HIGH COURT OF AUSTRALIA

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File Number:	A5/2020
File Title:	The Queen v. Abdirahman-Khalif
Registry:	Adelaide
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	05 Jun 2020

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A5 of 2020**

BETWEEN: **THE QUEEN**

Appellant

10

and

ZAINAB ABDIRAHMAN-KHALIF

Respondent

20 **RESPONDENT'S SUBMISSIONS**

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I. CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

II. CONCISE STATEMENT OF ISSUES

2. The essential issue arising on the appeal is the sufficiency of the evidence led by the prosecution to establish beyond reasonable doubt that the particularised conduct alleged against the respondent, if established, amounted to "steps to become a member" of Islamic State within the meaning of s 102.1(1) of the *Criminal Code*.

3. The respondent contends that the prosecution did not exclude the reasonable possibility that what was alleged against her did not amount to steps to become a member, but rather was conduct which, at its highest, manifested an intention to go to live as a supporter or subject in a society or territory which, at that time, was occupied by or ruled by Islamic State, without being a member of the terrorist organisation.

4. The majority in the Court of Criminal Appeal (**CCA**) was correct to find the verdict was unreasonable because the evidence led by the prosecution did not demonstrate beyond reasonable doubt that, if the respondent had ever travelled to and lived in Syria under Islamic State, she would be a member of the prescribed terrorist organisation.

5. On the respondent's notice of contention [CAB 290], the essential issues are:

   (1) whether the trial judge misdirected the jury by:

      (a) collapsing the physical element (being a member, including by taking a step to become a member) and the mental element (that those acts are intentional), into a single inquiry, namely, whether the person's conduct was undertaken intentionally to become a member;

      (b) failing to relate the evidence (or absence of evidence) about what amounted to membership or the steps to become a member to the elements of the offence;

   (2) whether the trial judge's summing up was otherwise imbalanced and/or failed properly to present the defence case.

III. SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

6. No notice need be given under s 78B of the *Judiciary Act* 1903 (Cth).

IV. FACTS AND CHRONOLOGY

Appellant's summary of facts

7. Subject to the qualifications referred to below, the respondent accepts that the appellant's summary of the evidence and proceedings at AS [5]-[27] is accurate, though not complete.

8. The appellant refers at AS [8] to an image of the respondent in Islamic dress with a right index finger raised, "which is a gesture used by Islamic State members". In fact, the evidence of Dr Shanahan was that the one finger salute signifies *tahweed*, from the Arabic *wahid*, meaning oneness of God (as distinct from the Trinity). Although Islamic State used the symbol, there was no evidence that it was an indicium of membership, or that it was exclusively used by Islamic State[1]. A5/2020

9. The appellant refers at AS [22] to the label "Muwahideen", and cites Dr Shanahan's evidence that Muwahideen are people who follow the notion of *tahweed*, and that Islamic State in particular refer to themselves often as Muwahideen, but it should be noted, as Kourakis CJ did (CAB230 [46(37)]), that the term was said by Dr Shanahan to be used by Islamic State to refer to "themselves **and their supporters**"[2].

10. It should also be noted that Islamic State was but one group on what might be described as the Salafist end of the spectrum of the Sunni tradition. The evidence revealed that over time, and at any one time, there have been a variety of groups which might be described as Salafist in nature, and that many symbols, beliefs, expressions and gestures that were also used by Islamic State were used from time to time, or were associated with, other Salafist groups. For example, the "green bird" concept was not exclusively an IS concept[3]; nor was the use of Nasheeds necessarily synonymous with IS or even violence or religion[4]. Not all Salafist groups were violent and not all Salafists are terrorists[5].

11. With respect to the references to electronic material referred to at AS [9], it should be noted that there was extensive evidence at trial as to whether, particularly in respect of the Telegram app, some content automatically downloaded, and therefore whilst inferences might be drawn, the evidence was equivocal as to whether the respondent had necessarily clicked on and downloaded all relevant material[6]. There was also evidence that Islamic State was prolific in its use of propaganda[7]. It should also be borne in mind that the evidence as to the respondent's oral Arabic was equivocal[8].

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1 Tr 1015-1016 [BFMV1 137-138]. In closing, the prosecution only went so far as to submit that on the evidence, it "seems to have been a symbol that has been adopted by this organisation": Tr p 1289.19 [BFMV1 297]. As Kourakis CJ said (CAB 235 [74]) "a belief or symbolic gesture which is not unique to Islamic State, albeit commonly used by its supporters, cannot, of itself, be the taking of a step towards membership".

2 Tr p 1077 [BFMV1 194].

3 Tr p 1042.17 [BFMV1 159].

4 Tr pp 1074, 1076 [BFMV1 191, 193].

5 Tr pp 1052, 1058, 1072 [BFMV1 169, 175, 189].

6 Tr pp 629, 651, 629, 690, 693 [RBFM 169-234].

7 Tr pp 1061, 1065 [BFMV1 178, 182].

8 There was evidence that apart from limited well-known phrases and the repeating of Nasheeds, the respondent was not overheard speaking Arabic on the listening device material: Tr p 969-970 [RBFM 261-262]. There was evidence that she had learnt Arabic and could read the Quran but the evidence was left in a state of uncertainty as to her aural and oral ability: Tr 976-978 [RBFM 268-270]. In closing the prosecutor referred to documentary evidence as to these topics and observed that "in the end it was noted that she needed more practice to improve her speaking skills": Tr 1260 [BFMV1 284].

12. With respect to AS [26] and the interview in the Customs Interview Room at Adelaide Airport on 14 July 2016[9], it should be noted that the respondent participated without legal representation.

13. She was questioned as to why she wanted to go to Istanbul she said that, amongst other things, she wanted to see if she could be part of aid work, or to see if there were any aid organisations and to be part of it, given the number of refugees in the country. (There was evidence at trial of entries in her bank account statements that were consistent with her having made charitable donations[10].) She also denied an intention to go to another war torn country (having come from one), planning to go to Syria, or having any contacts there. She said she was a Sunni and a Muslim but denied supporting terrorist organisations. She said she had not told her parents she was traveling because they would not let her go anywhere on her own. As to her lack of financial wherewithal, she said that if she found an organisation for aid work she thought they would support her.

14. Notwithstanding the vast volume of intercepts and recordings, it was conceded by the prosecutor at trial that there was no evidence that the respondent had a contact in Syria[11]. Whilst the jury were invited to infer that she nevertheless had the means to make her way to Syria, her lack of funds was contraindicative of that capacity.

