HIGH COURT OF AUSTRALIA

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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

REPLY AND SUBMISSIONS ON THE NOTICE OF CONTENTION

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II REPLY

2. According to the respondent's construction, the prosecution cannot prove that a defendant "has taken steps to become a member" of a terrorist organisation unless it proves "a cognisable process" for becoming a member, determined by the organisation itself, and to which the conduct of the accused corresponds [**RS [45], [56]-[57]**]. The absence of evidence that travelling to its territory was regarded by Islamic State as a step to membership is said to have rendered the prosecution case deficient [**RS [52]**].

3. The respondent thus endorses the construction favoured by the majority below, on the basis that its application is restricted to cases where the prosecution relies on paragraph (b) of the inclusive definition of "member" [**RS [57]**]. Even if the respondent is correct to say that the majority's construction only applies in these cases, it gives rise to further problems. Applying that construction, for instance, to a case put on the alternative bases that the conduct of the defendant either: (i) made them a member of an organisation (in the conventional sense, without relying upon any extended definition), or (ii) constituted taking steps to become a member; the jury would be required to be directed that: (a) to convict the defendant on the first basis, they need not be satisfied that the evidence demonstrated any process for the admission of members to the organisation; but that: (b) before they could convict on the basis of taking steps to become a member, they *would* need to be satisfied that the evidence demonstrated such a process, and that the conduct of the defendant corresponded with steps in that process.

4. The incongruity in these directions would be all the more acute in a case where the prosecution contended that membership was constituted by informal membership (relying on paragraph (a) of the inclusive definition of "member"). Consistent with the ordinary meaning of the word "informal", a jury would need to be directed in such a case that: (a) one could become a member without following or conforming to any prescribed procedure or rule; but that: (b) to convict the defendant on the basis that they had taken steps to become a member, those steps would need to correspond with steps in a prescribed process. In this way, the respondent's construction effectively precludes the Crown from relying on both paragraphs (a) and (b) of the definition of "member".

5. Contrary to the evident legislative intent to expand the reach of the offence provision, the respondent's construction of paragraph (b) of the definition of "member" narrows it by creating an additional hurdle which is not sourced in the text.[1] Further, her construction fails to acknowledge that the expression "has taken steps" is an ordinary English expression which should be read in context, in a way that would best achieve the purpose of the legislation.[2] These defects stem from a fundamental error in her construction: it reads words into paragraph (b) of the definition of "member", as if it referred to "a person who has taken steps in a process to become a member of the organisation".[3]

6. The respondent disputes that s 102.3 criminalises preparatory acts [**RS [39]**], without identifying any error in the authorities construing the offence provisions in Divisions 101 and 102 of the Code, or their application to s 102.3 in *Benbrika*.[4] Even if a terrorist organisation had an induction process for prospective members, a person could contravene s 102.3 by taking steps preparatory to commencing that process.

7. The "associating" offence in s 102.8 of the Code provides no reason to read down the scope of s 102.3 [see **RS [37]**]. Neither the appellant's construction, nor Kelly J's analysis, require a person to be found to have taken steps to become a member of a terrorist organisation merely by associating with it or with one of its members. A person can associate with an organisation without intending to be a member. In any event, there may be a degree of overlap between the offence provisions.[5] This is not novel.[6]

8. As the trial judge made clear in directing the jury, evidence about the nature of the organisation is important in order to determine what constitutes membership of that organisation [see **RS [20], [41]**]. At trial, the Crown led a substantial body of evidence about Islamic State, which went beyond the evidence of Dr Shanahan.[7] This evidence did

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1 See *R v A2* (2019) 93 ALJR 1106 at [156].

2 *Acts Interpretation Act* 1901 (Cth), s15AB(3).

3 The cases cited in **RS fn 28** helpfully expose this. They concern legislation which uses the language of "steps in a process". The absence of this language in ss 102.1 and 102.3 of the Code is consistent with the Parliament recognising that terrorist organisations are not likely to structure themselves like lawful organisations, and may not have a prescribed process for the attaining of membership; **CAB 222 [29]**.

