# FEDERAL COURT OF AUSTRALIA

## Zentai v Republic of Hungary [2006] FCA 1226

**CONSTITUTIONAL LAW** – whether s 19 and s 46 of *Extradition Act 1988* (Cth) are invalid – whether State legislation is necessary to authorise the performance by a State magistrate of functions under s 19 of the *Extradition Act 1988* (Cth) – whether performance by a State magistrate of functions under s 19 of the *Extradition Act 1988* (Cth) infringes the judicial incompatibility principle – whether the *Magistrates Court Act 2004* (WA) authorises the performance of s 19 functions by a State magistrate

Constitution Ch III, ss 51(xxix), 61, 109

*Extradition Act 1988* (Cth) ss 5, 7, 12, 16(1), 19, 22, 46
*Magistrates Court Act 2004* (WA) s 6
*Interpretation Act 1984* (WA) s 36
*Customs Act 1901* (Cth) s 219ZK
*Crimes Act 1914* (Cth) s 4AAB

*Harris v Attorney-General (Cth)* (1994) 52 FCR 386
*Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117
*Byrnes v The Queen* (1999) 199 CLR 1
*Bond v The Queen* (2000) 201 CLR 213
*Reg v Hughes* (2000) 202 CLR 535
*MacLeod v Australian Securities and Investments Commission* (2002) 211 CLR 287
*The Commonwealth v New South Wales* (1923) 33 CLR 1
*Rohde v Director of Public Prosecutions* (1986) 161 CLR 119
*Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1
*Jacobsen v Rogers* (1995) 182 CLR 572
*Dutton v O'Shane* (2003) 132 FCR 352
*Cabal v United Mexican States (No 3)* (2002) 186 ALR 188
*New York v United States* 505 US 144
*Printz v United States* 521 US 898
*Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88
*Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31
*Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51
*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1997) 189 CLR 1
*Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528
*Grollo v Palmer* (1995) 184 CLR 348
*Bennett v United Kingdom* (2001) 179 ALR 113
*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337
*Re Grinter; Ex parte Hall* (2004) 28 WAR 427

**CHARLES ZENTAI v REPUBLIC OF HUNGARY and ELIZABETH WOODS and THE COMMONWEALTH OF AUSTRALIA**
**WAD 31 OF 2006**

**VINCENT THOMAS O'DONOGHUE v IRELAND and GRAEME NEIL CALDER**
**WAD 332 OF 2005**

**SIOPIS J**
**12 SEPTEMBER 2006**
**PERTH**

**IN THE FEDERAL COURT OF AUSTRALIA**
**WESTERN AUSTRALIA DISTRICT REGISTRY** **WAD 31 OF 2006**

| | |
|---|---|
| **BETWEEN:** | **CHARLES ZENTAI**<br>**Applicant** |
| **AND:** | **REPUBLIC OF HUNGARY**<br>**First Respondent** |
| | **ELIZABETH WOODS**<br>**Second Respondent** |
| | **THE COMMONWEALTH OF AUSTRALIA**<br>**Third Respondent** |

**JUDGE:** **SIOPIS J**

**DATE OF ORDER:** **12 SEPTEMBER 2006**

**WHERE MADE:** **PERTH**

**THE COURT ORDERS THAT:**

1 The applicant's application dated 6 February 2006 is dismissed.

2. The applicant is to pay the first and third respondents' costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA**

**WESTERN AUSTRALIA DISTRICT REGISTRY** **WAD 332 OF 2005**

| | |
|---|---|
| **BETWEEN:** | **VINCENT THOMAS O'DONOGHUE**<br>**Applicant** |
| **AND:** | **IRELAND**<br>**First Respondent** |
| | **GRAEME NEIL CALDER**<br>**Second Respondent** |
| **JUDGE:** | **SIOPIS J** |
| **DATE OF ORDER:** | **12 SEPTEMBER 2006** |
| **WHERE MADE:** | **PERTH** |

**THE COURT ORDERS THAT:**

1 The applicant's application dated 18 November 2005 is dismissed.

2. The applicant is to pay the first respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA**
**WESTERN AUSTRALIA DISTRICT REGISTRY** **WAD 31 OF 2006**

| | |
|---|---|
| **BETWEEN:** | **CHARLES ZENTAI**<br>**Applicant** |
| **AND:** | **REPUBLIC OF HUNGARY**<br>**First Respondent** |
| | **ELIZABETH WOODS**<br>**Second Respondent** |
| | **THE COMMONWEALTH OF AUSTRALIA**<br>**Third Respondent** |

**WAD 332 OF 2005**

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| **BETWEEN:** | **VINCENT THOMAS O'DONOGHUE**<br>**Applicant** |
| **AND:** | **IRELAND**<br>**First Respondent** |
| | **GRAEME NEIL CALDER**<br>**Second Respondent** |

| | |
|---|---|
| **JUDGE:** | **SIOPIS J** |
| **DATE:** | **12 SEPTEMBER 2006** |
| **PLACE:** | **PERTH** |

**REASONS FOR JUDGMENT**

1 The Republic of Hungary is seeking the extradition of Mr Zentai in respect of an alleged war crime. The Republic of Ireland is seeking the extradition of Mr O'Donoghue in respect of charges of obtaining property by false pretences, alternatively, fraudulent conversion. Each of the applicants seeks an order in the nature of prohibition restraining each of the second respondents from conducting proceedings to determine whether each applicant is eligible for surrender for extradition pursuant to s 19 of the *Extradition Act 1988* (Cth) ('the Act'). Each of the second respondents holds the office of magistrate of the State of Western Australia.

