

CANBERRA: The Federal Government's war crimes legislation - and its special Nazi-hunting unit - narrowly survived a challenge to its validity by a 4-3 ruling in the High Court yesterday.

The court rejected the challenge mounted by Ivan Timofeyevich Polyukhovich, of Adelaide, who is facing charges under the legislation, the War Crimes Amendment Act 1988.

The case caused deep divisions of opinion and some strong emotions between the majority and minority judges.

The Chief Justice, Sir Anthony Mason, one of the majority judges, said it was inconceivable that the High Court would overrule Federal Parliament's judgment that it should pass legislation concerning war crimes.

Polyukhovich, 75, must now await the outcome of a Supreme Court hearing to determine if he is fit to stand trial.

He is described as being in a "reasonable" physical condition a year after allegedly shooting himself in the chest the night before his committal hearing.

Polyukhovich is alleged to have murdered 25 people and to have been knowingly concerned in the deaths of between 553 and 850 Soviet Jews in the Ukraine between 1942 and 1943.

A spokesman for the Attorney-General, Mr Duffy, said last night that the Federal Government's special investigations unit was still actively pursuing 12 war crimes cases, and inquiring into another five cases.

More than 650 war crime allegations have been made to the unit since it started in 1987.

Nearly \$12 million has been spent by the unit which is due to wind up in June next year.

Justice Brennan, one of the minority judges, after noting that the legislation did not concern any armed conflicts other than World War II which ended some 46 years ago, said: "Respect for the laws and customs of war cannot be secured by a law having such an oppressive and discriminatory operation."

The four judges in the majority were Sir Anthony Mason, and Justices Dawson, Toohey and McHugh. The three minority judges, who held that the legislation was invalid, were Justices Brennan, Deane and Gaudron.

The majority judges found that the legislation was a valid exercise of the Commonwealth's power over external affairs contained in Section 51(29) of the Constitution.

They rejected claims that the legislation was invalid because it contravened the Commonwealth's judicial power by operating retrospectively to alleged events in Europe between 1939 and 1945.

The primary finding by the three minority judges was that the legislation contravened the Commonwealth's judicial power by declaring retrospectively certain past conduct to be a criminal offence.

Sir Anthony Mason said that to the extent that the legislation operated on conduct which took place outside Australia and made that conduct a criminal offence it was properly characterised as a law with respect to external affairs and was a valid exercise of that power.

"... It is not necessary that the court should be satisfied that Australia has an interest or concern in the subject-matter of the legislation in order that its validity be sustained," Sir Anthony said.

"It is enough that Parliament's judgment is that Australia has an interest or concern."

Justice Dawson referred to arguments that genocide or crimes against humanity did not constitute offences under customary international law before 1945.

"War crimes of the kind created by the Act simply could not, in any civilised community, have been described as innocent or blameless conduct merely because of the absence of proscription by law," Justice Dawson said.

In his dissenting judgment, Justice Brennan said whatever right Australia might possess to bring alleged war criminals from World War II to trial before Australian courts the legislation before the court did not exercise it.

Justice Brennan said: "The means which the Act adopts to secure future adherence to the laws and customs of war not only trample upon a principle which is of the highest importance in a free society, namely, that criminal laws should not operate retrospectively, but also select a specific group of persons from a time long past out of all those who have committed, or are suspected of having committed, war crimes in other armed conflicts.

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