FEDERAL COURT OF AUSTRALIA

Zentai v Republic of Hungary [2009] FCAFC 139

EXTRADITION – function of magistrate in conducting hearing under s 19 of the *Extradition Act 1988* (Cth) – function of primary judge in conducting review of magistrate decision under s 21 of the *Extradition Act 1988* – whether magistrate and primary judge were required to determine whether alleged war crime was an extradition offence or whether appellant was an extraditable person – no appellable error – appeal dismissed

Constitution s 75(v)
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Crimes Act 1914 (Cth)
Extradition Act 1988 (Cth) s 5, s 10(4), s 11(1), 11(1A), s 11(1C), s 11(3), s 11(6), s 12, s 12(1), s 12(3), s 15, s 16, s 16(1), s 16(2), s 18, s 19, s 19(1), s 19(2), s 19(2)(a), s 19(2)(b), s 19(3), s 19(3)(a), s 19(3)(c)(ii), s 19(5), s 19(6), s 19(7), s 19(7A), s 19(9), s 21, s 21(1)(b), s 21(2)(b)(ii), s 21(6)(g), s 22, s 22(1), s 22(1)(b), s 22(2), s 22(3), s 22(3)(e), s 22(3)(f)
Judiciary Act 1903 (Cth) s 39B
Extradition (Republic of Hungary) Regulations reg 3, reg 4

Bennett v United Kingdom (2000) 179 ALR 113
Director of Public Prosecutions (Cth) v Kainhofer (1995) 185 CLR 528
Dutton v O'Shane (2003) 132 FCR 352
Federal Republic of Germany v Parker (1998) 84 FCR 323
Harris v Attorney-General of the Commonwealth (1994) 52 FCR 386
Oates v Attorney-General of the Commonwealth (2002) 118 FCR 544
O'Donoghue v Ireland (2008) 234 CLR 599
Papzoglou v Republic of the Philippines (1997) 74 FCR 108
Prabowo v Republic of Indonesia (1997) 74 FCR 599
Timar v The Republic of Hungary [2000] FCA 755
Unkel v Director of Public Prosecutions (1990) 95 ALR 44
Zoeller v Federal Republic of Germany (1989) 23 FCR 282

CHARLES ZENTAI v REPUBLIC OF HUNGARY and BARBARA LANE
WAD 47 of 2009

BLACK CJ, TRACEY AND BARKER JJ
8 OCTOBER 2009
PERTH

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 47 of 2009**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**CHARLES ZENTAI** **Appellant**
AND:	**REPUBLIC OF HUNGARY** **First Respondent**
	BARBARA LANE **Second Respondent**
JUDGES:	**BLACK CJ, TRACEY AND BARKER JJ**
DATE OF ORDER:	**8 OCTOBER 2009**
WHERE MADE:	**PERTH**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs.

3. For the purposes of s 21(6)(g) of the *Extradition Act 1988* (Cth) the appellant is eligible for surrender within the meaning of s 19(2) of the Act in relation to an extradition offence.

4. The order of the second respondent made pursuant to s 19(9) of the *Extradition Act 1988* (Cth) on 20 August 2009 be confirmed.

5. Execution of these orders and the order of the second respondent made 20 August 2009 be stayed for 14 days.

6. The appellant’s bail is confirmed on the same terms as granted by Gilmour J on 12 May 2009.

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 eSearch on the Court's website.

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AND:	**REPUBLIC OF HUNGARY** **First Respondent**
	BARBARA LANE **Second Respondent**
JUDGES:	**BLACK CJ, TRACEY AND BARKER JJ**
DATE:	**8 OCTOBER 2009**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 The first respondent, the Republic of Hungary, has made a request to the Attorney-General of the Commonwealth of Australia, pursuant to the 1995 Treaty on Extradition between Australia and the Republic of Hungary (the Treaty), for the extradition of the appellant who is alleged to have committed a war crime in Budapest on 8 November 1944.

2 On 8 July 2005, a provisional arrest warrant for the arrest of the appellant was issued under s 12 of the *Extradition Act 1988* (Cth) (the Act).

3 By written notice dated 8 July 2005, issued by the Minister for Justice (acting as the delegate of the Attorney-General) under s 16(1) of the Act (the Notice) and directed to a

magistrate, the magistrate was notified of the extradition request for the following extradition offence:

> a war crime violating section 165 of Act IV of 1978 on the Hungarian Criminal Code in conjunction with section 11, paragraph 5 of Law-Decree No. 81/1945 (II.5) ME on People's Jurisdiction enacted by Act VII of 1945, amended and complemented by Decree No. 1440/1945 (V.1.) ME (1 count).

4 On 18 August 2008, pursuant to s 19 of the Act, a hearing took place before the second respondent, a magistrate (the s 19 magistrate), in Perth, Western Australia for the purpose of determining whether the applicant was eligible for surrender to an extradition country in relation to an extradition offence. The s 19 magistrate, when undertaking this function, acted in an administrative, not a judicial capacity: see *O'Donoghue v Ireland* (2008) 234 CLR 599.

5 On 20 August 2008, the s 19 magistrate determined that the appellant was eligible for surrender and, pursuant to s 19(9) of the Act, by warrant in statutory form, ordered the appellant be committed to prison pending the determination by the Attorney-General of the Commonwealth, pursuant to s 22 of the Act, as to whether or not the appellant was to be surrendered to the Republic of Hungary.

6 The appellant then applied to the Federal Court of Australia for review of the s 19 magistrate's order, pursuant to s 21 of the Act. On 31 March 2009, the primary judge dismissed the application for review and confirmed the order of the s 19 magistrate made under s 19(9) of the Act.

7 At the hearing before the s 19 magistrate and the review before the primary judge the appellant drew attention to the Treaty and contended, by reference to its description of an "extraditable offence", that he was not eligible to be surrendered.