2 Each of the applicants advances the same grounds in support of his application. Accordingly, these matters were heard together. The applicants contend that the second respondents are precluded from conducting the s 19 proceedings, on the grounds that it is unlawful for the Commonwealth to legislate for State judicial officers to carry out the functions prescribed by s 19 of the Act. Both applicants seek a declaration that s 19 and s 46 of the Act are invalid as being beyond the legislative power of the Commonwealth.

**Statutory background**

3 The process provided for in s 19 of the Act is the third part of a four stage process for the extradition of a person from Australia. The four stages have been described as commencement, remand, determination by a magistrate of eligibility for surrender and executive determination that the person is to be surrendered (*Harris v Attorney-General (Cth)* (1994) 52 FCR 386 at 389).

4 Under the first stage, which is described in s 12 of the Act, an extradition country may apply to a magistrate (as defined in the Act) for the arrest of the person sought to be extradited. If the magistrate is satisfied that the person is an extraditable person, the magistrate shall issue a warrant for the arrest of that person.

5 Under the second stage of the process, the arrested person is brought before a magistrate to be remanded in custody or released on bail pending the conduct of the proceedings under s 19 of the Act.

6 The third stage of the process occurs when a magistrate conducts proceedings under s 19 of the Act to determine whether the person is eligible for surrender in relation to the extraditable offence. It is a precondition to the conduct of those proceedings that the Attorney-General has issued a notice under s 16(1) of the Act notifying a magistrate, that he or she has received an extradition request from an extradition country in relation to the person. If the magistrate decides that the person is eligible for surrender the fourth stage is reached.

7 Under the fourth stage, the Attorney-General determines under s 22 of the Act whether the eligible person should be surrendered to the country seeking extradition.

8 Section 19 of the Act is central to this application. It provides:

> *'**Determination of eligibility for surrender***
>
> *(1) Where:*
>
> *(a) a person is on remand under section 15;*
>
> *(b) the Attorney-General has given a notice under subsection 16(1) in relation to the person;*
>
> *(c) an application is made to a magistrate by or on behalf of the person or the extradition country concerned for proceedings to be conducted in relation to the person under this section; and*
>
> *(d) the magistrate considers that the person and the extradition country have had reasonable time in which to prepare for the conduct of such proceedings;*
>
> *the magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country.*
>
> *(2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:*
>
> *(a) the supporting documents in relation to the offence have been produced to the magistrate;*
>
> *(b) where this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications that require the production to the magistrate of any other documents—those documents have been produced to the magistrate;*
>
> *(c) the magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and*
>
> *(d) the person does not satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence.*
>
> *(3) In paragraph (2)(a), **supporting documents**, in relation to an extradition offence, means:*

*(a) if the offence is an offence of which the person is accused—a duly authenticated warrant issued by the extradition country for the arrest of the person for the offence, or a duly authenticated copy of such a warrant;*

*(b) if the offence is an offence of which the person has been convicted—such duly authenticated documents as provide evidence of:*

*(i) the conviction;*

*(ii) the sentence imposed or the intention to impose a sentence; and*

*(iii) the extent to which a sentence imposed has not been carried out; and*

*(c) in any case:*

*(i) a duly authenticated statement in writing setting out a description of, and the penalty applicable in respect of, the offence; and*

*(ii) a duly authenticated statement in writing setting out the conduct constituting the offence.*

*(4) Where, in the proceedings:*

*(a) a document or documents containing a deficiency or deficiencies of relevance to the proceedings is or are produced; and*

*(b) the magistrate considers the deficiency or deficiencies to be of a minor nature;*

*the magistrate shall adjourn the proceedings for such period as the magistrate considers reasonable to allow the deficiency or deficiencies to be remedied.*

*(5) In the proceedings, the person to whom the proceedings relate is not entitled to adduce, and the magistrate is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence for which the surrender of the person is sought.*

*(6) Subject to subsection (5), any document that is duly authenticated is admissible in the proceedings.*

*(7) A document that is sought by or on behalf of an extradition country to be admitted in the proceedings is duly authenticated for the purposes of this*

*section if:*

*(a) it purports to be signed or certified by a judge, magistrate or officer in or of the extradition country; and*

