot stand as a proper and genuine discharge of his responsibilities under the Act

364 Mr Zentai argues that the Minister in making his decision has taken into account a mistaken notion of comity regarding significant facts such as those regarding Mr Zentai's identity while omitting to have regard to other relevant propositions and distinctions such as that made by Gummow J in *Kainhofer* regarding the distinction between investigation and accusation. The 'logical incoherence of the total reasoning process', it is said, constitutes a failure to exercise the Minister's jurisdiction under s 22 in a lawful and proper manner.

365 The inference of manifest unreasonableness, it is argued, is supported by the following absolute and totally unqualified negative assertions provided by the Department to the Minister for his consideration prior to making his determination. These are made in the Department's covering letter to the Minister which records very briefly the Minister's determination.

- ‘The Department considers that it is open to you to be satisfied that the requirements of s 22 for surrendering Mr Zentai to Hungary are met in this case. The Department considers that none of the matters raised on behalf of Mr Zentai by his legal representations, son or supporters, taken singularly or collectively, warrant the exercise of your discretion to refuse surrender’;
- ‘The Department is not aware of any other reason for you to exercise your general discretion not to surrender Mr Zentai to Hungary’.

366 The Commonwealth strenuously opposes this ground which is based, effectively, on manifest unreasonableness on an accumulation of errors. As a matter of law, the Commonwealth argues that the scope for a *Wednesbury* unreasonableness challenge is extremely limited and success on this ground is exceptional (*Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 (at [100])).

367 The Commonwealth makes a good point. The legal/merits dichotomy is at the heart of Australian administrative law and the boundary between the two is vigorously policed: *Murrumbidgee Groundwater Preservation Assn Inc v Minister for Natural Resources* [2005] NSWCA 10 (at [127]).

368 In *Timar v Minister for Justice and Customs* (at [34]-[35]), Marshall J collected the authorities as follows:

> [34] It must be borne in mind that the Court has a "limited role" in "reviewing the exercise of an administrative discretion": see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J.
>
> [35] In this matter, I consider that counsel for Professor Timar has demonstrated why it may be forcefully contended that the Minister came to a conclusion with which other "reasonable minds might differ": see *Foster* per Gaudron and Hayne JJ at [38]. However, this does not render a decision unreasonable. Gleeson CJ and McHugh J discussed the concept of unreasonableness in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626-627:
>
> > "Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as `illogical' or `unreasonable', or even `so unreasonable that no reasonable person could adopt it'. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.
>
> In *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518 Lord Brightman said:

> `Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.'

In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 a delegate's decision that an applicant for refugee status had a fear of persecution which was not well-founded was held to fall within the provisions of the legislation then applicable which corresponded to the concept of *Wednesbury* unreasonableness. The conclusion is conveniently summarised in the judgment of Toohey J as follows (33):

> `In essence the delegate concluded that while the appellant had a fear of persecution, that fear was not well-founded. However, the delegate had accepted that there may have been `discrimination' against the appellant. Given the circumstances of that discrimination, no reasonable delegate could have concluded that it did not amount to persecution. Nor could a reasonable delegate have concluded other than that there was a real chance of imprisonment or exile if the appellant returned to China.'

In the same case Mason CJ (34) criticised the Full Court of the Federal Court for having `trespassed into the forbidden field of review on the merits'.

In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 itself, which was concerned with an issue as to whether the imposition of a condition imposed by a licensing authority was so unreasonable as to be beyond the proper exercise of the authority's powers, Lord Greene MR said that what a court may consider unreasonable is a very different thing from `something overwhelming' such that it means that a decision was one that no reasonable body could have come to. As Mason J pointed out in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42, **when the ground of asserted unreasonableness is giving too much or too little weight to one consideration or another `a court should proceed with caution ... lest it exceed its supervisory role by reviewing the decision on its merits'**." (emphasis added)

369 The Commonwealth argues that when there is no prohibition against surrender, it is difficult to see how a *Wednesbury* unreasonableness challenge can succeed when the decision-maker exercised a discretion against refusing extradition under a provision such as Art 3(2) of the Treaty.

370 The Commonwealth argues that many of Mr Zentai's review grounds, in effect, allege that the Minister's decision was not 'proportionate' having regard to the circumstances of the case and the impact on Mr Zentai's personal liberty and rights. Proportionality has no role to play in the scheme created by the Act: *Vasiljkovic* (at [41]).