8 The Treaty is set out in the Schedule to the *Extradition (Republic of Hungary) Regulations* (the Regulations), made pursuant to the Act, that commenced on 25 April 1997. By reg 3, the Republic of Hungary is declared to be an "extradition country". By reg 4, the Act is made applicable "in relation to the Republic of Hungary subject to the Treaty on Extradition between Australia and the Republic of Hungary [(Treaty)] (a copy of which is set out in the Schedule)".

9 Section 11(1) of the Act provides that:

> (1) The regulations may:
> (a) state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations; or

Section 11(1C) of the Act further provides that for the purposes of subs (1) and subs (1A), "the limitations, conditions, exceptions or qualifications that are necessary to give effect to a treaty may be expressed in the form that this Act applies to the country concerned subject to that treaty". It is apparent that the Regulations, by reg 4, have been made according to the form of expression provided for by s 11(1C). As a result, the Act applies subject to any limitations, conditions, exceptions or qualifications set out in the Treaty. In that sense, the Act is modified by the terms of the Treaty.

10 By Art 1 of the Treaty, the Contracting States (Australia and the Republic of Hungary) undertake to extradite to each other, subject to the provisions of the 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.

11 Article 2 of the Treaty then describes the extraditable offences. On the face of it, the war crime alleged would be included. However, para 5 of Art 2 then goes on to provide that:

> 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.

12 The appellant argues that by reason of the terms of Art 2, para 5(a) of the Treaty, the war crime alleged against him is not an "extraditable offence" as described in the Treaty. The appellant says that the warrant issued by the Republic of Hungary against him alleges he committed a war crime in Budapest on 8 November 1944. The warrant relies on the war crime, as defined, having been made an offence by legislation of the Republic of Hungary enacted in 1945 which applies retrospectively in the Republic of Hungary to include 8 November 1944. The appellant contends that the offence alleged against him by the

Republic of Hungary in the warrant was not an offence in the Requesting State "at the time of the acts or omissions constituting the offence" as required by Art 2, para 5(a) of the Treaty, notwithstanding that the law of the Republic of Hungary gives the war crime offence retrospective effect in the Republic of Hungary.

13 In conducting the review under s 21 of the Act, the primary judge held, on the authority of the decision of the High Court of Australia in *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 (*Kainhofer*), that it was not a function of the s 19 magistrate, or the Court on review, to determine by reference to the Treaty whether the appellant was an "extraditable person" or had committed an "extradition offence" for the purposes of the Act.

ISSUE ON APPEAL

14 The sole issue for determination in this appeal is whether the s 19 magistrate, in conducting the hearing under s 19 of the Act to determine the appellant's eligibility for surrender, and in turn the primary judge in conducting the review under s 21, was required, as put by counsel for the appellant in their written submissions to this Court on appeal, "to refrain from determining whether the war crime was an extradition offence, by reason of the Minister for Justice issuing a notice under s 16 of the Act specifying the appellant as an 'extraditable person'".

EXTRADITION ACT 1988 (CTH)

15 The Australian law relating to extradition is to be found in the Act.

16 The Act, in certain circumstances, permits the arrest, detention and surrender to another country of a person in respect of whom a warrant is in force for the arrest of that person in relation to an offence against the law of that other country that the person is accused of having committed, or for which the person has been convicted.

17 The steps or process by which a person is finally surrendered to another country was summarised by the Full Federal Court in *Harris v Attorney-General of the Commonwealth* (1994) 52 FCR 386 (*Harris*) at 389 as follows:

> The Act contemplates four stages in extradition proceedings as follows: (1) Commencement; (2) Remand; (3) Determination by a magistrate of eligibility for surrender; (4) Executive determination that the person is to be surrendered. In summary form, the scheme is as follows: The commencement of proceedings is by the issue of a provisional arrest warrant under s 12(1) or by the giving of a notice under s 16(1). Once arrested, the person is required by s 15 to be taken before a magistrate and remanded in custody or on bail for such period as may be necessary for eligibility proceedings to be taken under s 19. Where a person is on remand under s 15 and the Attorney-General has given notice under s 16(1), provision is made under s 19 for a magistrate to conduct proceedings to determine whether the person is eligible for surrender. If eligibility is so determined by the magistrate, a provision is made by s 22 for the Attorney-General to decide whether the person is to be surrendered.

18 By s 12 of the Act, a magistrate (the s 12 magistrate) may issue a provisional arrest warrant for the arrest of a person where, as provided for by s 12(1):

> (a) an application is made, in the statutory form, on behalf of an extradition country to a magistrate for the issue of a warrant for the arrest of a person; and
> (b) the magistrate is satisfied on the basis of information given by affidavit, that the person is an extraditable person in relation to the extradition country;

19 Thereafter the s 12 magistrate must send to the Attorney-General a report stating that the magistrate has issued the warrant, together with a copy of the affidavit. By s 12(3), the Attorney-General must direct a magistrate to cancel the warrant where he or she has received the report or has become aware of the issue of a warrant, but the person has not yet been arrested under the warrant and the Attorney-General either decides not to issue a notice under s 16(1) in relation to the person or considers that for any other reason the warrant should be cancelled.

20 Otherwise, by s 15 of the Act, "[a] person who is arrested under a provisional arrest warrant shall be brought as soon as practicable before a magistrate in the State or Territory in which the person is arrested" and "the person shall be remanded in custody, or … on bail, for such period or periods as may be necessary for proceedings under s 18 or s 19, or both, to be conducted".

21 By s 16(1), "[w]here the Attorney-General receives an extradition request from an extradition country in relation to a person, the Attorney-General may, in his or her discretion, by notice in writing in the statutory form expressed to be directed to any magistrate, state that the request has been received".