*(b) it purports to be authenticated by the oath or affirmation of a witness or to be sealed with an official or public seal:*

*(i) in any case—of the extradition country or of a Minister, Department of State or Department or officer of the Government, of the extradition country; or*

*(ii) where the extradition country is a colony, territory or protectorate—of the person administering the Government of that country or of any person administering a Department of the Government of that country.*

*(7A) Subsection (7) has effect in spite of any limitation, condition, exception or qualification under subsection 11(1), (1A) or (3).*

*(8) Nothing in subsection (6) prevents the proof of any matter or the admission of any document in the proceedings in accordance with any other law of the Commonwealth or any law of a State or Territory.*

*(9) Where, in the proceedings, the magistrate determines that the person is eligible for surrender to the extradition country in relation to the extradition offence or one or more of the extradition offences, the magistrate shall:*

*(a) by warrant in the statutory form, order that the person be committed to prison to await surrender under a surrender warrant or temporary surrender warrant or release pursuant to an order under subsection 22(5);*

*(b) inform the person that he or she may, within 15 days after the day on which the order in the warrant is made, seek a review of the order under subsection 21(1); and*

*(c) record in writing the extradition offence or extradition offences in relation to which the magistrate has determined that the person is eligible for surrender and make a copy of the record available to the person and the Attorney-General.*

*(10) Where, in the proceedings, the magistrate determines that the person is not, in relation to any extradition offence, eligible for surrender to the extradition country seeking surrender, the magistrate shall:*

*(a) order that the person be released; and*

> *(b) advise the Attorney-General in writing of the order and of the magistrate's reasons for determining that the person is not eligible for surrender.'* (original emphasis)

The term 'magistrate' is defined in s 5 of the Act to mean*:*

> *'(a)* …
>
> *(b) a magistrate of a State…, being a magistrate in respect of whom an arrangement is in force under section 46.'*

9 Section 46 of the Act provides that:

> '***Arrangements relating to magistrates***
>
> *(1) The Governor-General may:*
>
> *(a) arrange with the Governor of a State for the performance, by all or any of the persons who from time to time hold office as magistrates of that State, of the functions of a magistrate under this Act; or*
>
> *(b) arrange with the Administrator of the Northern Territory or of Norfolk Island for the performance, by all or any of the persons who from time to time hold office as magistrates of the Northern Territory or of Norfolk Island, as the case may be, of the functions of a magistrate under this Act.*
>
> *(2) A copy of each arrangement made under this section shall be published in the* Gazette*.'*

10 Section 6 of the *Magistrates Court Act 2004* (WA) ('the Magistrates Court Act') provides:

> '***Magistrates, functions of***
>
> *(1) A magistrate has the functions imposed or conferred on a magistrate by laws that apply in Western Australia, including this Act and other written laws.*
>
> *(2) A magistrate has and may perform any function of a registrar.*
>
> *(3) With the Governor's approval, a magistrate -*
>
> *(a) may hold concurrently another public or judicial office or appointment, including an office or appointment made under the law of another place; and*
>
> *(b) may perform other public functions concurrently with those of a*

*magistrate.*

*(4) A magistrate must not be appointed to an office that does not include any judicial functions without his or her consent.*

*(5) The Governor may extend the operation of section 37 to the performance by a magistrate of other functions, or the functions of another office or appointment, approved under subsection (3).'*

11 In the Commonwealth of Australia Gazette (No S 366, 30 November 1988) p 4, there is recorded an arrangement between the Governor-General of the Commonwealth and the Governor of the State of Western Australia in relation to the Act to the effect that:

> *'NOW, IT IS HEREBY ARRANGED in pursuance of section 46 of the Act that all or any of the persons who from time to time hold office as Magistrates of the State of Western Australia may perform the functions of a Magistrate under the Act.'*

12 This arrangement remains effective under the transitional provisions of the Magistrates Court Act and s 36 of the *Interpretation Act 1984* (WA).

13 The applicants rely upon three grounds. I will deal with each of them separately.

**Ground 1 – No legislative approval by the State**

14 The first ground of challenge is that the State Parliament has not passed any legislation consenting to and authorising the performance by a State magistrate of the Commonwealth functions purportedly conferred by s 19 and s 46 of the Act.