Addresses and summing up

15. Such was the importance of the matter of the attempt to travel to Turkey that the trial judge directed the jury that they could only find that the respondent "took steps to become a member of IS" and was guilty of the charge if they were satisfied beyond reasonable doubt that the respondent intended to travel to Turkey "in order to engage with the terrorist organisation IS": (Jury memorandum (**JM**) p 5 [BFMV1 750], Summing up (**SU**) 23 [CAB36]).

16. Further, notwithstanding that in opening the case the prosecutor indicated the prosecution relied both on the concepts of "informal member" and "steps to become a member"[12], prior to closing, the prosecutor indicated to the judge that "I don't think I'd be in a position to say that they could find she was an informal member because of the evidence they've heard. I think it would be difficult to"[13].

17. The case was left by the prosecutor to the jury on the basis of "steps", without specifically relying on steps to become an informal, as distinct from a formal, member[14] (as acknowledged at AS [13], but cf. AS [44]-[45], [47]).

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9 Exhibit P7, MFIP8 [BFMV1 640].

10 Exhibit D69 [RBFM 303-305].

11 Tr p 1345.13 [BFMV1 352].

12 Tr pp 500, 515 [RBFM 72, 78].

13 Tr p 1205 [BFMV1 229].

14 Tr pp 1251, 1429-1430 [BFMV1 259, 422-423]. See also Kourakis CJ at CAB230 [48].

V. RESPONDENT'S ARGUMENTS

Overview

18. The appellant essentially contends that the majority erred by adopting a requirement that the prosecution must adduce evidence of "the process" by which a terrorist organisation "admits people to membership" (AS [2], [41]). Respectfully, that misstates what the majority held; they held that there must be some evidence as to the nature of the organisation and its membership, in order that the jury could evaluate any connection between the particularised conduct and any formal or informal membership (CAB217 [10], CAB274 [238]).

19. The appellant contends not only that the statutory concept of membership is an ordinary English word capable of understanding by the jury but, critically, that its content in respect of a particular organisation is relevantly at large, so that it is in effect a matter for the jury to evaluate whether the conduct of an accused merits the description of the taking of steps to become a member having regard, inter alia, to the intentions of the accused (AS [64]-[67]).

20. Of course, "membership" is an ordinary English word, but according to the meaning which that word ordinarily bears in connection with an organisation, this invites attention to the organisation in question; that in turn requires the leading of evidence respecting the organisation; and that, properly understood, is all that the majority held.

21. The appellant, in contesting that proposition, must be asserting, as Kelly J implicitly appears to have held (CAB268 [208]-[209]), that one can commit the offence of membership by doing any act (however preliminary and unilateral, and however irrelevant from the perspective of the organisation) which the jury might infer reflected a desire by the individual to associate themselves with, or further the cause of, the organisation.

22. Furthermore, whilst, of course, it was for the jury to find whether the charged offending is proved, on an appeal based on an unreasonable or unsafe verdict, the question became the capacity or sufficiency of the evidence to establish membership as distinct from some other interest in or status with respect to the organisation.

23. The majority judgment does not depend on a proposition that that can only be done by leading evidence of "the process by which a terrorist organisation admits people to membership" (cf. AS [2], [41]), albeit one would expect there to be evidence bearing on the question whether there is such a process, and if not, how a person comes to be recognised as relevantly **part of** or **belonging to** the organisation, so as to be a member of it according to ordinary conceptions.

24. The prosecution manifestly failed to adduce evidence necessary to establish whether Islamic State had a concept of formal or informal membership. But assuming, as the evidence which was led suggested, that the organisation had members, supporters and subjects, the prosecution never led evidence to identify what if any distinction or overlap there was between those concepts. In a different trial, that evidence may or may not be led, and the underlying facts might, of course, change over time with changes to the organisation in question.

25. In respect of a small informal and covert organisation, membership might be inferred from participation or even the fact of communication between the other persons involved in the organisation, as Parker J observed (CAB276 [252]) with reference to *Benbrika v The Queen*[15]. Similarly, as Kourakis CJ held, in the case of some forms of participation, such as Islamic State fighters, one could readily infer that they must be either formal or informal members, because of the degree of organisation and control that one could infer must surround them (CAB 233-234 [65]). A5/2020

26. But in the present case, the prosecution was relying upon the extended conception of membership, based upon a person taking steps to become a member of a prescribed and recognised terrorist organisation, Islamic State. The putative step which became the focus of the trial was booking a flight to Turkey, it being alleged the respondent intended then to travel into Islamic State-held territory and live there. On the evidence, for all that the jury were to know, and for all that this Court knows, women answering the call to live in a subservient way in a society ruled by Islamic State were not to be regarded as members of the terrorist organisation. It is not enough to say that that was a matter for the jury to evaluate. The question is whether there was evidence before them capable of excluding the reasonable possibilities consistent with innocence.

27. The appellant's suggestion that there was some reason why it did not ask questions of its expert which would have permitted an understanding of the status of persons apart from fighters or leaders in Islamic State (AS [48]) should be rejected. The prosecution called Dr Shanahan to give expert evidence about the organisation. His evidence alluded to, but was never specific with respect to, the organisation having both members and supporters. The suggestion that further evidence with respect to these matters was unavailable or impermissible is, respectfully, misconceived.

Construction of "member" and "steps to become a member"

28. The offence provision, s 102.3(1) of the *Criminal Code*, is set out at AS [38]. There being no doubt that Islamic State was a terrorist organisation[16], and no real contest that the respondent knew Islamic State was a terrorist organisation, the prosecution was required to establish that the respondent "intentionally [was] a member of" that organisation.

29. The concept of a "member" is not exhaustively defined, but is affected, by s 102.1(1). That provision contains the extended concept of a person "who has taken steps to become a member of the organisation". The proper construction of the offence and definition provisions is to be determined according to the text, context and purpose of the provision.

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15 *Benbrika v The Queen* (2010) 29 VR 593 at [134].

16 The expression "terrorist organisation" was defined by s 102.1 to mean (a) an organisation that is directly or indirectly engaged in, preparing, planning, or assisting in or fighting in or fostering the doing of a terrorist act, or (b) an organisation that is specified by relevant regulations. Section 4(1) of the *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014* provides that for relevant purposes, "the organisation known as Islamic State is specified". Section 4(2) then goes on to provide that Islamic State is also known by a number of names that are then set out. The jury were told at the outset it would not be in issue that IS was at the relevant time a terrorist organisation: Tr p 468 [RBFM 50].