371 Further, the Commonwealth argues, Mr Zentai's so called unreasonableness is nothing more than an assertion that the Minister failed to give proper weight to a range of

competing considerations. Such an assertion does not constitute *Wednesbury* unreasonableness: *Foster* 164 ALR 357 per Drummond J (at [73]).

372 Mr Zentai has accepted that invalidity on the *Wednesbury* grounds is extremely limited and that the impugned decision must be verging on absurdity. However, he submits that given the various 'egregious' errors identified in the submissions of Mr Zentai, those conditions have been satisfied in this case.

373 In *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat & Live-Stock Corporation* (1990) 96 ALR 153, Gummow J considered a *Wednesbury* argument in the context of the ADJR Act, noting (at [45]) that the reference in para 5(1)(e) of the ADJR Act to an improper exercise of a power is to be construed as including a reference of an exercise of a power 'that is so unreasonable that no reasonable person could have so exercised the power': para 5 (2) (g). His Honour observed:

> This provision is drawn from the ground of review at general law propounded by Lord Greene M.R. in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* (1948) 1 KB 223 at 230, 233-234; see *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 at 41. It is fair to say that in recent times, in this country there has been a greater willingness to grant review of administrative decisions on this ground. The trend is exemplified by *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 63 ALJR 561 and *Luu v Renevier* (1989) 91 ALR 39 at 47-51. However, as has been pointed out, the result in the High Court decision might have been reached by a more direct route, namely that there had been an error of law in construing the term "refugee": see (1990) 64 ALJ 95. In any event, there is force in the criticism by Dr Allars that both Lord Greene's formulation of unreasonableness and subsequent attempts to explain or amplify it have been "bedevilled by circularity and vagueness" (Allars, "Introduction to Australian Administrative Law", 1990, para. 5.52).

374 His Honour continued (at [49]-[50]):

> 49. In her recent work, to which I have referred, Dr Allars seeks to instil a measure of order into the authorities dealing with the *Wednesbury* test by identifying three paradigm cases of unreasonableness. All of them are consistent with a view of Lord Greene's "doctrine" as rooted in the law as to misuse of fiduciary powers; see Grubb, "Powers, Trusts And Classes of Objects", (1982) 46 Conv. 432 at 438. The three "paradigms" are outlined in paras. 5.54-5.57 of Dr Allars' work. The first involves the capricious selection of one of a number of powers open to an administrator in a given situation to achieve a desired objective, the choice being capricious or inappropriate in that the exercise of the power chosen involves an invasion of the common law rights of the citizen, whereas the other powers would not. The second "paradigm" involves discrimination without justification, a benefit or detriment being distributed unequally amongst the class of persons who are the objects of the power. It is the third "paradigm" which the applicant would seek to

> attract to the facts of the present case. In effect, the submission is that on the facts as I have detailed them, the exercise of power by withdrawing the applicant's approval was out of proportion in relation to the scope of the power. A decision which provides an example of such disproportion is the decision of Burchett J. in *Edelsten v Wilcox* (1988) 83 ALR 99 at 114. An example of a case which fell on the other side of the line is the decision of the Full Court in *Wouters v Deputy Commissioner of Taxation* (N.S.W.) (1988) 84 ALR 577 at 584-585.
>
> 50. In the circumstances of the present case, the Corporation was bound by s. 4 of the Act to exercise its powers only for the purposes of promoting, controlling, protecting and furthering the interests of the Australian live-stock industry in relation to the export of live-stock from Australia. How it discharged that task in a given situation was very much a matter for judgment under all of the circumstances. If it had been necessary to decide the issue, in the circumstances of this case, as I have outlined them, I would not have characterized [the] decision as one in which he acted in such a disproportionately arbitrary manner as to attract review on *Wednesbury* grounds.

375 I have addressed the grounds of review individually. Some I consider to be made out, others not. In those upheld, I have taken into account the totality of considerations affecting the exercise of the discretion in this unusual case. While I consider to do so is appropriate on those individual grounds, I do not consider, putting those specific grounds aside, that the s 22 decision to surrender Mr Zentai for extradition is sufficiently irrational, capricious or so unreasonable that no reasonable person could have made it so as to satisfy a ground of review on a *Wednesbury* unreasonableness basis.