15 The applicants relied on a number of authorities in support of their argument that State legislative authorisation was necessary. Firstly, the applicants relied upon the following observations in the joint judgment of Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 127 *('Cram')*:

> *'State officers perform State functions pursuant to State law, and may, additionally, if so authorized and empowered, perform Commonwealth functions.'*

16 And at 128:

> *'While it is unnecessary to investigate the matter here, it may well be, of course, that precisely the same comments could be made, mutatis mutandis, in relation to an attempt by a Commonwealth Act to confer federal duties upon a State-constituted non-judicial tribunal, which was not expressly or impliedly authorized to exercise them by State law.'*

17 The latter observations were made in relation to the following observations of Brennan J in *Reg v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535 at 579:

> *'If the [Commonwealth] Act had merely constituted or authorized the constitution of a tribunal and had vested federal powers of conciliation and arbitration in it without reference to State powers, an attempt by a State Act to vest similar State powers in the same tribunal would fail - not because of a constitutional incapacity in a Commonwealth tribunal to have and to exercise State power, but because the Commonwealth Act would be construed as requiring the tribunal to have and to exercise only such powers as the Commonwealth Parliament had chosen to vest in it.'*

18 Next, the applicants relied upon a number of cases involving attempts by States to confer State powers upon Commonwealth officers. The applicants relied upon *Byrnes v The Queen* (1999) 199 CLR 1 *('Byrnes')*; *Bond v The Queen* (2000) 201 CLR 213; *Reg v Hughes* (2000) 202 CLR 535 *('Hughes')* and *MacLeod v Australian Securities and Investments Commission* (2002) 211 CLR 287, as instances involving co-operative legislative schemes, between the States and the Commonwealth, where said the applicants, 'the 'High Court had required reciprocal authorising legislation'.

19 Further, the applicants relied upon the case of *The Commonwealth v New South Wales* (1923) 33 CLR 1 ('the Royal Metals case'). In that case the High Court held that the Commonwealth lacked the necessary legislative power to make a law requiring a State official, the Registrar-General of the State of New South Wales, to register the Commonwealth's title to land in circumstances not provided for under the New South Wales legislation, namely, the *Real Property Act 1900* (NSW).

20 The applicants also submitted that for there to be an effective State authorisation of the conferral of Commonwealth functions on the State magistrates, the State legislation needed to confer that authority in clear terms. Counsel for the applicants referred to *Byrnes*. The issue relevant to the applicants' contention was whether s 91(5) of the *Corporations (South Australia) Act 1990* (SA) was to be construed as having conferred the power to appeal against sentence on the Commonwealth Director of Public Prosecutions

('the DPP') as part of the 'enforcement powers' which had been conferred on the DPP by that Act. Counsel relied on the approval in the joint judgment of Gaudron, McHugh, Gummow and Callinan JJ at 26 of the following observations by Deane J in *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 128-129:

> *'As a matter of established principle, a general statutory provision should not ordinarily be construed as conferring or extending such a prosecution right of appeal against sentence unless a specific intention to that effect is manifested by very clear language...'*

and upon the following observations in the joint judgment:

> *'In the absence of the manifestation of a specific intention, no power or function in relation to appeals against sentence is to be found in the terms of s 91(5).'*

21 The applicants also submitted that s 6 of the Magistrates Court Act did not constitute a sufficient legislative basis for the authorisation by the State of the conferral of the s 19 functions on State magistrates because it lacked the necessary degree of clarity.

22 The applicants submitted that the legislative authority is not to be found in s 6(3)(b) of the Magistrates Court Act which permits a State magistrate to perform, with the approval of the Governor, 'other public functions concurrently with those of a magistrate'. Firstly, it is said that the subsection is to be construed as only permitting a magistrate to perform other public functions at the instance of the State, and not at the instance of any other 'polity'. The applicants relied upon the case of *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 *('Essendon')* and observations of Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in the case of *Jacobsen v Rogers* (1995) 182 CLR 572 at 585 *('Jacobsen')*, and the observations of Kirby J in *Hughes* at 569, at [75].

23 The applicants also submitted that the construction contended for, is supported by the difference in the language of s 6(3)(a) and s 6(3)(b) of the Magistrates Court Act. Section 6(3)(a) expressly provides for a magistrate concurrently holding another public or judicial office or appointment, including one 'made under the law of another place', whereas in s 6(3)(b) there is no reference to 'the law of another place' in relation to the concurrent performance by magistrates of 'other public functions'. The absence of the reference to 'the law of another place' in s 6(3)(b) was, submitted the applicants, indicative of Parliament's

intention to confine the performance of the 'other public functions' referred to in that subsection, only to those other functions conferred by the State of Western Australia, and not by the Commonwealth. The applicants relied upon the maxim *'expressio unius est exclusio alterus'*.

24 In my view, the validity of s 19 and s 46 of the Act does not depend upon there being State legislation which furnishes the requisite consent and authority for the performance by State magistrates of the Commonwealth functions referred to in s 19 of the Act.

25 It is well established that the functions which are performed by magistrates under s 19 of the Act are performed in a personal capacity as a persona designata ('designated person') and not in their capacity as State officials (*Dutton v O'Shane* (2003) 132 FCR 352 at 385; *Cabal v United Mexican States (No 3)* (2002) 186 ALR 188 at 231 *('Cabal')*). The Act does not purport to confer functions upon a State magistrate in his or her capacity as such, nor does it purport to prescribe how a State official should carry out his or her function as a State magistrate.