30. A consideration of ***purpose*** will be based upon an express statement or an inference drawn from text, structure or, where appropriate extrinsic material, but ought not be based on *a priori* assumptions[17]. A5/2020

31. At least insofar as there is ambiguity, and insofar as the provisions may tend to restrict common law freedoms[18], a cautious construction in favour of the liberty of the subject may be called for[19]. It is submitted that that is so notwithstanding the important and serious nature of terrorism and offences associated with it, the dangers of which are not, of course, new[20]. A construction which assists in certainty of application should be preferred[21], and the Court may hesitate to adopt a construction that would be capable of leading to a conclusion of guilt in circumstances that might be regarded as extreme, manifestly unjust or anomalous[22].

32. As to the ***text***, it is important to appreciate that s 102.3(1)(a) requires proof that the person **intentionally is a member** of an organisation, rather than proof that the person **intends to be a member** of an organisation. That is to say:

(1) the physical element comprises **being** a member (including in the extended sense);

(2) the mental element requires that that membership be **intentional**.

33. The two elements ought not to be conflated into a single element of **intending to be** a member. Unless the elements are kept separate there is a risk of distracting attention from proof of the offence and subtly altering the nature of the offence so that it begins to approximate a crime consisting in merely preparatory acts or thoughts.

34. Whilst knowledge or intention must be proved, the anterior question is whether a person has by their acts or conduct "taken steps to become a member" of the relevant organisation. This requires an assessment of whether, according to the evidence respecting membership of the

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17 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26].

18 It might be argued that in making seriously criminal the status of membership of a terrorist organisation, there is a departure from the *nulla poena sine lege* principle: see, eg, McSherry, "Terrorism Offences in the *Criminal Code:* Broadening the Boundaries of Australian Criminal Laws" (2004) 27 *UNSW Law Journal* 354 at 364-365, referring to Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* (1996) p 15.

19 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 49, *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 at 443, *Kruger v Commonwealth* (1997) 190 CLR 1, *Melbourne Corp v Barry* (1922) 31 CLR 174 at 206.

20 Compare, in the admittedly very different Constitutional context, the approach taken to "membership" in *Scales v United States* 367 US 203 (1961), where a form of active membership was taken to be required. In *The Queen v Mellon* [2015] NICC 14, Judge McFarland said, in a case involving membership of the IRA, at [37]: "The often quoted phrase that proverbial dogs on the street may have reached certain conclusions in relation to matters is of no relevance. This court does not rely on canine intuition, but rather on hard evidence. There is no such evidence in this case to make me sure that the defendant is a member of the IRA, or that he had a directing role, at any level, of it, either as a member or outside its structures".

21 See, eg, *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at [48].

22 See, eg, *Public Transport Commission of New South Wales v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 350, *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321.

relevant terrorist organisation, and any process of becoming a member of that organisation, the conduct sought to be proved by the prosecution amounts to a step to become a member. A5/2020

35. Further, it is obvious, but critical, to appreciate that what is involved is being a member **of an organisation**. One can be a member of a group or cohort without doing, thinking or intending anything, because the status may be entirely passive or definitional[23]. But the prohibition is against being a member of an organisation. The very essence of a group which merits the description "organisation" is a group of people who have organised themselves on some basis for some purpose.

36. As to the ***context***, it is legitimate to have regard to the offence in question and the penalty prescribed in the hierarchy of other offences contained within Part 5.3 in order to shed light on its breadth. Whilst the membership offence (s 102.3) is less serious than the offences of directing the activities of a terrorist organisation (s 102.2), recruiting (s 102.4), training (s 102.5), funding (s 102.6) or providing support (s 102.7), it is more serious than the offence of associating with a terrorist organisation (s 102.8).

37. In this context, it has been observed that "membership" plainly connotes more than merely having an "association" with a group[24]. In circumstances where the concept of being a member is to be distinguished from the offence of "associating with" a terrorist organisation or "providing support" for a terrorist organisation (and may also be contrasted with the concept of an "attempt"[25] to commit those other offences[26]) the expression "member" cannot be understood to have been used in a broad or loose sense denoting merely having contact with, or expressing support for, or sharing the ideals of, the organisation.

38. The enlargement of the meaning of "member" by the inclusion of a person who has taken steps to become a member of the organisation obviously exhibits a legislative intention to extend the prohibition to persons who have not completed the process of becoming a member. It may even extend to persons who could not have completed the process.

39. However, given the contextual considerations identified (particularly, the fact that the putative member is guilty of the same offence as the ordinary member, and that that offence is more serious than association with a terrorist organisation), it is submitted that there is no evident purpose (nor contrary to the appellant's submissions[27], can one be inferred from the text and

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23 So, for example, in the context of "membership of a particular social group" resulting in a fear of persecution, for the purposes of refugee status, where the social group might be defined as "women" or "divorced women", the inquiry as to membership would simply be as to the status of the applicant. See, eg, *SBBK v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 117 FCR 412.

24 *Benbrika v The Queen* (2010) 29 VR 593 at [134].

25 Under s 11.1 of the *Criminal Code*, a person who attempts to commit an offence commits the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed: s 11(1); but for the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence: s 11.1(2).

26 Consideration was given by the AFP to whether the appellant had contravened the offence in s 119.3 of the *Criminal Code*, that is, entering a "declared area": see, eg, Tr 180 [RBFM 31].

27 Indeed, at AS [42], in submitting that as a "matter of logic, and ordinary meaning, a person could be said to take a step **toward** membership" without that step being prescribed by any identified rule, practice or process, the appellant subtly restates the statutory language. As for AS [44], it may be doubted that the

structure or extrinsic materials) which would justify any assumption that the prohibition is aimed towards what might be called merely preparatory acts. Any such view of the purpose would depend upon an *a priori* assumption as to purpose. (Of course, there is no necessary dichotomy between "preparatory conduct" and "steps to become a member", but equally, there is no necessary equivalence between the two concepts[28].)

40. Accordingly, the mere fact that an individual undertakes activities or conduct with a view to ultimately becoming a member, or even with the motivation of becoming a member, does not of itself render that conduct a "step to become a member". The test of whether conduct amounts to a "step" is not satisfied merely by considering whether, from the accused's perspective, it was attributable to a desire to become a member of the organisation.

41. Rather, where the line will be drawn between a relevant step and what might be described as merely preparatory conduct will necessarily turn upon the **nature of the organisation in question** and, in any given trial, the evidence led about the organisation, the concept of membership of that organisation (whether formal or informal) and, if any criteria or qualifications apply, the steps that must be taken to attain that membership. Contrary to AS [47], this is not to appeal to formalism by suggesting that one must (and must only) identify the group literally labelled "members" by the organisation. It requires a substantive inquiry based upon what the evidence reveals, in respect of a particular organisation, about who and why people are, or are regarded as, part of or belonging to the organisation itself, as distinct from those who have some lesser connection or status with respect to it.