22 In the present case, as noted above, the extradition proceedings concerning the appellant were commenced, while the appellant was the subject of a s 12 provisional arrest warrant, by the issuing of the Notice by the Minister for Justice (as delegate of the Attorney-General) under s 16(1) of the Act. The Notice informed the s 19 magistrate of the extradition offence of war crime.

23 The s 19 magistrate then conducted a hearing under s 19 of the Act in Perth for the purpose of determining the eligibility for surrender of the appellant, the appellant not having consented to surrender under s 18 of the Act. Section 19(1) of the Act requires the s 19 magistrate to conduct such proceedings where four factors are satisfied:

1. the person is on remand under s 15;
2. the Attorney-General has given a notice under s 16(1) in relation to the person;
3. an application has been made to the magistrate by the extradition country for the proceedings to be conducted; and
4. the magistrate considers that the person and the extradition country had reasonable time to prepare for the proceedings.

24 By s 19(2) the person is only eligible for surrender if:

1. the "supporting documents" in relation to the offence have been produced to the magistrate;
2. where the Act applies 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;
3. the dual criminality requirement is met, that is to say, 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 was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and
4. the person does not satisfy the magistrate that there are substantial grounds for believing there is an extradition objection in relation to the offence.

25 The "supporting documents" referred to are defined by s 19(3) to mean:

> (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.
> (emphasis in original)

26 Section 19(5) makes it plain that in the s 19 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.

27 Subject to that provision, any document that is duly authenticated is, by reason of s 19(6), admissible in the proceedings. Section 19(7) explains what documents may be considered to be "duly authenticated", and by virtue of s 19(7A) has effect in spite of any limitation, condition, exception or qualification under ss 11(1), (1A) or (3).

28 The expression "extradition country", used in ss 12(1), 16(1) and 19(1), and elsewhere in the Act, is defined by s 5 of the Act and includes any country (other than New Zealand) that is declared by the Regulations to be an extradition country. The Regulations referred to at [8] above have declared the Republic of Hungary to be an extradition country.

29 The term "extradition offence" is defined by s 5, so far as is relevant to the circumstances of the case of the appellant, to mean:

> (a) in relation to a country other than Australia—an offence against a law of the country:
> (i) for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months; or
> (ii) if the offence does not carry a penalty under the law of the country—the conduct constituting which is, under an extradition treaty in relation to the country, required to be treated as an offence for which the surrender

of persons is permitted by the country and Australia

30 In relation to s 19, two further provisions of the Act should also be noted. First, s 10(4), which provides:

> (4) A reference in this Act to an extradition offence for which surrender of a person is sought by an extradition country is, in relation to a time after the Attorney-General has given a notice under subsection 16(1) in relation to the person, a reference to any extradition offence to which the notice (including the notice as amended) relates.

The second is s 11(6), which provides that:

> (6) For the purpose of determining under subsection 19(1) whether a person is eligible for surrender in relation to an extradition offence for which surrender of the person is sought by an extradition country, no limitation, condition, qualification or exception otherwise applicable under this section (not including a limitation, condition, qualification or exception having the effect referred to in subsection (4)) has the effect of requiring or permitting a magistrate to be satisfied of any matter other than a matter set out in paragraph 19(2)(a), (b), (c) or (d).

We will return to these provisions in our consideration of the issue below.

31 Section 22(2) of the Act requires the Attorney-General, as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person, to determine whether the person is to be surrendered in relation to a "qualifying extradition offence". In the circumstances as they pertain to the appellant, an "eligible person" is defined by s 22(1)(b) to mean a person who has been committed to prison by order of a magistrate made under s 19(9) or required to be made under s 21(2)(b)(ii) (including by virtue of an appeal referred to in s 21), being an order in relation to which no proceedings under s 21 are being conducted or available. The expression "qualifying extradition offence" is defined by s 22(1)(b), in relation to an eligible person, to mean any extradition offence in relation to which the s 19 magistrate conducted final proceedings or the court conducted final proceedings under s 21 and determined that the person was eligible for surrender within the meaning of s 19(2).

32 The function and power of the Attorney-General under s 22(2) to determine whether the person is to be surrendered is dependent on a person having been declared an "eligible person". The Attorney-General must then decide whether the person is to be surrendered "in relation to a qualifying extradition offence". In our view, s 22(1) gives the Attorney-General a broad power to decide whether surrender should occur. Questions relating to whether the

person is an "extraditable person" and whether there is in law an "extradition offence" would again appear to be open for consideration.

33 The effect of s 22(3) of the Act is that the eligible person is only to be surrendered if a number of factors are made out. Section 22(3)(e) in effect requires the Attorney-General to give attention to the terms of a treaty that has the effect that surrender of the person in relation to the offence shall or may be refused in certain circumstances. Where such terms apply, the person may only be surrendered if the Attorney-General is satisfied either that the relevant circumstances do not exist or, where refusal to surrender is discretionary, that the circumstances do exist but that nevertheless surrender of the person in relation to the offence should not be refused. Further, by s 22(3)(f), the person is only to be surrendered if:

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

34 Although s 21 provides the only avenue for review of the extradition process within the Act itself, a decision made by the Attorney-General under s 16, and probably also under s 22, is also amenable to judicial review under the general law by resort to the so-called "constitutional writs", under s 75(v) of the *Constitution* and s 39B of the *Judiciary Act 1903* (Cth), as discussed below. Counsel for the Republic of Hungary, in oral submissions before this Court, accepted that the decision of the Minister, yet to be made, under s 22 of the Act would, for example, also be amenable to such judicial review. Whether the s 12 magistrate's decision to grant a provisional arrest warrant is amenable to similar review, however, may be doubted: see *Papzoglou v Republic of the Philippines* (1997) 74 FCR 108 (*Papazoglou*) [note: incorrectly cited in 74 FCR 108 as Papzoglou], the Full Court, at 132 (F-G).