26 I accept the submissions of senior counsel for the first respondent in each application and the third respondent in Mr Zentai's application ('the first and third respondents') that the Act is an Act with respect to external affairs within the meaning of s 51(xxix) of the Constitution; and it is within the legislative power of the Commonwealth, by the Act, to confer s19 functions upon a State magistrate as a designated person without the need for any State legislation authorising the conferral of those functions.

27 None of the cases relied on by the applicants deals with the conferral by a Commonwealth statute of Commonwealth functions on a State official as a designated person. They are all distinguishable.

28 The observations in *Cram* were made in the context of the High Court considering the status of officers who were members of a single tribunal which was established jointly under both Commonwealth and State law. Neither the observations in [15] nor [16]-[17] above referred to the conferral of functions by a Commonwealth statute upon a State official as a designated person. The observations in [15] above refer to the conferral of power on State officials in their capacity as such. The observations in [16]-[17] above, refer to the

conferral of powers on a State tribunal.

29 Further, I accept the submissions of the first and third respondents to the effect that all the cases relating to co-operative legislative schemes, are distinguishable because they are cases about Commonwealth officials performing functions conferred by State law. They are affected by the operation of s 109 of the Constitution. As senior counsel put it, the cases do not 'speak to or establish any principle relevant to or supporting the applicants' contention that State legislation is necessary to authorise a magistrate to act as a designated person under Commonwealth legislation, the validity of which is not in issue'.

30 The Commonwealth legislation considered in the Royal Metals case is distinguishable because it sought to direct how a State official should carry out his or her function in that capacity. The distinction which is drawn between 'State service' and 'individual service' is apparent from the following observations of Isaacs J at 54:

> *'…Sec. 20* [of the Commonwealth statute], *however, is really an amendment of the* Real Property Acts *of the States, and is a command to a State official as such in the performance of his State functions to disregard the conditions of his statutory authority and to act in accordance with Commonwealth directions. His action is a State service, not an individual service. Sec. 20 attempts to create, not a new individual duty on the part of an inhabitant of the Commonwealth, but a new State governmental duty towards the Commonwealth. In the circumstances here appearing, that is not warranted by any provision of the Constitution, and the attempt fails. …'*

31 The applicants also sought to rely upon the United States cases of *New York v United States* 505 US 144 and *Printz v United States* 521 US 898, but they are also distinguishable on the basis that the cases do not deal with the position of the conferral of federal functions on a State officer as a designated person.

32 I also accept the submissions of the first and third respondents that, even if the validity of s 19 and s 46 of the Act depended upon the existence of State legislative 'consent and authority', such consent and approval is to be found in s 6(3)(b) of the Magistrates Court Act.

33 I do not accept the applicants' submissions that s 6(3)(b) is to be construed as authorising the magistrates to perform other public functions only at the instance of the State and not at the instance of the Commonwealth. It is plain that Parliament intended that the words 'may hold concurrently another public or judicial office or appointment' in s 6(3)(a) of the Magistrates

Court Act, were to be construed as not being confined to another public or judicial office or appointment made at the instance only of the State of Western Australia and no other polity. This is obvious from the presence in s 6(3)(a) of the additional words 'including an office or appointment under the law of another place'.

34 An appointment of a State magistrate to public office by the Commonwealth would not be one made 'under the law of another place'. It follows that, if Parliament intended, as it clearly did, that the other offices or appointments referred to in s 6(3)(a) were to include an appointment made under the laws of places other than Western Australia, it must have intended that the words 'another public or judicial office or appointment' would include an eligible appointment made under the laws applicable in Western Australia, which would include the laws of the Commonwealth. There is no reason why the general words 'other public functions' in s 6(3)(b), should be read more restrictively than the general words in s 6(3)(a), so as to exclude the performance of Commonwealth functions.

35 In this regard, it is significant that at the time that the Magistrates Court Act was enacted in 2004, there were in force several Commonwealth statutes which conferred functions upon State magistrates as designated persons. These include the *Customs Act 1901* (Cth) (s 219ZK) and the *Crimes Act 1914* (Cth) (s 4AAB). It is unlikely that Parliament would have intended to permit State magistrates to take up appointments under the law of places other than Western Australia as contemplated in s 6(3)(a), while at the same time precluding magistrates from performing the functions prescribed under Commonwealth statutes applying in Western Australia.

36 Further, I do not accept the submissions of the applicants that the operation of the maxim *'expressio unius est exclusio alterus'* mandates a finding that s 6(3)(b) is confined to permitting a State magistrate to perform public functions only at the instance of the State of Western Australia. It is recognised that the maxim should be applied cautiously and 'applies only when the intention it expresses is discoverable upon the face of the instrument:…' (*Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94). In my view the maxim is inapplicable and the intention it expresses is not discoverable on the face of the statute. As I have already said, any public appointment made, or public function conferred on a magistrate, by the Commonwealth will not be made 'under the law of another place'. The fact that a magistrate

is permitted to hold a concurrent Commonwealth appointment under s 6(3)(a) is not, therefore, dependent upon the presence of those words in s 6(3)(a) of the Magistrate Courts Act. Accordingly, the absence of those words in s 6(3)(b) gives rise to no inference as to Parliament's intention in respect of the holding of Commonwealth appointments and the performance of Commonwealth functions.