42. That the content of the concept of membership is necessarily organisation-specific is not only consistent with the ordinary meaning of the language but with the approach that has been taken to membership in other contexts[29], including with respect to terrorist organisations.

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meaning of "member" is to be elucidated by an iterative application of separate limbs of the inclusory definition in the manner contended for. Further, the submission in the last sentence in AS [44] is misplaced, in that the provisions cannot be interpreted on the footing that all aspects of an inclusory definition, and in combination, must have practical content in respect of any organisation, when the provisions are plainly designed to have ambulatory operation in respect of diverse organisations.

28 Compare, for example, the distinction that has been drawn in the context of drug offences which proscribe the taking of a step in a process of manufacture, or in the sale, of drugs. It has been observed that the acquisition and/or transport of chemicals or equipment do not, without more, constitute steps in the process of manufacture; they are rather steps preparatory to the process of manufacture: *R v B D* [2001] NSWCCA 184 at [26]. A similar approach has been taken in relation to South Australian provisions: see, eg, *Re Avory; Question of Law Reserved (No 1 of 2003)* (2003) 87 SASR 392 and *R v Randylle* (2006) 95 SASR 574.

29 See, eg, *Horton v Higham* [2004] 3 All ER 852, where the question was whether a pupil of barristers' chambers was a relevantly a "member" of a "trade organisation" (the definition of "trade organisation" included an organisation whose members carried on a particular profession). Peter Gibson LJ emphasised that whilst the terms 'member' and 'membership' were not defined in the relevant statute and must be given their ordinary meaning in the context in which they were used, "[t]he context of 'member' and 'membership' which is relevant is **that of being a member or membership of a trade organisation**". Although a pupil would stand in a different position than a member of the general public, and would have an association with the chambers, that was not enough, because pupils did not carry on the profession of being a barrister. Regard was to be had to a consideration of the rights and duties of the person in relation to the organisation.

43. Thus, in *R v Ahmed*[30], Hughes LJ (speaking for the Court) said: A5/2020

> What then amounts to membership of a proscribed organisation? That is likely to depend upon the nature of the organisation in question. Membership of a loose and unstructured organisation may not require any formal steps whereas a more structured organisation may have an express process by which a person becomes a member. …
>
> We agree with the submission made to us that in some cases it will be necessary to make clear that unilateral sympathy with the aims of an organisation, even coupled with acts designed to promote similar objectives, will, whilst being clear evidence of belonging, not always be sufficient; the jury may need to consider whether there is the necessary element of acceptance or reciprocity which will be involved in belonging.

(Expert evidence had been led as to the pyramid shaped structure of Al Qaeda, and that evidence explained the nature of lower level participants in the organisation, the way in which they interacted with the middle level participants, and the franchise nature of the organisation.)

44. To recognise that the concept of a relevant "step" may vary according to the organisation (or may have no application vis-à-vis a particular organisation)[31], and that the content must be elucidated by evidence in a particular case, is not to accept that the matter of "membership" or the identification of a relevant "step" is "at large". Respectfully, inasmuch as the trial judge in this case, and the approach of Kelly J in dissent, suggested that the jury was to treat itself as free to make an evaluative judgment, as distinct from a factual assessment, they erred.

45. It is submitted that, whilst the ultimate assessment is and was one of fact for the jury, the meaning of "steps to become a member" of an organisation could not be answered without considering the question, according to the evidence led, what did the organisation in question recognise or have as the process (if any) or status of membership, and did any act alleged against the respondent correspond therewith?

46. If the matter is left at large, and the jury are directed or encouraged to consider whether what the accused in fact did was **intended** to be a step in becoming a member, there would be no sensible limit on what might qualify[32]. Membership is not to be determined by reference to the simple question whether the accused **desired** to be a member; or to whether the jury thinks that what the accused has done **ought to** amount to membership in the "lay"[33] sense of that word[34].

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30 [2011] EWCA Crim 184 at [87], [89].

31 It is accepted that it is legitimate to construe s 102.3 on the basis that it will apply to potentially numerous and diverse terrorist organisations. It is not legitimate, however, to take a particular organisation that may have been prescribed by Regulation, and to then reason backwards that Parliament must have intended that some cohort of people associated with that organisation must constitute members. .

32 An organisation such as a golf club might require the sending in of an application form, the provision of two referees, and the payment of an application fee of $500. Doing any one of those three things would be recognised (and objectively characterised) as a step in becoming a member. But asking a parent or friend for $500 to be in a position to pay the fee would not be apt to meet that description.

33 See, eg, Tr pp 1217.29, 1255.27 or 1430.35 [BFMV1 241, 263, 423]. These submissions were made in the context of the element of intention.

34 The learned trial judge in fact suggested that the extended meaning of membership went beyond the "usual lay meaning": SU15 [CAB28].

47. Accordingly, a direction that encourages the jury not to inquire into what the evidence revealed amounted to membership, or a step to become a member, of Islamic State, but rather to treat there as being some continuum or spectrum by reference to which, if the jury thinks the accused has gone too far, they are to be treated as being (or, as it is put in AS [61], "could be regarded as") a member within the meaning of the offence provision, would be erroneous. It is wrong to say, in the abstract, that there is no "bright line" and no "necessary condition"[35]. Depending on the evidence relating to a particular terrorist organisation, that may or may not be so. The first question is and must be: what does the evidence show to be the nature of membership of the terrorist organisation in question? A5/2020

48. Merely to espouse the beliefs of an organisation, or even to state a desire to be a member of an organisation, may not, in respect of a particular organisation, have any significance in becoming a member of the organisation. To identify the beliefs or objectives of the organisation is not to establish the nature, criteria (if any) or incidents of membership of that organisation.

The prosecution case on membership and the directions of the trial judge

49. In the present case, not only was there no clear evidence of what amounted to membership of the terrorist organisation Islamic State (as the prosecution conceded at trial[36]), but the evidence did not clearly distinguish between the organisation known as Islamic State (the prescribed terrorist organisation), the territory occupied by and sometimes described as Islamic State (the Caliphate), or the society sought to be established by Islamic State (in that territory or elsewhere).

50. As has been observed (CAB232 [56]), the only evidence from which any conclusions could be drawn about the structure of Islamic State, the organisation, and the nature of its membership, was that of Dr Shanahan. He referred at times to "supporters" and "followers" of Islamic State, "facilitators" and "fighters", women who were needed to be part of the "Islamic Society" that Islamic State was seeking to build and "people within Islamic State territory or associated with Islamic State"[37]. As was observed by the Chief Justice, the omission from his evidence of any reference to the organisational involvement of women in Islamic State was telling (CAB234 [67]).