376 It follows that this ground is not made out.

Ground 12: failure to give reasons

377 Mr Zentai argues that the Minister further erred in law and failed to comply with the fundamental legal requirement by refusing to provide him with a statement of his relevant findings and reasons for the determination under s 22 of the Act in consequence of which the Minister's determination is a nullity and of no legal effect.

378 It will be recalled that although the Minister received a large amount of information including (without attachments) Attachment C, that his decision was constituted in circling the word 'approved' and signing and dating the Minute. This practice is customary. By referring to the simplicity of that aspect of the process, no criticism is intended at all, at least from my perspective.

379 It is common ground that on 17 and 19 November 2009 Mr Zentai's solicitors requested the Department to provide a statement of the Minister's reasons for his decision. By a letter dated 20 November 2009, the Department replied that no such statement would be provided.

380 Mr Zentai refers to s 22 of the Act and the obligation of the Attorney-General to determine a number of matters such as whether there is an extradition objection. He argues that while neither s 22 of the Act nor other relevant general acts such as the ADJR Act expressly requires the Minister to provide a statement of reasons, the Minister in exercising his statutory discretions and powers is under a duty to make various findings and to be satisfied regarding matters specified in that section. Therefore, it is contended, that by necessary implication for the purpose of judicial review of his decision, the Minister must provide a statement of relevant findings and reasons if requested by the person subject to the order for extradition.

381 Mr Zentai argues that unless a Minister records findings with respect to such a decision, a reviewing court will not be able to judge whether his or her actions are lawful or not. The failure to provide reasons in that context leaves the decision-maker open to the claim that he or she has failed to exercise his or her jurisdiction in accordance with the statute. Such a conclusion can be particularly drawn where having regard to the materials before the designated functionary there is reason to infer that the functionary fell into error and exceeded his or her authority by identifying a wrong issue, asking the wrong question, ignoring relevant material, relying on irrelevant material or, at least in some instances, making an erroneous finding or reaching a mistaken conclusion thereby affecting the purported exercise of power. Reliance is placed on the observations of Dixon J, as his Honour then was in *Avon Downs Pty Ltd* at 360:

> His decision … is not unexaminable … Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was put before him, be found to be capable of explanation only on the ground of some such misconception.

382 It is argued that the refusal to furnish reasons is said to constitute a failure to comply with the Minister's duty under the Act and therefore, of itself, vitiates the Minister's decision. That provides a ground for quashing it and if appropriate the matter should be reconsidered and a fresh decision made by the Attorney-General.

383 The Commonwealth, correctly in my view, observes that the Minister was under no common law obligation to provide a statement of reasons and that there is no general rule of the common law or principle of natural justice requiring reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests or defeat the legitimate or reasonable expectations of other persons: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 662 where Gibbs CJ said (footnotes omitted):

> With the greatest respect to the learned judges in the majority in the Court of Appeal, the conclusion which they have reached is opposed to overwhelming authority. There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons. That this is so has been recognized in the House of Lords (*Sharp v Wakefield*; *Padfield v Minister of Agriculture, Fisheries and Food*) and the Privy Council (*Minister of National Revenue v Wrights' Canadian Ropes Ltd.*); in those cases, the proposition that the common law does not require reasons to be given for administrative decisions seems to have been regarded as so clear as hardly to warrant discussion. More recently, in considered judgments, the Court of Appeal in England has held that neither the common law nor the rules of natural justice require reasons to be given for decisions of that kind: *Reg. v Gaming Board; Ex parte Benaim*; *Payne v Lord Harris*. It has similarly been held that domestic tribunals are not bound to give reasons for their decisions; see *McInnes v Onslow-Fane* and earlier authorities collected in *Pure Spring Co Ltd v Minister of National Revenue*.

384 Moreover as observed by Drummond J in *Foster* 164 ALR 357 (at [66]), the correct balance in circumstances of no reasons can be seen in the following way:

> The Minister has not given any reasons for her decision of 30 March 1999. She is not obliged to do so. But as Watkins LJ pointed out in *R v Secretary of State for the Home Department; Ex parte Sinclair* [1992] Imm AR 293 at 301, while the failure to give reasons where there is no obligation to do that does not of itself attract judicial review of a minister's surrender decision, the absence of reasons does not necessarily leave the decision immune from such a challenge. A failure to give reasons when the evidence shows the advice given to the minister did not advert to a relevant consideration leaves uncontradicted the inference that that consideration was overlooked when the decision was made.