37 None of *Essendon*, *Jacobsen* or *Hughes* deals with the construction of the Magistrates Court Act. They are not directly on point. However, in the observations from these cases relied upon by the applicants, it is recognised that any presumption or rule of construction which might otherwise apply, must yield to the clear intention of Parliament. In this case, as I have already said, Parliament has made its intention clear that State magistrates are eligible to hold public offices or appointments, and, to perform other public functions, at the instance of 'polities' other than the State of Western Australia, including the Commonwealth.

38 Further, in my view, contrary to the submissions of the applicants, the principle in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, that the Commonwealth lacks the power to pass laws which interfere with the exercise by the States of their constitutional functions, is not pertinent to the construction of s 6 of the Magistrates Court Act which, as I have already said, is to be derived from the words of the statute.

I also reject Mr O'Donoghue's submission that the carrying out of the s 19 functions under the Act would not fall within the ambit of 'public functions' for the purposes of s 6(3)(b) of the Magistrates Court Act. The s 19 functions are performed pursuant to statutory authority, and are plainly public functions.

39 Accordingly, in my view, even if the legislative authority of the State is necessary to make s 19 and s 46 of the Act constitutionally effective, such authority exists.

**Ground 2 - Incapacity of State officials to act in international affairs**

40 In support of this ground, the applicants submitted that the Commonwealth Parliament was not competent, as a matter of legislative power, to confer executive functions on State officers which concern Australia's external affairs. This is because it is the Commonwealth, and not the States, that is authorised by s 61 of the Constitution to conduct Australia's international relations. This submission is premised on the assumption that the functions performed under s 19 of the Act are performed by State magistrates in their capacity as State officers. As I have already said, it is well established that the functions are performed in a personal capacity as a designated person. I, accordingly, reject this ground of challenge.

**Ground 3 - Incompatibility with Chapter III of the Constitution**

41 The applicants submitted that s 19 and s 46 of the Act effected an unconstitutional vesting of Commonwealth executive power in State officers that was incompatible with or repugnant to the continuing exercise by those officers of the 'judicial power of the Commonwealth under Chapter III of the Constitution'.

42 The applicants submitted further that the magistrates were members of a State court which was vested with federal jurisdiction, and their participation in s 19 proceedings was incompatible with their function as officers of a court exercising from time to time the judicial power of the Commonwealth. It was said that the performance by the second respondents of the s 19 functions will damage the appearance of their judicial objectivity by their 'attending to the administrative needs of the Commonwealth'. The applicants also submitted that the s 19 proceedings comprise the third step in an 'intermeshing' process which involves a Commonwealth Minister and leads to the making of what is ultimately an executive government decision. It was also said the magistrate's performance of the s 19 functions affected the political affairs of the Commonwealth government and the magistrate was likely to be associated with the outcome.

43 The applicants relied upon the authorities of *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51 *('Kable')* and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1997) 189 CLR 1 *('Wilson')*.

44 In *Kable*, the High Court stated the importance of the judicial incompatibility principle and held that the principle could apply to a judicial officer of a State court which was vested with federal jurisdiction. However, the case did not involve a designated person and the case is, therefore, distinguishable from this case.

45 The *Wilson* case did, however, involve consideration by the High Court of the position of a designated person. In *Wilson*, a judge of the Federal Court was appointed by the Minister for Aboriginal and Torres Strait Islander Affairs ('the Minister') as a designated person to prepare a report under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('the Heritage Protection Act').

46 Section 10 of the Heritage Protection Act provided that where the Minister received an application by an Aboriginal or a group of Aboriginals, seeking to have an area of land preserved or protected from injury or desecration, and he has received a report, from a person nominated by him, he may make such a declaration, after having considered the report and 'such other matters as he thinks relevant'.

47 Among the matters required to be dealt with by the report were the 'extent of the area that should be protected' (s 10(4)(c)) and the 'prohibitions and restrictions that should be made' (s 10(4)(d)).

48 The validity of the appointment of the judge was challenged on the grounds of it being incompatible with the holding of judicial office under Ch III of the Constitution.