51. The evidence did not establish that a person living in territory occupied by Islamic State, or who would be a member of the society established in that territory, would be a member of the terrorist organisation known as Islamic State. Notwithstanding that the evidence suggested Islamic State wanted women to help populate the society they wished to establish, it was hardly self-evident (from what the evidence disclosed about the extreme form of Salafism

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35 SU18-20 [CAB31-33], JM p 3-4 [BFMV1 748-749]. It appears that the learned trial judge adapted these directions from the observations made about how one might approach proof of the existence of an "organisation" in *Benbrika v The Queen* (2010) 29 VR 593 at [83]-[84]. Respectfully, the considerations attending the meaning of an "organisation" and the content of the concept of "membership **of an organisation**" are quite different.

36 Tr 1203.31 [BFMV1 227].

37 See, eg, Tr pp 1009, 1011, 1042 [BFMV1 131, 133, 158].

practised by adherents of Islamic State) that such a woman would be regarded as a member of the organisation, formal or informal, as distinct from part of the society sought to be established. A5/2020

52. The evidence did not establish that a person who embarks on travelling to the territory (then) occupied by Islamic State, with a view to being a member of that society, would thereby become a member of the organisation, much less that buying a ticket for a flight to Turkey and travelling to the airport involved a "step to become a member" of the terrorist organisation.

The majority did not err

53. Against this background, Kourakis CJ (with whom Parker J agreed) was correct to make the observations he made as to the deficit in the evidence adduced by the prosecution (CAB217 [9]) and to conclude that there was no evidence to suggest that membership was accorded by Islamic State in the loose way suggested by the prosecution (CAB218 [12]).

54. His Honour was right to observe that the prosecution opening, the evidence and the judge's directions conflated Islamic State, the organisation, with either the population it controlled in Syria and Iraq, or its supporters and sympathisers, wherever they lived (CAB226 [44]).

55. Respectfully, Kourakis CJ was also right to observe that Dr Shanahan did not give any evidence that Islamic State viewed the role of women in the Levant as members or fighters for its organisation. He made no assumption that women were precluded from membership (CAB234 [66]-[68]); the point was simply that no evidence was led that could discharge the prosecution's burden.

56. Further, when considering the expanded concept of "steps", Kourakis CJ was, with respect, right to acknowledge that whilst that calls attention to the substance of a person's participation, the very notion of a step implies a cognisable process, which can only be determined reference to the organisation and not its putative members (CAB220 [20]).

57. Properly understood, and contrary to the appellant's submission (AS [41]), his Honour was not there holding that, apart from a case in which reliance is placed upon "steps to become a member", the offence is incapable of having content unless the organisation has some particular process by which one is recognised as a member. Rather, he was observing that insofar as the "steps" element of the definition expands the ordinary meaning, it does so on the premise that its demonstration requires the identification, from the perspective of the organisation, of relevant "steps to become a member". So much is apparent from the paragraph that follows, in which the Chief Justice, far from presupposing that in all cases there must be some identified process, suggests that the inquiry must not be made in a vacuum and regard must be had to, inter alia, "common practices" (CAB220 [21]).

58. The Chief Justice went on to consider the scope of the concept of an "organisation" in Part 5.3. That analysis was not ultimately dispositive of the case, but nor was it erroneous. It was correct to say that whilst the extrinsic materials suggested an organisation need not have a **particular** formal attribute or structure, there was no indication of a legislative purpose to

strain the meaning of organisation, close to the point of self-contradiction, by including within it amorphous bodies of people with no, or little, structure (CAB 222 [29]). (It is to be recalled, in this context, that the trial judge gave directions respecting the nature of an organisation, without any objection by the prosecution, in similar terms: SU8 (CAB21)). A5/2020

59. Parker J's reasons also demonstrate that whilst it can be accepted that in the case of a small and informal organisation, such as that in *Benbrika*, the membership requirement may potentially be satisfied merely by other participants in the group acting in such a way as to demonstrate their acceptance that the imputed member is working together with them towards a common goal or in pursuing a common interest, the evidence in the present case did not show that Islamic State was such an organisation (CAB276-278 [252]-[259]).

60. The appellant's contentions as to error by the majority proceed upon a mischaracterisation of the effect of the reasons. Further, the supposed inconsistency with the decision in *Benbrika* is, on analysis, illusory[38]. Moreover, for the reasons given earlier, the approach of Kelly J, which effectively leaves the jury to make an evaluative assessment having regard to the inferred intention of the accused, untethered from an evidential foundation as to the nature or requirements of membership of the organisation in question, cannot be sustained.

61. Kelly J observed that on the proper construction of the definition of "member", there was no absolute means by which the status of membership may be proven (CAB266 [201]). Respectfully, that can be accepted – no invariable or specific means of proof is specified by the legislature. But that does not mean that there need not be evidence to support a conclusion that a person who did the things it was alleged the respondent was intending to do would become a member of the organisation in question. To say that proof of membership might be advanced by considering the aims, objectives and goals of the organisation, and then by considering whether the person demonstrated through their conduct the pursuit of an alignment with the organisation's goals and objectives can also be accepted (CAB271 [221]). But unless demonstrating an alignment with the goals and objectives of an organisation **always** renders a person a member of that organisation (a proposition which cannot be correct and is not proposed even by the appellant), this can only take the inquiry so far. More must be shown about the organisation's affairs and its conception of membership.

62. Respectfully, Kelly J's reasons did not demonstrate how the actual evidence led at trial was capable or sufficient to prove (to the requisite standard), why an **alignment** with the objectives of an organisation, or even why an **intention to be part of an organisation**, amounted to membership of the organisation. As Kourakis CJ pointed out (CAB224 [38]), there is an

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38 At AS [53], the appellant elevates the rejection in *Benbrika* of a contention that a particular direction was required to a statement of what membership is or is not, which runs contrary to the Court's observations that membership was to be distinguished from association and that an appropriate distinction was to be drawn (by the jury) between persons who were active and those who were peripheral (see *Benbrika* at [128]-[135]). It is also submitted that the observation in *Benbrika* (at [555]), that the definitions of "terrorist organisation" and "terrorist act" are extraordinarily broad was a reference to the breadth afforded by the descriptions of what could qualify an organisation or act as "terrorist", not to the underlying concept of an "organisation".

offence in the *Criminal Code* (s 102.8) of intentional association with and support for a terrorist organisation or affiliation with a terrorist organisation; that section may lack utility if intentional association or affiliation with a terrorist organisation which facilitates its work constituted informal membership of it. A5/2020

63. Finally, the appellant's contention that "from the evidence led at trial about Islamic State, there is no basis to suppose Dr Shanahan could have said anything directly about who qualified as a 'member' of it" (AS [48]) is, respectfully, difficult to accept. Granted, what he said would not have been determinative, but the submission that evidence about whether and to what extent people were recognised as members of the organisation would plainly have been admissible, given the accepted qualifications of Dr Shanahan. This would not be evidence as to the legal meaning of membership in the *Criminal Code*, or as to the application of a legal standard, but evidence of fact[39] to enable the jury to apply the meaning to the evidence of conduct concerning the respondent in the context of the particular organisation.

