



21 September 2009

Kirsten Law,
Director, Legislation and Policy Section,
International Crime Cooperation Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Ms. Law,

**Re: The Extradition and Mutual Assistance in Criminal Matters Legislation
Amendment Bill 2009**

Thank you for the opportunity to forward a late submission in relation to this Bill. There is a particular issue that I seek to address.

I am of the view that the grounds of refusal contained in section 7 of the Extradition Act 1988 should be extended to include the right to a fair trial in a procedural sense. It is apparent that fairness and respect for human rights are the principles underlying the particular bases for an extradition objection in the existing Act. The court may reject an extradition request because it is satisfied that, for example, the person would suffer political prejudice at their trial. The same applies to the proposed amendment of subsections 7(b) and (c), so as to deny extradition where the person may be punished, or prejudiced at their trial, by reason of their sex.

However, the circumstances of a current extradition request have highlighted the absence of a legislative basis to contest extradition where the trial in the extradition country that the person whose extradition is sought would be submitted to does not meet the basic procedural requirements of a fair trial.

I refer to the case of Karoly (Charles) Zentai, whose extradition is sought by Hungary to face trial for the murder of a Jewish youth, Peter Balazs, in 1944 in Budapest. If extradited, Zentai would be tried before a military tribunal, presumably because at the time of the alleged offence he was a member of the Hungarian Military, albeit fascist puppet forces overseen by the Nazi occupiers. I have no interest in the matter other than

what I have learned through media reports, and as a consequence of a telephone conversation with his counsel.

The compelling aspect of the case is that there are no living witnesses to the crime. Two accomplices were arrested shortly after the war, and made confessions which they later complained were extracted by torture; apparently a credible claim, given the notoriety of the police unit and particular prison where they were held at the time. Both are deceased. Consequently at any trial the prosecution case would not include any live testimony of contemporaneous witnesses or, as I understand it, any forensic evidence linking Zentai to the killing, or confessional evidence attributed to him.

Such a trial would, in my view, contravene international human rights instruments. Hungary and Australia are state parties to the International Covenant on Civil and Political Rights ("the ICCPR"), which at Article 14(3)(e) provides:

14.3 In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

This Article is replicated at Article 6(3)(d) of the European Convention of Human Rights, ("the ECHR") to which Hungary is a state party.

In Australian domestic criminal procedure, and that of many other states, it is commonplace for the evidence of an isolated absent or deceased witness to be admitted into evidence, particularly where there has been a testing of that evidence by the defence, for example, at a committal. An example of a foreign state with a similar procedure is Israel. When the Court of Criminal Appeal of Israel in 1993 heard the appeal of Ivan Demjanjuk for his conviction for his alleged part as a camp guard in the execution of thousands of inmates of concentration camps, it considered the issue of the admissibility of the statements of deceased witnesses. Section 15 of the Israeli Nazi Punishments Law permitted a court to deviate from rules of evidence: "if it is satisfied that this will promote the ascertainment of the truth, and the just handling of the case." The Court of Criminal Appeal noted that the trial court: "in admitting depositions under section 15 above, had only deviated from the rules of evidence in admitting the depositions of witnesses who had died in the period between their examination and the trial, and only after those who had taken the depositions had given evidence and were available for cross-examination by the defense."¹

¹ Summary of the Demjanjuk appeal by Asher Landau, Israeli Ministry of Foreign Affairs, available on line and viewed on 4.9.08 at: <http://www.mfa.gov.il/MFA/Anti-Semitism%20and%20the%20Holocaust/Documents%20and%20communiques/THE%20DEMJANJUK%20APPEAL-%20SUMMARY%20BY%20ASHER%20FELIX%20LANDAU>

I am unaware of any state party to either the ICCPR or ECHR, or both, that would put an accused on trial where the only evidence as to the critical facts is in the form of statements, or depositions of evidence at which the accused had not been represented. If the extradition proceeds, and Zentai is convicted on such evidence, then once he exhausts his domestic (Hungarian) appeal rights, he would be entitled to appeal to the European Court of Human Rights ("the European Court"), which in my view would be overwhelmingly likely to overturn the conviction on the basis that his rights under the ECHR had been contravened. However, such appeal processes take many years; Zentai is 87 years old and in poor health. It may be that he survives the stresses of extradition and the trial, but should he be convicted, it is unlikely that he would live long enough to test the fairness of the trial procedure before the European Court.

In a case such as Zentai's, the person whose extradition is sought has no basis under the Extradition Act 1988, or the proposed amendments, to raise this issue of fundamental procedural fairness before the Court; it is not an issue of prejudice based on the grounds that are presently articulated. The only remedy for such a person is ultimately to rely on the Minister's discretion to deal with the issue. However, this is an issue that, in the interests of avoiding any implied governmental criticism of foreign criminal court procedures, is better dealt with in an open court and with the benefit of the appellate process to develop and refine the relevant principles of law. This avenue also allows the extradition state to meet the challenge by tendering evidence that counters any suggestion of the prospect of a procedurally unfair trial.

For these reasons, I submit that it is appropriate to add an extradition objection; namely, if on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, by reason of a failure to comply with Article 14 of the ICCPR.²


The advantage of this or like wording is that, since Article 14 is mirrored in the ECHR, and this is the basis of the jurisdiction of the European Court, there is an extensive body of jurisprudence that would be available to an Australian court that heard such an objection.

For understandable policy reasons, one would want to avoid extradition challenges that went to philosophical differences between the common law system as it is applied in Australia, and other legal systems, such as the civil law system. By adopting the suggested wording above, and thereby making pertinent the judgements of the European Court, Australian courts would be assisted by jurisprudence that applied the fundamental principles of human rights in respect of a fair trial to both civil (continental) and common law (English) courts, uniformly.

² I note that two of the submissions on your website also propose an extradition objection to the effect that the person would not receive a fair trial, although they are not developed as to how this should be done: the Human Rights Law Resource Centre at paras 26 and 35-36; the Law Council of Australia at page 19, adopting the recommendations of the Australian Human Rights Commission (HREOC as it was at the time) in its 2005 review of the Act.

If I can be of any further assistance, please do not hesitate to contact me.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Mark Ierace". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Mark Ierace SC
Senior Public Defender