49 At 16-17 of *Wilson* Brennan CJ, Dawson, Toohey, McHugh and Gaudron JJ observed:

> *'The capacity of Ch III judges to perform their judicial duties throughout the terms of their appointment independently of the political branches of government cannot be prejudiced by their appointment to non-judicial office or to perform non-judicial functions. If an appointment to non-judicial office or performance of non-judicial functions prejudices that capacity it is incompatible with the office and function of a Ch III judge. And that is inconsistent with s 72 of the Constitution.* …
>
> …

*Bearing in mind that public confidence in the independence of the judiciary is achieved by separation of the judges from the persons exercising the political functions of government, no functions can be conferred on a Ch III judge that would breach that separation. The separation that is relevant here is separation in the performing of the particular non-judicial functions…Constitutional incompatibility has the effect of limiting legislative and executive power. Where it has that effect, it is discovered on the face of the statute, or on the face of those measures taken pursuant to a statute, that purports or purport to confer a non-judicial function on a Ch III judge. That is not to say that constitutional incompatibility is a matter of mere form. The operation of the statute or of the measures taken pursuant to it is ascertained by looking to the circumstances in which the purported function might be performed. Where a non-judicial power is purportedly conferred, constitutional incompatibility is ascertained by reference to the function that has to be performed to exercise the power.*

*The statute or the measures taken pursuant to the statute must be examined in order to determine, first, whether the function is an integral part of, or is closely connected with, the function of the Legislature or the Executive Government. If the function is not closely connected with the Legislature or the Executive Government, no constitutional incompatibility appears. Next, an answer must be given to the question whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law (hereinafter "any non-judicial instruction, advice or wish"). If an affirmative answer does not appear, it is clear that the separation has been breached…If the function is one which must be performed independently of any non-judicial instruction, advice or wish, a further question arises: Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds – that is, on grounds that are not confined by factors expressly or impliedly prescribed by law? In considering these questions, it will often be relevant to note whether the function to be performed must be performed judicially, that is, without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests. An obligation to observe the requirements of procedural fairness is not necessarily indicative of compatibility with the holding of judicial office under Ch III, for many persons at various levels in the executive branch of government are obliged to observe those requirements. But, conversely, if a judicial manner of performance is not required, it is unlikely that the performance of the function will be performed free of political influence or without the prospect of exercising a political discretion.'*

50 The High Court held that the appointment of the Federal Court judge as a designated person to prepare the report, infringed the constitutional incompatibility principle. At 18-19 of the joint judgment, their Honours observed:

> *'The only power conferred by s 10 of the Act is the power conferred on the Minister to make a declaration. A report is no more than a condition precedent to the exercise of the Minister's power to make a declaration. The function of a reporter under s 10 is not performed by way of an independent review of an exercise of the Minister's power. It is performed as an integral part of the process of the Minister's exercise of power. The performance of such a function by a judge places the judge firmly in the echelons of administration…'*

51 Their Honours went on to observe (at 19) that the Heritage Protection Act did not require the reporter to disregard any non-judicial instruction, advice or wish in preparing the report and that the report may be prepared so as to accord with ministerial policy. Also, the High Court observed that the decisions which the Heritage Protection Act required the reporter to make, such as the extent of the area that should be protected or the prohibitions that should be made, were not necessarily linked to findings as to the nature and extent of the Aboriginal connection with the land or by assessment as to the extent to which Aboriginal beliefs and lifestyles were under threat, and were 'political in character'.

52 I am of the view that on the application of the criteria recognised by the High Court in *Wilson*, the administrative functions which are performed by a magistrate acting as a designated person in relation to s 19 proceedings are not such as would offend the constitutional incompatibility principle.

53 Firstly, it cannot be said, as was said of the function of the reporter in *Wilson*, that the performance of the function is 'no more than a condition precedent' to the exercise by the Attorney-General of the power under s 22 of the Act to decide whether to grant the extradition request. This is because s 19(10) vests in the magistrate an independent power, in prescribed circumstances, to bring the extradition process to an end. The magistrate performs an independent and self-contained function, which contrary to the applicants' submission, is not simply a step in an intermeshing process which leads to the making of an executive government decision. The true position is that the s 19 process may or may not lead to the making of an executive government decision, depending upon the decision which is made by the magistrate. The independent role of the s 19 magistrate was recognised by the High Court in the case of *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 538 where Brennan CJ, Dawson and McHugh JJ, observed:

> *'...The powers conferred by the Act, other than those conferred on a court by s 21, are administrative in nature. They are exercisable by different repositories in sequence, but none of them authorises the repository of a power to review the exercise of a power by another repository earlier in the sequence.*
>
> *Of course, the same issue or similar issues may arise for independent determination by the respective repositories of powers where the same issue or a similar issue conditions the exercise in sequence of their respective powers. Thus, if the Attorney-General forms an opinion when considering the issue of a s 16 notice that there is an extradition objection, he has no power to issue the notice (s 16(2)(b)); if the s 19 magistrate is satisfied that there are substantial grounds for believing that there is an extradition objection, the magistrate must order the person to be released (s 19(2)(d), (10)(a)); and unless the Attorney-General in making a determination under s 22 is satisfied that there is no extradition objection, he cannot issue a warrant for the person's surrender under s 23 (s 22(3)(a)). But the s 19 magistrate does not review the Attorney-General's non-formation of an opinion under s 16; nor does the Attorney-General review the s 19 magistrate's state of non-satisfaction. The existence or possible existence of extradition objections fall for consideration by the Attorney-General under s 16, by the s 19 magistrate and again by the Attorney-General under s 22 but on each occasion the repository of the relevant power makes an independent determination of the issue on which the existence of that power depends.'*