VI. NOTICE OF CONTENTION

Ground 1.1 – misdirection with respect to elements

64. It may be acknowledged that in the summing up (SU13) [CAB26] (and JM p 3 [BFMV1 748]) the learned trial judge in terms identified the elements of the offence. It may also be acknowledged that the trial judge (with respect, correctly) instructed the jury that the question of proof of membership (by the taking of relevant steps) was ultimately a question of fact (SU13, 18) [CAB26, 31], and, obviously, a matter for the jury to decide (SU19) [CAB32]. However, it is submitted that the judge's directions were inadequate in the following respects.

65. ***First***, when the learned trial judge came to instruct the jury in relation to the particulars relied upon by the prosecution as to both the physical and mental elements, his directions tended to conflate the two elements and to focus the jury's attention upon what was characterised as the real issue, namely, whether the steps taken with respect to attempting to fly to Turkey were undertaken with a view to becoming a member of Islamic State. That distracted attention from a critical question of whether, whatever her intention with respect to those acts, the acts amounted to "steps to become a member" of Islamic State, and tended to assume or suggest that the acts were relevant "steps"[40].

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39 It may be noted that evidence of this kind was led in *R v Ahmed* [2011] EWCA Crim 184, with reference to principles articulated by King CJ in *R v Bonython* (1984) 38 SASR 45. In the context of outlaw motorcycle gangs, evidence as to organisation and membership is often received (a recent survey of relevant authorities is found in *Western Australia v Martin* [2018] WASC 151). Evidence as to the nature and membership of indigenous groups and clans is often given by anthropologists (see, eg, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 161-162, *Groote Eylandt Aboriginal Trust v Deloitte, Touche Tohmatsu (No 2)* [2017] NTSC 4 at [33]-[47]).

40 Defence counsel had submitted to the jury that "it is a bit of a vague situation, this notion of membership, and the same, I would suggest, could be said for the notion of taking steps to become a member" (Tr 1442-1443 [BFMV1 435-436]), and there was no concession that even if it could be shown that the appellant booked her ticket to Turkey with the intention of thereafter engaging with Islamic State, her conduct amounted to the taking of a step to become a member of Islamic State.

(1) At SU24 [CAB37], his Honour directed the jury: A5/2020

> Ladies and gentlemen, the critical question of course is not so much those various acts or activities, because really they are not disputed, but rather whether **those steps** were taken to become a member of Islamic State. That is going to be the **real question** for you.

(2) And further at SU24 [CAB37]:

> Now, the position is that if you accept the prosecution case beyond reasonable doubt that **these steps** surrounding the attempt to fly to Turkey were taken intentionally to become a member of Islamic State, then the charge would be made out because you have the definitions, you have the elements, I have explained those to you, and if you found beyond reasonable doubt that **those steps** surrounding the attempt to travel to Turkey were intentionally taken by the defendant to become a member of Islamic State then, if you are satisfied beyond reasonable doubt, would establish the charge.

(3) At SU34 [CAB47]:

> Now, with possibly one exception I understand that the issue here is not really as to what the defendant did, in other words not really as to her intentionally doing something in the sense of deliberately doing something, but rather the **real issue is as to whether or not she had the intention to become a member of Islamic State** whether she was taking steps to become a member of Islamic State, to use the words of the offence.

(4) At SU35 [CAB48]:

> the rest of the things from 1-6 are basically events that do not appear to be disputed as such, are not said to be accidental rather than deliberate but the area of contention, of course, is whether they were taken as steps to become a member of IS, as I understand the issues in the case.

(5) And at JM p 5 [BFMV1 750], his Honour directed the jury that:

> the matter of the attempt to fly to Turkey is such an important part of the prosecution case that I direct you that you can only find that the defendant 'took steps to become a member of IS' and is guilty of the charge before the Court **if you are satisfied beyond reasonable doubt that the defendant intended to travel to Turkey 'in order to engage with the terrorist organisation IS'**.

Whilst the latter direction did not in terms convey that such a finding would dictate a finding of guilt, it tended to identify as the real issue what was the respondent's purpose in flying to Turkey, whereas the question of intention was irrelevant unless it was established beyond reasonable doubt that making arrangements to travel to Turkey constituted steps to become a member of Islamic State.

66. ***Secondly***, in so far as the learned trial judge could be said to have directed the jury as to the physical element of the offence, it is respectfully submitted that the learned trial judge did not give the jury sufficient guidance on how they might approach the question of what constituted steps to becoming a member by inviting them to relate the evidence regarding membership of Islamic State **the terrorist organisation** (such as it was) to the concept of "steps to become a member". The judge did not invite the jury to consider whether the prosecution had established by evidence what could constitute steps to becoming a member of Islamic State (as a terrorist organisation, as distinct from becoming a person merely living under or subject to Islamic State as part of a society). Nor did the learned trial judge invite the jury to consider whether the acts pointed to by the prosecution could be so characterised. As Kourakis CJ

found, this involved a conflation of concepts (CAB226 [44]), and a failure to relate the evidence to the relevant directions (CAB239 [86], CAB245 [104]). A5/2020

67. Instead, whilst ostensibly leaving the matter to their judgment and at large (by indicating there was no "bright line" (JM p 3 [BFMV1 748], SU13 [CAB27], SU18 [CAB31]), the judge's directions subtly encouraged the jury to take a broad approach, by repeated explanations as to why Parliament had deemed it necessary to take an expansive approach.

(1) The jury were informed (JM p 3) [BFMV1 748]:

> While traditionally preparatory acts are not often made into criminal offences, the prevention of terrorism **requires** criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct. Parliament has here created an offence that may apply **at an early stage** of a person's **movement towards membership**, and potentially participation in the activities, of a terrorist organisation.