4 (2010) 29 VR 593 at [134]. See **AS [53]** and **fn 70**.

5 Membership and association do not exist in sealed silos: see *R v Ahmed* [2011] EWCA 184 at [89].

6 *Magaming v The Queen* (2013) 252 CLR 381 at 391 [25].

7 See especially **AS [24]-[25], [60]-[61]**. The Islamic State propaganda promoting jihad as an integral part of life in its territory tended to undermine a purported distinction between fighters and those who supported them. Tellingly, the respondent wrongly asserts that Kourakis CJ held that "one could readily infer" that Islamic State fighters must be members **[RS [25]]**. What his Honour said was that "an inference might more readily be drawn" that Islamic State fighters were formal or informal members (emphasis added) [**CAB 233-234 [65]**]. Curiously, in the same passage, his Honour cast the issue as whether wives and nurses of fighters were members of "the Islamic State militia" rather than organisation (emphasis added).

not suggest that Islamic State itself used language distinguishing supporters from members. In claiming responsibility for the Mombasa attack, for example, IS referred to the three Kenyan women responsible as "courageous sisters".[8] **RS [16]-[17], [24]** do not fairly characterise the Crown case at trial, which was that there were no formalities for attaining membership of Islamic State.[9]

PART III RESPONSE TO NOTICE OF CONTENTION

A. Ground 1.1 – misdirection with respect to elements

9. This ground should be rejected once the principal issue of the construction of s 102.3 is resolved against the respondent [see also **CAB 271 [224]**]. The respondent's argument implicitly assumes she is correct about the construction of the provision [see **RS [65]-[66], [67(2)]**]. The trial judge's directions were in accordance with the physical and fault elements of the offence. Counsel made no objection and sought no redirections.

10. Nor did the trial judge indicate that proof of intention alone would be sufficient. His Honour's directions included passages which instructed the jury to consider whether the respondent's conduct brought her within the definition of "member", for example:[10]

> It is for the jury to consider whether or not: first, those acts were done in order to fly to Istanbul, Turkey, "in order to engage with the terrorist organisation Islamic State" and secondly, were "steps to become a member of Islamic State".
>
> As to particulars 2-6 above, it is for the jury to consider whether or not conduct of these types by the defendant occurred between about 14 July 2016 and 23 May 2017 and, if so, whether or not such conduct constitutes "steps to become a member of Islamic State".

11. To the extent that the summing up focussed on the respondent's intention, this reflected the way the trial was conducted. Defence counsel's address focussed on the respondent's intention in traveling to Turkey. Whether traveling to Syria to join Islamic State constituted taking steps to become a member was the subject of no more than a passing query in defence counsel's address.[11] As the respondent puts it, there was "no concession" in relation to the matter **[RS fn 40]**. Given the way the trial was conducted, it is unsurprising that this issue was not give more attention by the trial judge.[12]

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8 See Exhibit P16A [**BFMV1 472 at 474**].

9 See Trial Transcript (Extract) at pp 1204-1206, 1246.22 – 1247.25 [**BFMV1 228-230, 254-255**]. In *R v Ahmed*, no expert evidence was permitted to be led concerning the conduct of the accused, and the evidence which was led about Al-Qaeda's structure and methods did not directly concern what constituted "membership" of, or "belonging to", that organisation: [2011] EWCA 184 at [52]-[54] cf **RS fn 39**.

10 Transcript of Summing Up at p 23 [**CAB 36**].

11 See Trial Transcript Extract (Defence Closing Address) at pp 1442-1443 [**BFMV1 435-436**].

12 *R v Baden-Clay* (2016) 258 CLR 308 at 324 [48]; *Doggett v The Queen* (2001) 208 CLR 343 at 346 [1].

12. The criticism at **RS [67]** and **[73(11)]** refers to remarks which simply explained what might otherwise seem an incongruous concept that a person who has taken steps to be a member is to be treated as a member. They were not directions. While their utility might be doubted, [cf **CAB 245 [104]**], they were accurate, and did not give rise to legal error.