385 The Commonwealth contends that the statutory implication pleaded in particular (b) to ground 12 is untenable. The implication is not supported by the words of s 22 of the Act. the implication would be inconsistent with the exclusion of the application of the ADJR Act including the obligation in that Act at s 13 to provide reasons.

386 In my view, the Commonwealth is correct in this submission and this ground cannot succeed.

CONCLUSION

387 The Court is not empowered to substitute its view for that of the Minister. The only function of this judicial review is to consider whether the process adopted by the Minister accorded with requirements at law.

388 The Minister circled 'approved' and signed and dated a Minute. That was his decision. It is a practice which is entirely customary. The Minister was not required to give reasons for his decision to surrender Mr Zentai for extradition.

389 He did, however, have extensive advice. The parties have proceeded, as I have, on the premise that the extensive advice to the Minister was information on which he could rely if he so chose.

390 Whether he did or not, the absence of reasons leave the inference uncontradicted that to the extent considerations were not addressed in that advice, that he did not take them into account. This is relevant only where he was actually required to consider certain matters. To the extent that the advice contained errors, rather than omissions, the position is more complex. The occasional error would be inconsequential largely because it would never be known whether or not the Minister relied on that particular error. As long as it could be seen that it was open to him, on the advice, to exercise his discretion in accordance with the Act, that would completely answer any challenge in the review process.

391 However, in my view, at least those errors which are so central to the issue under consideration that they go to the heart of the statutory objects, are in a different category. An entirely hypothetical example would be this. If by the time the Minister's surrender decision was to be exercised, it came to light that the requesting country accepted that it had sought extradition of entirely the wrong person, the completely wrong person would not be extraditable just because earlier steps in the process had not revealed such an error.

392 An equally fundamental error would include the fact that Mr Zentai is simply not charged at all with any offence and that the offence of which he is suspected never existed at the relevant time. Such errors which go to the heart of the statutory object are not just merits considerations arising in exercise of a discretion but jurisdictional preconditions to be satisfied before the Minister can exercise his power under the Act. The Act permits

extradition of people accused of an offence, not suspected of an offence. The offence (not the conduct constituting the offence) must have existed at the time alleged. To surrender a person for extradition where those basic requirements are not satisfied is beyond power.

393 A challenge is also made, in any event, to the exercise of discretion by the Minister. To be relieved of the consequences of a surrender for extradition on this basis would be rare indeed. The authorities discussed above emphasise the well established paramount importance of Australia's treaty obligations. Those obligations in the area of extradition are strictly observed. They arguably assume even greater importance in the case of War Crimes. In addition a common sense degree of latitude and flexibility is necessary to accommodate co-operation between different legal systems. There is a presumption that legal systems of sovereign treaty states will conform both with their own domestic requirements and with international law obligations. The discretion to be exercised is entirely a matter for the executive, not the judiciary, subject only to it being exercised within jurisdiction.

394 Exceptional features of Mr Zentai's situation set it apart from any precedent. Shortly stated such features, taken as a whole – not individually - are these.

- Mr Zentai will be 89 years of age in October.
- He has lived openly in Australia for over 58 years.
- The events on which he is to be questioned occurred 66 years ago.
- He did not change his name after coming to Australia (as was unfortunately suggested to the Minister).
- He is in particularly frail health – to the point where the realistic possibility of severe if not extreme health consequences were he extradited and imprisoned could not be excluded.
- He is and has been for 58 years, an Australian citizen, arguably only an Australian citizen, rather than also a Hungarian citizen.
- He is not charged with anything in any conventional sense but is wanted (albeit under arrest and with imprisonment) for questioning due to suspicions held, yet the original s 16 notice and the magistrate's s 19 order were based on an assumption that he was actually accused of committing a war crime.