(2) The jury were instructed that "nor is there any set of necessary conditions, the absence of any one of which would render the term 'member of an organisation inapplicable'" (JM, p 3) [BFMV1 748]. With respect, there may not have been any *a priori* necessary conditions prescribed, but it was necessary for the prosecution to prove by evidence that what **was** done was a step to become a member of Islamic State. As McHugh J said in *Fingleton v The Queen*, it is usually imperative that the jury be specifically directed as to the criteria to be applied and distinctions to be observed in determining whether particular conduct is within the terms of a section, and that may be particularly so where a novel offence is involved[41].

(3) At SU15 [CAB29] and SU16-17 [CAB30-31], the learned trial judge said:

> [The definition of membership] is very consistent with the fact that this legislation is aimed at organisations which, obviously, from the very nature of them, are not going to be cooperative in terms of handing you up a membership list, for example, you know, it is just so obvious. Therefore, **parliament has deemed it necessary** for the reasons, some of them I have set out further down the page, **to take a broader approach**. …
>
> You then go to (b) and that extends the concept of a member **considerably** because, you see, it says … Now you can appreciate that if what you have got is a person who has taken steps to become a member of the organisation, **hopes to become a member of the organisation**, clearly that person is not yet a member in the usual lay sense, he or she is not yet a member in the usual lay sense as we would talk about …

(4) Again, at SU18 [CAB30], the jury were instructed:

> Parliament, because of the seriousness of terrorism, has laid down a more expansive inclusionary definition – I told you about that – because of the nature of these organisations. While traditionally preparatory acts are not often made into criminal offences, the prevention of terrorism **requires** criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct.

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41 *Fingleton v The Queen* (2005) 227 CLR 166 at [80, [84]. Of course, the forensic issues in the case will determine the extent to which elucidation of the concepts is necessary, as *Benbrika* illustrates.

The learned trial judge then said "[s]o parliament has here created an offence that may apply at an **early stage of a person's movement towards membership**" (SU18) [CAB31]. A5/2020

68. Such observations were beside the point (it playing no part of the jury's function to consider whether the law was justified or not), and had the tendency to give the jury comfort that what might seem a radical conclusion (that an act such as booking a flight to Turkey with a particular thought in mind might amount to membership of a terrorist organisation, an offence more serious than associating with a terrorist organisation) ought not to trouble them.

69. Kourakis CJ agreed there was a risk to a fair trial arising from similar observations made by the prosecutor (CAB236 [78]), and he later doubted the utility of the direction the judge gave (CAB245 [104]).

Ground 1.2 – failure to relate evidence to elements

70. This ground substantially overlaps with the complaint just articulated. The further complaint is that the judge's directions did not relate the evidence to the legal issues[42]. Rather, the question of membership was left essentially at large, the jury merely being told there was no bright line but instead a continuum, and in circumstances where there was a legislative imperative that a broad approach be taken.

71. It is submitted that the learned trial judge was required to identify the evidence as to what constituted steps to becoming a member of Islamic State, the terrorist organisation, and then to relate the evidence as to what the appellant did to that evidence. Fairness dictated also that the jury be instructed that the prosecution's submissions about what amounted to membership[43] were not self-evidently borne out on the evidence, and that Dr Shanahan had not in fact been asked what a member of the organisation was, as the prosecutor had conceded[44]. Identification of the limits of the expert evidence led was an important aspect of the duty to relate the evidence to the issues[45].

Ground 2.1 – unbalanced summing up

72. This ground relies upon the matters already advanced and their cumulative effect, in combination with other aspects of the summing up, with reference to the principles articulated in *McKell v The Queen*[46].

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42 *Alford v Magee* (1952) 85 CLR 437. Although the jury are the sole judges of the facts, it is also the case that the trial judge in a criminal trial must instruct the jury about some matters that affect how they set about finding the facts: *Melbourne v R* (1999) 198 CLR 1 at [143].

43 Tr 1247-1248 [BFMV1 255-256].

44 Tr 1203 [BFMV1 227].

45 Cf. *Aytugrul v The Queen* (2012) 247 CLR 170 at [32].

46 (2019) 246 CLR 307. It was emphasised that: the summing up is not an occasion to address the jury in terms apt to add to the force of the case for the prosecution or the accused so as to sway the jury to either view ([3]); a judge should refrain from comments which convey his or her opinion as to the proper determination of a disputed issue of fact to be determined by the jury ([5]); in order to determine whether a summing up is unfairly balanced, it is necessary for it to be considered in its entirety and in the context of

73. The additional matters are these. A5/2020

(1) The learned trial judge directed the jury that if they thought it was a reasonable possibility which they could not exclude "that [the respondent] was going [to Turkey] to look at the beaches, or to look at a mosque, on holiday, last-minute trip, whatever" then they would "not be able to find that she was then taking steps to become a member of ISIS" (SU26) [CAB39], and by doing so the learned trial judge tended to suggest to the jury that it was sufficient if they rejected such possibilities, without alerting them to the possibility that they might find the offence not proved irrespective of the state of mind of the respondent. Further, the assertion made by the respondent in her record of interview critically involved a desire to undertake aid work. The reference to a holiday was to be understood by reference to Exhibit P3 [RBFM 283-284] and in a context where the 'holiday' being described by the respondent was obviously one involving the carrying out of aid work.

(2) The assertions of innocence made by the respondent in her interview were material in the Crown case[47]. Practically speaking, they were required to be negatived as innocent hypotheses[48]. Her contemporaneous denials of an intention to engage with Islamic State were not mere denials but were supported by positive assertions of an intention to seek out aid work, there being other evidence in the case that supported the idea that she had a charitable nature (eg, Exhibit D69) [RBFM 303-305].

(3) Rather than identify her positive assertions and her denials of wrongdoing, and her statements that she had no contacts from whom she could obtain assistance in crossing the border to Syria and entering into Islamic State-held territory as material in the Crown case that had to be considered and excluded as a reasonably possible hypothesis before a verdict of guilty could be returned, the learned trial judge instead focused upon how the jury might treat what were asserted to be lies in the record of interview (SU49-51) [CAB62-64].

(4) The learned trial judge generally referred to the defence case in terms of the submissions of her counsel, notwithstanding that in significant respects the address was founded upon the assertions of innocence made by the respondent in her record of interview.

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the issues and the evidence led in the trial ([30]); whilst a trial judge might be required to correct a submission by counsel they should not go beyond correction so as to gratuitously belittle counsel and distract from the issues ([38]); even where a jury is not confused as to their role as the sole arbiters of the facts the summing up must not be such that the prosecution is given the advantage of a second address ([40], [43]); and the issue is whether the trial judge's comments are apt to create a 'danger' or a substantial risk that the jury might actually be persuaded of the accused's guilt by comments in favour of the prosecution case made with the authority of the judge ([42]).