35 In turn, a general issue arises whether it is open, or indeed necessary, at each stage of the administrative or executive decision-making process described, for the decision-maker to determine whether an affected person is an "extraditable person" and whether the proceedings concern an "extradition offence" under the Act. As discussed below, authority suggests that these questions may be considered by the relevant decision-maker under s 12 and s 16. We have suggested that, on the face of it, it may also be a question for consideration by the Attorney-General under s 22. However, authority indicates that it is not a question open for consideration under s 19. We now turn to that issue.

CONSIDERATION OF THE ISSUE

36 The appellant's basic contention, set out in the written submissions of counsel, is that the s 19 magistrate lacked jurisdiction to conduct eligibility proceedings because her jurisdiction was dependent on the existence of an extradition offence. It was submitted that the offence alleged against the appellant was not such an offence. The appellant further submitted that, in purporting to exercise power under s 19, the magistrate erred in two respects:

- in holding that because the Minister for Justice had given the Notice under s 16 that the appellant was an "extraditable person", she was bound not to inquire further in order to satisfy herself that a relevant "extradition offence" existed as a matter of Hungarian law at the time when the relevant conduct constituting the offence occurred; and
- in holding, in any event, that there was a relevant extradition offence operative under Hungarian law at the relevant time because of the retrospective operation of the Hungarian legislation.

37 The appellant contends that the primary judge accordingly erred in the review proceeding conducted under s 21 of the Act in holding that the s 19 magistrate was correct to proceed on the basis that the Notice authorised her to determine that the appellant was an "eligible person", and not to proceed to determine whether there was an extradition offence.

38 The appellant particularly takes issue with the primary judge's finding that the effect of the decision of the High Court of Australia in *Kainhofer* was that the opinion of the Attorney-General formed under s 16 of the Act, prior to the giving of the Notice that the appellant was an "extraditable person", and the related opinion of the Attorney-General that there was an "extraditable offence", were not reviewable by the magistrate under s 19. The appellant contends in the written submissions of counsel that the primary judge should not have found that:

- for the purposes of s 19(1) of the Act, the "extradition offence" was, by virtue of s 10(4), the extradition offence to which the Notice relates, and the Notice in the instant case expressed the extradition offence to be the alleged war crime;

- by reason of s 11(6) of the Act, the matters that a magistrate has to consider in proceedings to determine eligibility for surrender under s 19(2) do not include restrictions or limitations arising under the Treaty; or that
- the sole avenue for judicial review of whether the war crime was an "extradition offence" at the s 19 eligibility hearing stage was if the s 16 Notice was on its face invalid and then by way of proceedings under s 39B of the *Judiciary Act 1903*.

39 The appellant's key submission is that s 19(1) and s 19(2) of the Act cannot sensibly operate without the requesting State nominating an "extradition offence" that relevantly has legal effect according to the Act. The hearing magistrate must therefore ascertain that such an offence exists. That is a jurisdictional pre-condition separate from, and in addition to, the other stipulated matters the s 19 magistrate is required to determine, and is modified in this case by Art 2, para 5(a) of the Treaty. By force of those provisions a person cannot be eligible for surrender in relation to an offence that did not exist at the time the relevant conduct is alleged to have occurred.

40 The appellant contends therefore that the issue before the s 19 magistrate is not simply whether the facts alleged in the supporting documents were adequately described or were such as to satisfy the minimum requirements of the foreign offence. Rather, the issue properly for determination extends to whether there was a relevant foreign extradition offence in the first place. The existence of that jurisdictional pre-condition is not a matter falling outside the ambit of those sections; rather, it is intrinsic to s 19.

41 The appellant submits that *Kainhofer* has never explicitly been applied to a situation where a treaty provision, like Art 2, para 5(a) of the Treaty here, operates upon s 19(1) of the Act to deprive the specified offence of the character of an "extradition offence", the existence of which is a jurisdictional fact or condition intrinsic to s 19(1).

42 Recognising that the issue to be determined by the Court is entirely about the proper interpretation or construction of the Act, counsel for the appellant draws attention to the various steps, or the process, by which extradition of a person occurs under the Act and the particular length of time for which a person may be detained pending a final resolution of the extradition proceeding by an executive decision taken under s 22 of the Act. Counsel

acknowledges that judicial review of the various administrative or executive decisions taken may be available to a person. As a matter of policy, however, it is submitted that the determination of an issue such as that raised here, concerning the relevant effect of Art 2, para 5(a) of the Treaty on the question whether the appellant is an "extraditable person" who may be said to have committed an "extradition offence", should not have to await the Attorney-General's consideration under s 22 following often a long period in detention. Rather, counsel submits, the s 19 hearing constitutes an appropriate earlier forum for the determination of this question.

43 The appellant contends *Kainhofer* should, therefore, be read as applying only to challenges that "would collaterally seek to deny or qualify some factual, procedural or evidentiary aspects of the allegations of the conduct stated by the requesting state to have occurred in relation to an actual existing offence". Accordingly, the appellant argues, the principle in *Kainhofer* is not relevantly applicable and therefore is distinguishable, as are other authorities said to follow it, such as *Timar v The Republic of Hungary* [2000] FCA 755 (*Timar*) and *Papazoglou*. The appellant contends the latter are all predicated on the existence in law of a foreign extradition offence, the elements of which putatively may be satisfied by the facts comprising the alleged conduct. None were concerned with the unique circumstances and objection presented in the present proceedings.

44 The appellant says that *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 (*Zoeller*), decided before *Kainhofer* by the Full Federal Court, is consistent with the view that a magistrate is required to determine whether the nominated offence qualifies as an "extradition offence" that founds jurisdiction. In that respect, it is said, *Zoeller* has not been impliedly overruled by *Kainhofer*, given that the latter has never been applied to the extent of permitting a magistrate to exercise what is only a purported, assumed or fictional authority. The appellant draws attention to the decision in *Bennett v United Kingdom* (2000) 179 ALR 113 (*Bennett*), in which Katz J at 119 [6] queried the consistency of *Zoeller* and *Kainhofer*, and also to observations of O'Loughlin and Whitlam JJ in *Oates v Attorney-General of the Commonwealth* (2002) 118 FCR 544 at [25], which are said to provide support for this view.