54 Secondly, the Act does not vest in the magistrate a discretion which is to, or may, be exercised on political grounds. The Act confers on the magistrate the function of determining whether a person is 'eligible for surrender', but that decision is to be made by reference to factors that are 'expressly or impliedly prescribed by law', namely, the provisions which are found in s 19 of the Act. The s 19 functions are to be performed independently of any non-judicial instruction, advice or wish. The absence of deference by the magistrate in carrying out the s 19 proceedings, to the political arm of government, serves to further distinguish the position of the magistrate from the position of the reporter in the *Wilson* case.

55 Thirdly, s 19 of the Act contemplates that the magistrate will accord the parties procedural fairness in the conduct of the s 19 proceedings. Section 19 contemplates that both the person in respect of whom extradition is sought, and the country seeking extradition will have a fair opportunity to be able to participate in the proceedings. This is evident from s 19(1)(c) of the Act which requires that the magistrate only conduct the s 19 proceedings where he or she considers that the parties have had sufficient time to prepare for the proceedings.

56 The applicants also submitted that the functions performed by a magistrate conducting

s 19 proceedings were 'largely mechanical' and this detracted from the judicial function. I do not accept that the functions prescribed by s 19 are such as to detract from the judicial function. Among the prescribed functions that the magistrate must perform is to consider whether there are substantial grounds for believing that there is an 'extradition objection' in respect of the extraditable offence. Among the circumstances which may comprise an extradition objection (as defined in s 7 of the Act) are that the extradition is being sought for the 'purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinion' or that the 'person may be…detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions'. In this context, the magistrate may need to consider and decide complex issues affecting the liberty of the individual. The involvement of the magistrate in a proceeding which has as an element, a concern for the protection of the individual from a threatened infringement of basic human rights by the abuse of executive power, is consistent with the judicial function (*Grollo v Palmer* (1995) 184 CLR 348 at 367-368). Even the functions the magistrate must perform in relation to the assessment of the authenticity of the documents, involving as it does the construction and application of statutory provisions to the facts, is not, in my view, incompatible with the judicial function. The extent of the inquiries and the difficulty of some of the issues which a magistrate may have to decide is demonstrated by cases such as *Cabal* and *Bennett v United Kingdom* (2001) 179 ALR 113.

57 Finally, it was submitted that the performance of the function was likely to give rise to a perception of bias because the magistrate was 'guided' by an officer of the DPP who represented the requesting country. It is said that the perception of bias arises from the fact that officers of the DPP are likely to be involved in future federal summary prosecutions in the Magistrates Court of Western Australia. I do not accept this submission. Section 19 of the Act does not contemplate proceedings in which the DPP 'guides' the magistrate. As previously stated, the Act contemplates both parties participating in proceedings, and having a fair opportunity to do so. The fact that the extraditing country may happen to be represented by solicitors and counsel employed or engaged by the DPP, would not in the mind of a fair-minded lay observer give rise to a reasonable apprehension that the magistrate would not bring an impartial mind to the conduct of future federal summary prosecutions in the Magistrates Court (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344). The circumstances of this case are distinguishable from the case of *Re Grinter; Ex parte Hall* (2004) 28 WAR 427 *('Grinter')*, on which the applicants relied in support of this submission.

In *Grinter*, the magistrate presided over an examination under s 102 of the *Justices Act 1902* (WA). Malcolm CJ observed at 442:

> *'…The justice who supervises the s 102 investigation has no independent decision-making function, and little or no role in controlling the proceedings, including ensuring proper supervision of the conduct of the prosecution. …'*

58 Later, at 443 Malcolm CJ said:

> *'…The procedure under s 102 involves "judicial participation in criminal investigation" as described in* Grollo v Palmer. *That would seem to be its very purpose, namely, to assist the prosecution to gather evidence and compile a prosecution brief. This assistance is provided without notice to and in the absence of the defendant. …'*

59 By contrast, as previously mentioned, in the s 19 proceedings, both parties are before the magistrate and the magistrate is required to make an independent determination in accordance with prescribed criteria. The s 19 proceedings do not involve the participation of the magistrate in an evidence gathering process for a criminal prosecution.

60 I do not accept the applicants' third ground of challenge.

61 Each of the applications is dismissed with costs.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis.

Associate:

Dated: 12 September 2006

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| Date of Hearing: | 28 July 2006 |
| Date of Judgment: | 12 September 2006 |