HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY **NO A5 OF 2020**

BETWEEN: **THE QUEEN**

Appellant

AND: **ZAINAB ABDIRAHMAN-KHALIF**

Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II OUTLINE OF PROPOSITIONS

The majority's reasoning

2. There are three important features of the majority's reasons.

   (a) They held that the reference in s 102.1 to taking steps to become a member of a terrorist organisation entails (and requires the Crown to prove) the existence of some process by which a person becomes a member: **CCA[9] (CAB 217), [20]-[21] (CAB 220), [260] (CAB 278)**. AS [41].

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   (b) They adopted a narrow and rigid understanding of an "organisation", requiring clear criteria for the identification of its members, and the participation of those members in its decisions: **CCA[13] (CAB 218), [26]-[27] (CAB 221-222), [34]-[35] (CAB 223-224)**. AS [49]-[58].

   (c) They confined themselves to the evidence of Dr Shanahan, thereby ignoring much of the evidence that could rationally bear on membership of Islamic State. This demonstrates and reinforces the narrowness of their understanding of critical statutory concepts: **CCA [10] (CAB 217); CCA [56] (CAB 232)**.

The majority's errors of construction

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3. The words "has taken steps" are ordinary English words. They do not imply the existence of a process by which a person becomes a member. AS [42]-[43]; Reply [5]. A jury can determine whether the defendant is a person who has taken steps to become a member of a terrorist organisation from circumstantial evidence, including about the defendant's reasons for engaging in particular conduct.

4. The words "member" and "organisation" in Division 102 eschew technicality, pedantry, and pre-conceptions of what an organisation is and who qualifies as a member. The majority's interpretation is inconsistent with this statutory context. AS [42]-[46]

   - ***Benbrika v The Queen*** **(2010) 29 VR 593 at [74], [80]-[86] (JBA Vol 3 Tab 13)**

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   - **Explanatory memorandum, Security Legislation Amendment (Terrorism) Bill 2002 (Cth) (JBA Vol 4 Tab 24)**

5. Section 102.3(1) is part of the deliberate legislative design to criminalise preparatory conduct extending beyond conduct amounting to an attempt. A requirement to prove a

defendant has commenced a proven process for the attainment of membership is inconsistent with that design. AS [53]; Reply [6].

- ***Benbrika* (2010) 29 VR 593 at [113]-[115], [128]-[130] (JBA Vol 3 Tab 13)**

6. Analogies to other kinds of associations or organisations do not assist. The terms "terrorist organisation" and "member" are deliberately broad, and should not be confined by *a priori* assumptions about organisations and members or by analogies to other forms of organisations and members. Paragraph (c) of the definition in s 102.1 does not extend membership of a body corporate to directors and officers *to the exclusion* of shareholders. AS [56]-[58].

7. The fact that Division 102 criminalises other kinds of conduct affords no basis for reading ss 102.1 and 102.3 in a manner that requires proof of a process to distinguish "members" from "supporters": Reply [7]. Harmonious interpretation does not therefore require proof of a process of membership.

Evidence relevant to membership

8. In further elaboration of para 2(c) above, there was other substantial evidence before the jury relied upon by the prosecution, and the majority's singular focus on Dr Shanahan reinforces that they unduly confined membership of an organisation.

9. Important bodies of evidence (not to be considered piecemeal) before the jury included the following:

(a) Dr Shanahan's expert evidence: See T994:18-28 **(ABFM V1 116)**, T995:17-24 **(ABFM V1 117)**, T1008:18-25 **(ABFM V1 130)**, T1009:3-7 **(ABFM V1 131)**, T1041:10-20 **(ABFM V1 158)**, T1053:35-37 **(ABFM V1 170)**.

(b) Bay'ah: **ASBFM 48-49**.

(c) Blog posts: See Exhibit P11 (**ABFM V1 479-480**); Crown's closing address at T1263-1285 (**ABFM V1 271-293)**; Exhibit P9 at Post 2 (**ABFM V1 488**), Post 3 (**ABFM V1 489-491**), Post 4 (**ABFM V1 492**), Post 5 (**ABFM V1 493-494**), Post 7 (**ABFM V1 496-498**), Post 9 (**ABFM V1 502-503**) Post 10 (**ABFM V1 504**), Post 22 (**ABFM V1 548-550**), Post 25 (**ABFM V1 554-555**), Post 36 (**ABFM V1 567-569**), Post 42 (**ABFM V1 587-590)**, Post 43 (**ABFM V1 591-594**), Post 44 (**ABFM V1 595**), Post 45 (**ABFM V1 598-601**), Post 46 (**ABFM V1 602-603**).

(d) Videos and Nasheeds: Will not take the Court separately to them, but see **ABFM V2 (USB)** (Videos) and **ABFM V1 609 and 623** (Nasheeds): eg in relation to "Qariban" Nasheed – see Transcript at **ABFM V1 622;** Crown's Closing address **ABFM V1 318 and 392-393**); Agreed Facts at [10] (**ABFM V1 477**); multiple references in Chronology document (**ABFM V1 741-742**).

(e) Images from phone: See eg. Exhibit P14 (**ABFM V2 2**) images 11,13,19,30 (**ABFM V2 29, 31, 37 and 48**) and see Crown's Closing address at **ABFM V1 313-320 and 328-329**).

(f) LD material: See **ASBFM at 13-16, 18, 20-22, 26, 37-38, 40, 45, 48-49, 63-64, 66, 68, 82-84, 86-87, 96-97, 105-107, 109, 113 and 117-118**. A5/2020

(g) Other evidence of concealment, eg in Crown's Closing address **ABFM V1 352-353;** Fell XN - T613:2-9 (**RBFM 153**), T651:25-27 (**RBFM 192**), T672:17-21 (**RBFM 213**), T672:37-T673:8 (**RBFM 213-214**).

(h) Records of interview: **ABFM V1 640, 672 and 682**.

The case left to the jury

10. The only real issue in the trial (*Alford v Magee* (1952) 85 CLR 437 at 466) was whether the respondent had intended to take steps to become a member of Islamic State. There were admissions that (a) Islamic State was a terrorist organisation and (b) the respondent knew this. There was no admission that attempting to travel to Islamic State could constitute "taking steps" to become a member, but the issue was not actively contested.

- **Exhibit P16 – First Statement of Agreed Facts at [31]-[32] (ABFM V1 471)**
- **Respondent's closing address at T1441:28-T1442.22 (ABFM V1 434-435)**

11. Grounds 1.1 and 1.2 of Notice of Contention: The trial judge did not elide the physical and mental elements. The physical element was separately identified and left to the jury: **CAB 36-37 and 111 (summing up) and ABFM V1 750 (memorandum).** In so far as his Honour focused on intention, that reflected the real issue in the trial.

12. Ground 2.1. No error is shown in the decision below. In context there is no impermissible imbalance in the trial judge's summing up. The evidence presented by the Crown was voluminous, and its case was met with a confined set of arguments by the defence which were all included in the judge's summary.

13. Ground 2.2. The jury will have appreciated that the interviews were important evidence in the defence case. They grounded the alternative explanation which was advanced by the defence for the respondent's attempt to travel.

14. If any ground in the notice of contention succeeds, then the appropriate order is for a retrial. (a) 205 days of her sentence to serve (b) strong prosecution case (c) grave offending and general deterrence. Reply at [20].

- ***R v A2* (2019) 93 ALJR 1106 at [86] (JBA Vol 3 Tab 15)**

Sarah McNaughton SC Patrick Doyle Christopher Tran

3 September 2020