45 Despite the contentions made on behalf of the appellant to the contrary, we consider that it is not open to us to come to the view that *Kainhofer* is not directly relevant to the

determination of the primary issue. *Kainhofer* is not stated to be a decision applicable only to challenges that collaterally seek to deny or qualify some factual, procedural or evidentiary aspects of the allegations of the conduct stated by the requesting State to have occurred in relation to an actual existing offence. As the primary judge demonstrated by reference to the judgments of the members of the High Court in *Kainhofer*, the principle there established is of general application.

46 The facts in *Kainhofer*, shortly stated, were that on 20 January 1993 the Republic of Austria made a request in writing for the surrender of the respondent Maria Kainhofer, "for prosecution in Austria in respect of a number of misappropriation and malversion offences under the Austrian Penal Code". This request was or was taken to have constituted an "extradition request" for the purposes of the Act. Ms Kainhofer did not succeed in her contentions before the s 19 magistrate or the primary judge on review. On appeal in the Full Court of the Federal Court, however, she succeeded on her argument that the s 19 magistrate's order could not properly have been made unless the magistrate was satisfied, in accordance with ss 19(2)(a) and (3)(a) of the Act, that the supporting documents furnished by the Republic of Austria provided for the arrest of the respondent as a person "accused" of the offences to which the warrant referred. The Full Court examined the supporting documents and found that the s 19 magistrate could not have been properly satisfied that the appellant was "accused" of the four alleged offences, and for that reason the appeal was allowed.

47 The High Court allowed an appeal against the decision of the Full Federal Court. Brennan CJ, Dawson and McHugh JJ jointly gave reasons with which Toohey J agreed. Gummow J gave separate reasons in coming to the same conclusion.

48 In the joint judgment at 533, their Honours stated that the "principal issue" for determination on the appeal was:

> … whether it was part of the magistrate's function to determine whether the appellant was 'accused' of the four alleged offences in relation to which the order committing her to prison [in Australia under the Act] was made.

49 Their Honours undertook an extensive analysis of the operation of the Act. Having regard to the scheme of the Act, the function of the magistrate under s 12 of the Act in issuing a provisional arrest warrant, and the role of the Attorney-General under s 16 of the Act in giving a notice in writing in the statutory form expressed to be directed to a magistrate, their

Honours concluded that the power of a s 19 magistrate, who is required 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", does not extend to the review of the satisfaction of the original magistrate or the opinion of the Attorney-General as to whether the person is an extraditable person.

50 In the joint judgment, at 538 – 539, their Honours stated:

> The question whether a person is accused of having committed an offence in relation to which a warrant for the person's arrest has been issued by an extradition country is addressed by a magistrate under s 12(1) and by the Attorney-General under s 16 in considering whether the person is an extraditable person. The state of mind which is formed on that issue by those officers is not reviewable by a s 19 magistrate. Of course, prohibition or mandamus may go to an officer of the Commonwealth who exercises power under the Act (footnote omitted) but the amenability of decisions under ss 12(1) and 16 to judicial review does not expose those decisions to review by a magistrate who conducts administrative proceedings under s 19. Nor does sub-s (2)(a) in conjunction with sub-s (3)(a) of s 19 make the accusation of the person whose surrender is sought a condition affecting any power conferred by that section. The s 19 magistrate is neither required nor authorised to determine the issue whether that person is an extraditable person.

51 Their Honours further noted, at 539:

> Lacking any power to review those decisions, a s 19 magistrate must proceed on the footing that the order and the notice, if not invalid ex facie, were validly made. Treating the order of remand and the giving of the notice as valid, the s 19 magistrate must proceed on the footing that the person whose surrender is sought is an extraditable person and that the case falls within either par (a)(i) or par (a)(ii) of s 6. It would be a curious interpretation of s 19 to attribute to a s 19 magistrate the power to find that the person is not an extraditable person when the s 19 magistrate's authority depends on the contrary hypothesis. In the administrative sequence, that issue is committed only to the consideration of the magistrate under s 12(1) and the Attorney-General under s 16.

52 Toohey J, at 541, agreed with the construction of the Act explained by their Honours in the joint judgment. His Honour, however, expressed some concern about the fact that there is "little scope for judicial review of the question whether a person is an extraditable person". In that regard, his Honour at 541 – 542, doubted that judicial review of the s 12 magistrate's decision was open under s 39B of the *Judiciary Act 1903*. His Honour, at 541, considered that the observation that the Act represents "a substantial shift away from judicial review of the extradition process towards the exercise of unreviewable executive discretion" (Shearer, "Extradition and Human Rights" (1994) 68 ALJ 451 at 452), had "force".

53 Gummow J exhaustively analysed the terms of the Act and provided a similar construction to that of the other members of the Court. In relation to the s 19 magistrate's function, Gummow J, at 552, noted:

> It will be apparent that, within the meaning of s 19, the person is eligible for surrender only if the magistrate is satisfied of two matters, those in s 19(2)(c) and (d). The first of these is concerned with dual criminality and the second with the absence of an extradition objection. In respect of both these matters, the Attorney-General had been required to form an opinion before issuing a notice under s 16.
>
> Both the Attorney-General and the magistrate, when respectively giving notice under s 16 and issuing a provisional arrest warrant under s 12, were obliged to consider whether the person was an extraditable person in relation to the extradition country. That requirement, spelled out in the text of ss 12 and 16, is not repeated in s 19(2).

