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High Court was wrong to stop 'war crimes' extradition

Abstract

In 2005, the Australian government and ALP opposition stated their firm principled position on war criminals: extradite or prosecute. War criminals are not welcome to live freely in Australia. As the High Court has recently blocked a war crimes extradition, it has left the government with a difficult potential prosecution.

Hungary had requested the Commonwealth government to extradite Charles Zentai to stand trial for a war crime committed in 1944. Allegedly, while a member of the Hungarian Royal Armed Forces, Zentai recognised Peter Balazs, an 18-year old-youth, as a Jew who was out on the street without wearing the yellow star required to be sewn and displayed on his outer garments.

Keywords

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Gregory Rose

The majority's reasoning in the Charles Zentai case was obtuse, GREGORY ROSE writes

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Hungary already had murder on the statute books but in 1945 also passed retrospective law to recognise such acts by its armed forces as war crimes so that they could be prosecuted as part of the post-war rendering of national justice.

The former minister for home affairs, Brendan O'Connor, stood by Australian bipartisan government principles in 2009 and decided to extradite Zentai to Hungary. The extradition has been in the courts since then, until last week. On Wednesday, the High Court decided not to extradite.

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When Zentai first appealed, a single judge of the Federal Court held that the minister could extradite. Then, on appeal, judges of the Full Federal Court held, by a two-to-one majority, that the minister could not. In the High Court, the five-to-one majority decision was that extradition is impermissible. Chief Justice French delivered a separate judgement, while that of Justices Gummow, Crennan, Kiefel and Bell was a joint judgement. Justice Heydon dissented. The diversity of opinions appears to reflect competition between the judges' humanitarian impulses and respect for the Australian constitutional doctrine of separation of powers between the executive and judiciary.

Zentai is 90 years old and the minister could decide not to extradite on humanitarian grounds. It is the minister's call and not the High Court's. In its decision, the court found its own way to exercise the minister's role while dressing this action as an exercise of judicial function. Its problematic reasoning for preventing the minister from exercising the power to extradite is actually a cover for the breach of Australia's constitutional separation of roles. Sadly, the cloth is perfectly transparent.

The majority of the court interpreted the Australian-Hungarian extradition treaty as preventing extradition for two reasons: the war crime was proscribed retrospectively; and a murder crime was not explicitly specified in the extradition request. The former issue requires an examination of the relationship between international law and Hungarian law, such as whether the war crime already existed in Hungary, through its reception of customary international law, and whether Hungarian law allows a retrospective law to be effective. The High Court majority did not bother to consider these matters but simply expressed an antipathy to retrospective criminality; this is remarkable given that Australia

has recognised both crimes under customary international law and also retrospectivity as being available in Australian law.

In relation to the second argument, asserting insufficient evidence of intention to murder, Justice Heydon was blunt: "First, it is wrong. Second, it is immaterial." He points out that Hungary had advised that murder was committed. Further, the treaty expressly allows extradition for crimes of similar but not identical kind. Justice Heydon got it right. The High Court majority's obtuse reasoning around this was artificial. It rescues an old man from trial in Hungary and maintains Australia's historic record of inaction against World War II criminals who migrate here. Yet international law provides that, for international crimes such as these, the country with custody over the alleged offender must either extradite or else itself conduct the prosecution. The Hungarian government might amend its extradition request to specify a murder charge. Alternatively, the Commonwealth government has full legal authority to prosecute Charles Zentai here, if it has the political will. Back over to you, Attorney-General.