B. Ground 1.2 – failure to relate evidence to elements

13. This ground should also be rejected if the appellant succeeds on construction [see also **CAB 271 [224]**]. The trial judge identified the matters relied on by the Crown, and explained how they were said to prove the legal elements in dispute.[13] Trial counsel made no complaint and sought no further directions.

C. Ground 2.1 – Unbalanced summing up

14. The respondent has not sought to identify any error in the reasoning which led to the unanimous rejection of this ground below (**CAB 240-246 [91]-[110], 271 [225], 280 [272]**). "It has been repeatedly affirmed by this Court that it is not a court of criminal appeal", and it should not be asked "to substitute for the view taken by the Court of Criminal Appeal a different view of the evidence and of the effect of the summing up".[14]

15. But briefly: as to **RS [73(1)-(3)]**, the trial judge's directions, which plainly referred to the version of events given to police by the respondent on 14 July 2016, should be considered in conjunction with his earlier directions as to the use to be made of the respondent's records of interview,[15] and that even if the jury were to reject her version, the Crown must still positively prove the charge.[16] His Honour made plain that the jury was required to consider all of the evidence to determine whether the Crown's circumstantial case was proved beyond reasonable doubt.[17]

16. As to **RS [73(4)-(5)**], the respondent appears to contend that the trial judge should have recounted her records of interview in more detail than her own counsel did at trial. Her case was fairly and accurately put to the jury.[18] **RS [73(7)]** refer to comments made in the context of assisting the jury as to how they might draw inferences, which need to be considered in

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13 See Transcript of Summing Up at pp 20-26 [**CAB 33-39**].
14 *Liberato v The Queen* (1985) 159 CLR 507 at 509 (Mason CJ, Wilson and Dawson JJ).
15 Transcript of Summing Up at p 48 [**CAB 61**].
16 Transcript of Summing Up at p 4 [**CAB 17**].
17 Transcript of Summing Up at pp 43-44 [**CAB 56-57**]. Necessarily and implicitly, the defence case would thereby be rejected as a reasonable innocent hypothesis.
18 See Transcript of Summing Up at pp 110-122 [**CAB 123-135**].

the context of the whole summing up, and in particular the directions on the burden of proof [cf also **RS [73(10)]**.[19] They did not suggest there was a "correct answer".

17. As to **RS [73(8)]**, the trial judge did not "subtly endorse" the Crown case. The comments must be understood in a context where the Crown case went largely unchallenged and the respondent did not lead or call evidence. Nor did the trial judge undermine the respondent's case or counsel. The comment in **RS [73(9)]** concerned a submission by counsel addressing matters that were not part of the Crown case. Further, this solitary comment in a lengthy and detailed summing up did not cause unfairness or imbalance.

18. As to **RS [73(12)]**, the comments were appropriate in light of the submission by defence counsel that the extensive resources and capabilities of police would have detected any contact the respondent was to meet in Turkey.[20] There was also unchallenged evidence that she had deleted evidence from her phone.[21] As to **RS [73(13)**], the identification of relevant evidence, by reference to the prosecution case, was unobjectionable.

D. Ground 2.2 – Failure to put defence case

19. No error has been shown in the rejection of these complaints by the Court below. In the context of the whole of the charge, there could be no doubt in the minds of the jury that the interviews were evidence, which could be used both for and against the respondent.[22]

E. ORDERS

20. Should the notice of contention succeed, a retrial should be ordered. A verdict of acquittal would not be an appropriate result.[23] Whether the respondent is tried again would then be a matter for the appellant, taking into account matters including the public interest in pursuing a conviction, and the adequacy of the portion of her head sentence served.

Dated: 26 June 2020

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19 See Transcript of Summing Up at p 4 [**CAB 17**].
20 See Trial Transcript Extract (Defence Closing Address) at pp 1447.24 – 1448.6 [**BFMV1 440-441**].
21 See Transcript of Summing Up at pp 80, 85, 96, 97, 113, 118, 122 [**CAB 93, 98, 109, 110, 126, 131, 135**].
22 See Transcript of Summing Up at p 48 [**CAB 61**].
23 See *Criminal Procedure Act 1921* (SA), s 158(3); *R v A2* (2019) 93 ALJR 1106 at [86].