- War crime, in any event, did not exist in Hungary at the date it was allegedly committed and the Treaty proscribes retrospectivity with no exception for War Crimes.
- No earlier steps have been taken in the 66 year period to secure his extradition despite the fact that he was living openly in Australia.
- There are apparently no live witnesses to the alleged events.
- Official documents which Mr Zentai claims could have proven his innocence apparently (perhaps unsurprisingly) no longer exist.
- The statements that are apparently relied upon (now being over 60 years old) were secured in arguably questionable circumstances under a particularly harsh Communist regime.
- Although it was open to them to do so, Australian authorities understandably, due to lack of evidence, considered but refrained from prosecuting Mr Zentai. (The Minister was imperfectly advised that they had not refrained).

395 Other features which, added to the totality of factors, warrant consideration but are not necessarily so unusual are these:

- Critically (and although the Minister was not adequately so advised), it has always been open under provisions in the Treaty, to refuse to surrender Mr Zentai but, if requested by Hungary, to submit him for prosecution in Australia for the same offence – a process seemingly tailor made for an exceptional case of this nature.
- The specific means by which international treaty obligations of a fair trial, including the entitlement to question witnesses will be observed, are unknown as no detailed inquiries have been made on those topics. This is in circumstances where it would not have been difficult to do so, the potential consequence to Mr Zentai was dire and the Treaty contemplates such inquiries being made.
- Conditions in Hungarian prisons, the availability of bail and the availability of health care are also topics on which no detailed knowledge has been acquired as inadequate inquiries have been made on those topics. This is in circumstances where it would not have been difficult to do so and the potential consequence to Mr Zentai was dire and the Treaty contemplates inquiries being made.

396 In *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1 (at 11-15), Sheppard J. observed that:

> In case this judgment should be read by persons not familiar with the provisions of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*, I should emphasise that this Court has no power to review the merits of a case of this kind. Whether an application for resident status is granted or refused is a matter for the Minister and appropriate officers of his Department. The court's power is supervisory in nature. It obliges the court to ensure that any decision made by the Minister or one of his delegates is made according to law. If it is, the court has no jurisdiction to interfere.
> …
> In order to endeavour to demonstrate that this case had not been dealt with according to law, counsel for Mr Hindi said that the material in evidence disclosed that there had been no proper or separate consideration of the matters relied upon by Mr Hindi either when the ultimate decision was made on 4 August 1987 or when the Minister's delegate considered the matter after the Panel had made its recommendation. It should be observed that it is not open to Mr Hindi to challenge any decision except the one made on 4 August 1987 which was notified to him in the letter to his solicitors dated 26 August 1987. Indeed that is the only decision of which the amended application seeks review. But what counsel for Mr Hindi has submitted is that there was no separate consideration given to the matter once the Panel had made its recommendation. The Minister's delegate was said to have "rubber stamped" the Panel's decision and the decision to maintain that decision reached on 21 August 1987 was said to have been made, when analysed, upon the basis of what is contained in the Panel's recommendation without any separate attention being paid to a number of new matters which were raised in the solicitor's letter written on 12 June 1987.
>
> The way in which this submission was fitted into the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) was to claim that the evidence revealed that the delegates who dealt with the matter left relevant considerations out of account and exercised their discretion in accordance with a rule or policy (the policy contained in the Handbook) without regard to the merits of the particular case: see s 5(1)(e) and 2(b) and (f) of the *Administrative Decisions (Judicial Review) Act*.
>
> In support of his submissions counsel relied upon two unreported decisions of single judges of this Court and on authorities referred to in those judgments. The two decisions are *Brelin v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, Wilcox J, 14 May 1987) and *Khan v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, Gummow J, 11 December 1987). Both cases involved situations in which **it was submitted that inadequate consideration had been given to applications**. In the *Brelin* case Wilcox J said of the criticisms made of the Panel's consideration of the matter (at 9-10):
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> > "**These criticisms do not go to the weight of the various factors** to be taken into account. **Weight was for the Panel and, ultimately, for the Minister to determine. Rather they concern the question whether the Panel gave to the application proper and adequate consideration**: see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1053; or, expressing the question another way, **whether there was `a real exercise of discretion**': see *Associated Picture Houses Ltd v Wednesbury Provincial Corporation* [1948] 1 KB 223 at 228."
>
> Earlier his Honour indicated that the provision of the *Administrative Decisions*

(Judicial Review) Act upon which reliance had been placed was s 5(2)(b), namely, that the Minister's delegate failed to take into account a relevant consideration (at 8-9).