54 At 553 – 554, Gummow J repeated the proposition:

> That the person be an extraditable person is not specified in s 19(2) as a necessary condition of eligibility for surrender and the making of an order by the magistrate under s 19(9) committing the person to prison to await surrender.
>
> The classification in s 19(3) of that which is required for the necessary "supporting documents" assumes that extradition is sought either in respect of an offence of which the person is accused or in respect of an offence of which the person has been convicted. It does not proceed on the footing that there is a further category of offences in respect of which the person is neither accused nor convicted.

55 The interpretative provision s 10(4) of the Act relating to an extradition offence, and set out at [30] above, aids the construction settled upon in *Kainhofer*. It provides that a reference to an "extradition offence for which surrender of a person is sought by an extradition country" (which are the same words that appear in s 19(1)), is, in relation to a time after the Attorney-General has given a s 16(1) notice "a reference to any extradition offence to which the notice (including the notice as amended) relates". This plainly implies that the extradition offence has been identified in the notice and is not for the s 19 magistrate to inquire into whether or not there is an extradition offence.

56 The terms of s 11(6) of the Act also confirm a construction of the Act that limits the function of a s 19 magistrate in the manner identified by the High Court in *Kainhofer* and as found by the primary judge. Section 11(6) provides as follows:

> (6) For the purpose of determining under subsection 19(1) whether a person is eligible for surrender in relation to an extradition offence for which surrender of the person is sought by an extradition country, no limitation, condition, qualification or exception otherwise applicable under this section (not including a limitation, condition, qualification or exception having the effect

> referred to in subsection (4)) has the effect of requiring or permitting a magistrate to be satisfied of any matter other than a matter set out in paragraph 19(2)(a), (b), (c) or (d).

57 As explained above at [9], by virtue of s 11(1) and s 11(1C) and the Regulations, the terms of the Treaty are taken to modify the Act by reference to whatever limitations, conditions, exceptions or qualifications as are expressed. In these circumstances, the express words of s 11(6) permit no other reasonable meaning than that the s 19 magistrate should not consider the terms of the Treaty. As a s 19 magistrate is not "permitted" to be satisfied about any matter other than the stipulated matters, the magistrate is not permitted to enter upon an analysis of whether or not Art 2, para 5(a) of the Treaty, properly construed means that there is no "extradition offence" under the Act.

58 In that regard, we note that in *Papazoglou*, the Full Court (Wilcox, Tamberlin and Sackville JJ) held, by reference to s 11(6), that the function of a magistrate under s 19 and a judge under s 21 review did not extend to the consideration of the terms of a treaty that provided that extradition shall not be granted "if final judgment has been passed in the Requested State or in a third state in respect of the offence for which the person's extradition is requested", and which allowed the requested State to take into account the question whether extradition of the person "would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment". The Court, in *Papazoglou* at 140, stated:

> The matters that a magistrate has to consider in proceedings to determine eligibility for surrender are those set out in s 19(2) of the *Extradition Act*; whatever the proper construction of s 19(2), those matters do not include restrictions or limitations arising under a treaty. This is made clear by s 11(6) of the *Extradition Act*,

59 That s 11(6) has the effect of removing from consideration by a s 19 magistrate any limitations, conditions, exceptions or qualifications (save those referred to in s 19(2)(b) limited to the documents that a treaty requires to be produced to a magistrate) is also supported by other Full Federal Court authority: see, for example, *Prabowo v Republic of Indonesia* (1997) 74 FCR 599 at 606; *Timar* at [19].

60 Notwithstanding the reasoning of *Kainhofer* and the provisions of the Act, counsel for the applicant seeks to draw some support for the applicant's contentions from the Full Federal Court's decision in *Zoeller*, decided before *Kainhofer*. In *Zoeller*, the Full Court (Lockhart,

Gummow and Hill JJ) at 303 – 304, having referred to the fact that the ultimate issue to be decided by a s 19 magistrate is whether a person is "eligible for surrender", continued:

> To determine that issue the magistrate will be required to determine the following constituent matters:
> 1. Is the offence one which qualifies as an extradition offence? (see s 5)
> 2. Is the requesting country an extradition country? (see s 5)
> 3. Are the documents produced to him as "supporting documents" under s 19(2)(a) within the definition of that expression in s 19(3) having regard to the following questions:
>
> (a) is there a duly authenticated warrant of the kind described by s 19(3);
> (b) if the extradition is in respect of a conviction, are there duly authenticated documents which provide evidence of the matters in s 19(3)(b);
> (c) is there a duly authenticated statement in writing setting out the matters in s 19(3)(c)(i);
> (d) is there a duly authenticated statement in writing setting out the conduct constituting the offence (see s 19(3)(c)(ii))?

61 In *Bennett*, Katz J at [6] observed, by reference to this passage, that it "might be possible to mount an argument that the effect of the High Court's decision in *Kainhofer* was that, in so far as this court held in *Zoeller* that a magistrate determining a person's extradition eligibility is required to determine whether the offence is one which qualifies as an extradition offence, its holding was impliedly overruled by *Kainhofer*". However, no such argument was mounted before Katz J and he simply followed *Zoeller* on the "extradition offence" point without troubling to consider whether such an argument would, if made, be likely to succeed.

62 In *Dutton v O'Shane* (2003) 132 FCR 352, the Full Federal Court (Finn, Dowsett and Conti JJ) dealt with a contention by the appellant that the function imposed on a s 19 magistrate extends to consideration of a person's eligibility for surrender in relation to an extradition offence and that the expression "extradition offence" recurs throughout s 19. The appellant in this case submitted that the s 19 magistrate is not required to consider whether the person on remand is an "extraditable person". That is the Attorney-General's s 16 function and the s 12 magistrate's function. But the s 19 magistrate, nonetheless, must consider whether the relevant offence is one for which the person could be eligible for surrender.

