

O'DONOGHUE v. IRELAND & ORS (P40/2007)
ZENTAI v. REPUBLIC OF HUNGARY & ORS (P41/2007)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 16 April 2007

Date of grant of special leave: 3 September 2007

Vincent Thomas O'Donoghue's extradition is sought by Ireland in respect of charges of obtaining property by false pretences, fraudulent conversion in the alternative. Charles Zentai's extradition is sought by the Republic of Hungary in respect of alleged war crimes. Both appellants sought an order in the nature of prohibition to restrain the second respondent in each matter (the presiding magistrate) from conducting proceedings to determine whether each appellant is eligible for surrender to extradition pursuant to section 19 of the *Extradition Act* 1988 (Cth) ("the Act"), on the basis that it is unlawful for State judicial officers to carry out the functions prescribed by section 19 of the Act. Both appellants sought declarations that sections 19 and 46 of the Act are invalid as being beyond the legislative power of the Commonwealth. By virtue of section 46 of the Act and section 6 of the *Magistrates Court Act* 2004 (WA), State magistrates of the State are empowered to conduct extradition proceedings pursuant to section 19 of the Act.

The appellants contended before the Federal Court (Siopis J) that the WA parliament had not passed legislation consenting to and authorising State magistrates to perform Commonwealth functions conferred by sections 19 and 46 of the Act, that the Commonwealth parliament was not competent, as a matter of legislative power, to confer executive functions regarding Australia's external affairs on State officers, and that sections 19 and 46 of the Act vested Commonwealth executive power on State officers incompatible with the continuing exercise by those officers of the judicial power of the Commonwealth under Chapter III of the Constitution. Siopis J dismissed the applications on the basis that the functions performed by magistrates under section 19 were performed as *persona designata* and that, even if the validity of section 19 and 46 of the Act was reliant upon the existence of State legislative authority, such authority is provided in section 6(3)(b) of the *Magistrates Court Act*.

The Full Court of the Federal Court (Moore, Tamberlin and Gylers JJ) dismissed the appellants' appeals. Tamberlin J wrote the judgment of the Court, with which Moore and Gyles JJ agreed. The Court held that it was not necessary to rule on two of the appellants' arguments, on the basis that sufficient approval by the State for the performance by persons holding office under the *Magistrates Court Act* of duties under section 19 of the Act was provided by section 6(3)(b) of the *Magistrates Court Act* and an arrangement entered into between the Governor-General and the State Governor. The Court concluded that it was not necessary to address the arguments put by the appellants in relation to *persona designata* and Chapter III of the Constitution.

The Attorney-General for the Commonwealth and the Attorneys-General of Western Australia, New South Wales, Victoria and South Australia have all indicated their intention to intervene in the both proceedings.

The grounds of appeal include:

- Whether section 6 of the *Magistrates Court Act* and the arrangement between the Governor-General and the State Governor together give sufficient legislative and executive approval to the conferral of functions under section 19 of the *Extradition Act* on a State magistrate;
- Whether sections 19 and 46 of the *Extradition Act* effects an unconstitutional vesting of Commonwealth power in State officials incompatible with the continuing exercise by those officers of the judicial power of the Commonwealth.

In the O'Donoghue appeal, the first respondent (Ireland) will seek leave by consent to file an amended notice of contention:

- That by s.6(3)(a) of the *Magistrates Court Act 2004* (WA), the Parliament of Western Australia has authorised the second respondent (the magistrate) to undertake functions under s19 of the *Extradition Act 1988* (Cth); and
- That by s.6(1) of the *Magistrates Court Act*, the Parliament of Western Australia has authorised the second respondent to undertake functions under s19 of the *Extradition Act*.

In the Zentai appeal, the first respondent (Republic of Hungary) and the fourth respondent (Commonwealth) will seek leave by consent to file a notice of contention in the same terms as the first contention set out above.