In *Kahn's* case, Gummow J reached the conclusion (at 12) that **on the whole of the evidence in that case, the applications in question had not each been given "proper, genuine and realistic consideration upon the merits**". He relied on s 5(2)(f) of the *Administrative Decisions (Judicial Review) Act* which provides a ground for judicial review where there has been an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case. Gummow J said (at 11-12):

> "**[W]hat was required of the decision maker, in respect of each of the applications, was that in considering all relevant material placed before him, he give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy**: *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169 at 195; *Kioa v West* (1985) 159 CLR 550 at 604; *Chumbairux v Minister for Immigration and Ethnic Affairs* (1986) 74 ALR 480 at 4992-494. That consideration included, in respect of each application, the effect or likely effect of refusal of the application upon members of the family; cf *Tabag v Minister for Immigration and Ethnic Affairs* (1982) 70 FLR 61 at 67, referred to by Wilson J in *Kioa v West* (supra) at 604. The assertion by a decision maker that he has acted in this fashion will not necessarily conclude the matter; **the question will remain whether the merits have been given consideration in any real sense**: *Turner v Minister for Immigration and Ethnic Affairs* (1981) 55 FLR 180 at 184; *Chumbairux v Minister for Immigration and Ethnic Affairs* (1986) 74 ALR 480 at 495-496."

I would, with respect, adopt what both Wilcox and Gummow JJ have said in these two cases. It matters not that one judge approached the matter by treating it as a case where a relevant consideration had been omitted from count and the other by treating the case as one where a policy had been applied without regard to the merits of the case. The essential principle upon which counsel for Mr Hindi relied was that the **Minister, the Panel and the delegates were required to give proper consideration to the merits of the cases before them**. So the question for decision is whether that consideration has been given to the applicant's case here. The answer to the question necessitates an analysis of the various decisions and memoranda to which reference has been made.

I have reflected about the matter for some time conscious of the matters stated earlier in these reasons concerning the difficulty under which immigration officers operate, but I am driven to the conclusion that the way in which the submission based on Mr Hindi's difficulty in returning to Liberia is put reflects a situation in which the matter was **not given any genuine or proper consideration** either by the recommending officer or by the delegate who accepted the recommendation. (emphasis added)

397 The *Khan* or the *Hindi* principle has been applied many times. Examples include: *Immigration, Local Government & Ethnic Affairs, Minister for v Pashmforoosh* (1989) 18 ALD 77; *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 136 ALR 453 at 468; *Bruce v Cole* (1998) 45 NSWLR 163 at 186; *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 442; *Turner v Minister for*

Immigration and Ethnic Affairs (1981) 55 FLR 180; *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation* (1986) 10 FCR 197; and *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516.

398 In the present unusual situation the advice to the Minister did not inform him adequately or at all as to the alternative steps open to him to comply with Art 2(a) of the Treaty by refusing surrender but complying with any request from Hungary to submit Mr Zentai for prosecution in Australia. The advice to the Minister did not give genuine, realistic and proper consideration to the Art 2(a) option when considering the Art 2(f) argument as to humanitarian considerations. The more humane solution, still within the bounds of the Treaty was dismissed on the basis of 'longstanding' policy'.

399 This is not a merits review. Nevertheless, in Mr Zentai's very unusual circumstances, the conclusion must be reached that the *Khan* or *Hindi* principle has not been observed. On the whole of the evidence (and as argued in ground 9) the Minister could not have given proper, genuine and realistic consideration to the merits of the virtually unmentioned far more humanitarian option open to him under Art 2(a)of the Treaty.

400 Mr Zentai succeeds therefore on grounds 3, 4 and 9 and is entitled to relief. The parties have requested I defer making specific orders so that the parties may consider further submissions in support of orders which should reflect these reasons and conclusions. That course is entirely appropriate.

401 The following orders will be made:

1. The applicant, within 28 days, do file and serve submissions supporting a minute of orders which the applicant contends should be made.

2. The respondents who wish to do so, do file and serve within 28 days submissions in reply and a minute of orders proposed.

3. The applicant, within 14 days thereof, do file any submissions in reply and any amended orders.

4. There be liberty to apply.

5. Costs be reserved.

I certify that the preceding four hundred and one (401) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

Dated: 2 July 2010