63 In dealing with this submission, Finn and Dowsett JJ, at 361 – 362 [37] – [38], noted the observations of Katz J in *Bennett* and further, wryly perhaps, observed:

> This issue is not one which it is necessary to resolve in this proceeding, given the view we take of the ground of appeal itself. We would, though, indicate that its proper resolution may raise directly, though in another guise, the constitutional issue to which reference will later be made in these reasons. We would indicate additionally that the respondent's submission goes quite some distance, in our view, to falsify one of the declared objects of the Act which is:
>
> '(a) to codify the law relating to the extradition of persons from Australia to extradition countries and New Zealand and, in particular, *to provide for proceedings by which courts may determine whether a person is to be, or is eligible to be extradited* without determining the guilt or innocence of the person of an offence.'
>
> (Emphasis added.)
>
> It may be, though, that despite this object the legislature only intended the court conducting a s 21 review to be seised of part of the 'matter' … assuming there is a matter…

64 Conti J, on the other hand, considered at 398 [198], that *Kainhofer* "does not question the correctness of the Full Federal Court's decision in *Zoeller*, and nor is it in my opinion presently on point". His Honour added:

> I find nothing inconsistent in *Kainhofer* which persuades me that *Zoeller* should not be followed in respect of the mandatory requirement that in determining a person's eligibility for surrender, the s 19 magistrate is to consider whether any offence in the supporting documents qualifies as an extradition offence for the purposes of s 5 of the *Extradition Act*.

65 Senior counsel for the Republic of Hungary acknowledges the apparent inconsistency and the requirement identified in *Zoeller* at 303 that the s 19 magistrate, amongst other things, be satisfied whether "the offence is one which qualifies as an extradition offence". Counsel contends, however, that the Court did have in mind a substantive examination of the facts and circumstances alleged or the precise legislative framework in the requesting country and, indeed, at 300, expressly stated that all the magistrate is required to do, by reference to Australian law, is to determine whether the conduct referred to in a s 19(3)(c)(ii) statement is an offence under the law of a State or Territory of Australia or Commonwealth law.

66 In *Zoeller*, the Court (which, as noted, included Gummow J, who later delivered a separate judgment in *Kainhofer*) observed, at 300:

> Accordingly it is our view that the magistrate was entitled to consider the statement of facts in each warrant in determining whether offences were committed under Australian law. As we understand it, the applicant concedes that in relation to the two misappropriation offences, if regard may be had to the statement of facts there are, subject to a limitation argument, disclosed offences under either or both of s 229(1) and (4) of the *Companies (New South Wales) Code*, that State's law being the relevant law to determine the matter, it being the State of apprehension. A different

problem arises in respect of the first tax charge.

67 In relation to the "first tax charge", the Court then dealt with the appellant's submission that it was not an offence punishable with imprisonment for a term of 12 months or more (ie an extradition offence under s 5 of the Act). Rather, it was said that the facts disclosed no more than a breach of the taxation legislation, punishable by a fine or imprisonment not exceeding 12 months. However, the Court ultimately accepted, at 300 – 302, that the relevant Australian offences were to be found in the *Crimes Act 1914* (Cth) and that they answered the description of an "extradition offence" in this regard.

68 We think it is also important to note that in *Zoeller*, at 304, the Court, having just noted that amongst other things it is necessary for the s 19 magistrate to determine if the offence is one which qualifies as an extradition offence, further noted that:

> In a case to which the provisions of s 11 apply the magistrate may be required as well to determine whether the evidence before him would, if uncontroverted, provide sufficient grounds to put the person on trial or sufficient grounds for inquiry by a court. But s 11 will only require this result in the case of a country which be force of regulations becomes an extradition country after the commencement of the 1988 Act (as the Federal Republic of Germany did) where the regulation is subject to a limitation condition, qualification or exception to the effect that the sufficient evidence test or the prima facie evidence test is satisfied. In the case of the respondent country there was no such limitation, condition, qualification or exception.
>
> The question whether the proceedings are statute barred in Germany is therefore a question irrelevant to the inquiry before the magistrate under s 19. This is not surprising because questions of limitations notoriously involve questions of facts, most limitation provisions being subject to exceptions and qualifications. … Since we are of the view that the issue whether the German offence was statute barred was not an issue properly before the magistrate it follows that in our view the affidavit dealing with the limitation period was rightly rejected.

69 These aspects of the judgment of the Full Federal Court in *Zoeller* tend to support the view that the Full Court did not have in mind a substantive examination of the facts and circumstances concerning whether a person is an "extraditable person" or whether an "extradition offence" has been made out for the purposes of the underlying treaty in the course of a s 19 hearing.

70 We also note that in the judgment of Gummow J in *Kainhofer*, his Honour gave special attention to the requirement under s 19(2) that "supporting documents" be produced to the magistrate in relation to the offence and such other documents as required to satisfy any

limitation, condition, exception or qualification subject to which the Act applies in relation to the extradition country. In *Kainhofer*, nothing turned on that particular requirement, just as nothing turns on it in this case. At 552 – 553, Gummow J noted:

> In this sense, the power of the magistrate to determine whether the person is eligible for surrender depends upon the production of 'supporting documents' which comprise documents which are 'duly authenticated' (*Riley v The Commonwealth* (1995) 159 CLR 189, 21). In addition to being 'duly authenticated', what other classification applies to 'supporting documents' in any given case? The answer is provided by s 19(3). Attention should first be directed to par (c) thereof. This states that 'in any case', that is to say, in any case in which the magistrate is conducting proceedings under s 19 to determine eligibility for surrender, there must be a duly authenticated statement in writing setting out a description of and the penalty applicable in respect of the offence, together with a duly authenticated statement in writing setting out 'the conduct constituting the offence'. ***The phrase 'the conduct ... constituting the offence in relation to the extradition country' appears in s 19(2)(c) as an element in the consideration of dual criminality.*** Questions of the penalty applicable will be relevant to the inquiry under s 19(2)(d), the existence of an extradition objection.
> (emphasis supplied)

At 554, Gummow J added:

> It is for the magistrate to determine that the necessary duly authenticated documents are produced and there may be debate as to what, in a particular case, amounts to due authentication within the meaning of s 19(7). ***There may also be debate in a particular case as to whether the warrant is 'for the arrest of the person for the [extradition] offence'.***
> (emphasis supplied)

71 In our view, the discussion in *Zoeller*, supplemented by the analysis of Gummow J in *Kainhofer*, discloses that there remains a requirement, in the terms just discussed, for a s 19 magistrate to be satisfied that there is a warrant for the arrest of the person for an "extradition offence" identified by the supporting documents, but there is no wider role to be played by the s 19 magistrate concerning whether the conduct stated in the supporting documents actually constitutes the offence described in the warrant.

72 In this regard, we note that in *Unkel v Director of Public Prosecutions* (1990) 95 ALR 44 – also decided prior to *Kainhofer* – Pincus J concluded, at 49 by reference to *Zoeller*, that s 19 of the Act does not say that the magistrate must be satisfied that the conduct stated under s 19(3)(c)(ii) constitutes (in law) the offence described in (i).

73 In *Federal Republic of Germany v Parker* (1998) 84 FCR 323, a case decided soon after *Kainhofer*, another Full Federal Court (Ryan, Einfeld and Foster JJ) considered the

function of a s 19 magistrate in relation to the requirements of a treaty. The relevant treaty provided that the request for extradition should be accompanied by "all available information concerning the identity and nationality of the person claimed". Taking into account *Kainhofer*, and also the decision of the Full Federal Court in *Papazoglou*, the Court, at 342, stated:

> In our view, the question that might arise under Art 9(2)(a) is one which is committed to the Attorney-General, as being a matter which could affect the exercise of discretion under s 16 or under s 22 of the Act. His or her determination in this regard is not one that can be reviewed by the magistrate, although it may be susceptible to review under s 39B of the *Judiciary Act*, as indicated in the passages cited earlier.

74 In our view, the judgments in *Kainhofer* are not susceptible to a gloss, as submitted on behalf of the appellant, such that the s 19 magistrate is only prevented from determining whether a person on remand is an "extraditable person" in respect of an "extradition offence" in circumstances where the person collaterally seeks to deny or qualify some factual, procedural or evidentiary aspect of the allegations of the conduct stated by the requesting State to have occurred in relation to the actual existing offence.

75 We do not consider that the principle to be drawn from *Kainhofer* is distinguishable in the circumstances of the appellant, where he wishes to contend that the effect of Art 2, para 5(a) of the Treaty is such that he cannot be said to have committed an "extraditable offence" as described by Art 2, para 5, or an "extradition offence" as defined by the Act as modified by the terms of the Treaty.

CONCLUSION AND ORDER

76 We accept that the answer sought by the appellant to the substantive question concerning Art 2, para 5(a) of the Treaty is demonstrably an important one. We appreciate that, while in theory it may be possible for a person in the position of the appellant to make representations on such a question before a s 12 magistrate when an application for a provisional arrest warrant is considered, or with the Attorney-General before a notice is issued under s 16 of the Act, it will not always be the case that such questions are fully considered at that stage. We recognise, however, that it is open to a person in the position of the appellant to seek judicial review, at least of the decision of the Attorney-General to issue a notice under s 16, before a determination is made by a s 19 magistrate. We also consider that it may well be the case that, following a declaration under s 19(9), the question can again

be raised before the Attorney-General before he or she makes a surrender decision under s 22 of the Act. Any decision of the Attorney-General under s 22 would also, on the face of it, be amenable to judicial review in the manner described above.

77 It might be said, as was observed by Toohey J in *Kainhofer* at 541 and repeated by the Full Federal Court in *Papazoglou* at 140 – 141, that the system established by the Act represents a substantial shift away from judicial review of the extradition process towards the exercise of unreviewable executive discretion. Nevertheless, the reviewable exercise by the Attorney-General of the power under s 22 of the Act to consider whether, in the final analysis, a person should be surrendered to another country, plainly is of critical importance to the rights or interests of a person affected by an extradition proceeding.

78 None of that means, however, that the primary judge made any appellable error in determining that it was no part of the function of the second respondent in conducting the hearing under s 19 of the Act, and no part of the function of the primary judge in conducting a review of that decision under s 21, to determine whether the war crime alleged against the appellant was an extradition offence or whether the appellant was an extraditable person for the purposes of the Act. Accordingly, the appeal should be dismissed.

79 The Court would therefore make the following orders:

1. The appeal be dismissed.
2. The appellant pay the first respondent's costs.
3. For the purposes of s 21(6)(g) of the *Extradition Act 1988* (Cth) the appellant is eligible for surrender within the meaning of s 19(2) of the Act in relation to an extradition offence.
4. The order of the second respondent made pursuant to s 19(9) of the *Extradition Act 1988* (Cth) on 20 August 2009 be confirmed.
5. Execution of these orders and the order of the second respondent made 20 August 2009 be stayed for 14 days.
6. The appellant’s bail is confirmed on the same terms as granted by Gilmour J on 12 May 2009.

I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Black CJ, Tracey and Barker JJ.

Associate:

Dated: 8 October 2009

Counsel for the Appellant:	Dr PW Johnston with Dr VM Priskich
Solicitor for the Appellant:	Fiocco's Lawyers
Counsel for the Respondents:	Mr S Owen-Conway QC with Ms PA Aloi
Solicitor for the Respondents:	Commonwealth Director of Public Prosecutions
Date of Hearing:	25 August 2009
Date of Judgment:	8 October 2009