47 See, eg, *M v The Queen* (1994) 62 SASR 364 at 369.

48 *R v Weetra* [2010] SASCFC 52 at [13] per White J. See also *R v Golubovic* [2016] SASCFC 144 at [118]. As to whether a particular *Liberato*-style direction was required, see *De Silva v R* (2019) 94 ALJR 100; [2019] HCA 48 at [11].

(5) An accused is entitled to have the case that he or she presented fairly put to the jury together with any other matter upon which the jury might properly have returned a verdict in his or her favour[49]. A5/2020

(6) The learned trial judge invited the jury to consider and contrast two rival submissions, namely, whether the respondent's intention on 14 July 2016 was "completely innocent" or "something much more sinister" (SU 31) [CAB44], when it was open to the jury to acquit the respondent even if she had a sinister intention, and when it was open to the jury to accept neither submission and acquit the respondent. These directions tended to reinforce what would be a natural inclination of a juror impermissibly to convert the correct application of the criminal burden of proof to a binary inquiry (and a false dichotomy).

(7) The learned trial judge used language such as "real clues" and "real help" and "real continuing pattern" (SU31-32) [CAB44-45], tending to suggest there was a particular correct answer (implicitly known or apparent to the judge) which the evidence might reveal.

(8) When instructing the jury that the prosecution did not have to establish all of the things it had put before them, the learned trial judge subtly endorsed the prosecution case as being comprehensive by commenting "my goodness, it has put a lot of evidence before you" (SU21) [CAB34].

(9) The learned trial judge undermined the defence by stating, in reference to a submission of defence counsel, that "That was put with all seriousness, I assume, by Mr Boucaut, this is a serious case" (SU38) [CAB51]. It is important that when summarising arguments of the parties the fair presentation of those arguments not be interspersed by comments which detract from or belittle that party's case or their counsel[50].

(10) The learned trial judge subtly discouraged the jury from applying the onus of proof by requiring the defence positively to identify and establish any innocent hypothesis (SU45 [CAB58], albeit see the re-direction at SU73 [CAB86]). (Separately, the judge made the observation that the defence did not call any witnesses responsive to the prosecution witnesses SU59 [CAB72], albeit see the prosecutor's submission at SU61 [CAB74] and the further direction at SU72 [CAB85].)

(11) As noted earlier, the learned trial judge instructed the jury that such was the seriousness of the subject matter, there was a legislative imperative that required preparatory acts to constitute criminal acts (SU13, 18) [CAB26, 32].

(12) The learned trial judge encouraged the jury to consider that there may be other evidence that had not been available to police by suggesting that it was easy to overestimate the degree to which police may be able to recover evidence in a given case (SU113)

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49 *Castle v The Queen* (2016) 259 CLR 449 at [58]-[59], *Domican v The Queen* (1992) 173 CLR 555 at 561.

50 Cf. *R v Colbert* [2016] SASCFC 12.

[CAB126]. This comment was interspersed in the (limited) summary of the defence case, creating a risk of imbalance. A5/2020

(13) The learned trial judge identified matters that he considered supported the prosecution case – a matter objected to by defence counsel[51] – and reiterated them in his summing up (SU94-95) [CAB107-108].

74. Although defence counsel sought no further directions at the conclusion of the summing up, at an earlier point, defence counsel made the complaint that the learned trial judge had firmly aligned himself with the Crown case and had in summing up delivered another Crown address. The learned trial judge rejected that criticism (SU100) [CAB113].

Ground 2.2 – failure to put defence case

75. This complaint focuses upon a discrete aspect of the foregoing complaints, and asserts that, in order to avoid a miscarriage of justice, the obligation to relate the evidence to the law (or vice versa) includes a requirement to put the defence case[52] in relation to those issues and its source. Where the defence case is reflected in a denial or explanation by the accused that features in the evidence, that should be put to the jury as a matter to be taken into account in considering whether the Crown has discharged its standard of proof[53].

76. Apart from the question whether arranging to travel to Turkey could constitute a relevant step to become a member of Islamic State on the evidence, the respondent's account in her record of interview was material adduced in the prosecution case that supported the defence case and needed to be negatived as a reasonable possibility. In particular, there were matters of detail which, combined with the contemporaneity of the account, and the respondent's preparedness to be interviewed in the absence of legal representation, gave her account in her first interview significant weight. In circumstances where the judge directed the jury that they could not convict unless they were satisfied that the respondent arranged to travel to Turkey with the intention of engaging with Islamic State, it was critical that the defence case on that issue be fairly presented.

77. When the judge addressed the fact that the respondent had chosen not to give evidence, he concluded by saying that "[t]he evidence is what it is in this case and it is upon that evidence that you will come to your verdict" (SU57) [CAB70]. That direction had the tendency to undermine any understanding by the jury that the respondent's denials in her account were evidence in the case. Further, in the summary of the defence case, the learned trial judge

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51 Tr pp 1371.11-1372.12 [RBFM 273-274].

52 *R v Schmahl* [1965] VR 745 at 748, *R v C, A* [2013] SASCFC 137 at [111]-[115], *R v Sekrst* [2016] SASCFC 127.

53 This is so, and perhaps even more important, if it be thought that the defence case was 'weak'. In *R v Meher* [2004] NSWCCA 355, Wood CJ at CL referred with approval to the judgment of Isaacs J in *R v Tomazos* (Court of Criminal Appeal, 6 August 1971, unreported) where his Honour said: "… A trial according to law includes as an essential prerequisite that the trial judge has put fairly, cogently and with clarity to the jury the accused's defence. The weaker the defence the more essential it is for his defence such as it is to be put to the jury so that they can consider it in the light of the Crown case and evaluate it as part of their assessment together with the Crown evidence to see whether the Crown has discharged its onus of proof". See also *Maraache v R* [2013] NSWCA 199.

interspersed points by way of rebuttal (eg, SU113 [CAB126]), highlighted some limits or weaknesses of the submissions (eg, SU115 [CAB128], SU118 [CAB131]) and gave some prominence to a mistaken submission that counsel had made and retracted (eg, SU122 [CAB135]). Many of these observations in isolation could not be criticised; it is their cumulative effect that is complained of.

Conclusions

78. The majority below found that the learned trial judge's directions were inadequate in failing to relate the evidence to the issues (CAB226 [44], CAB239 [86], CAB245 [104]). The majority also accepted other criticisms of the summing up (CAB245 [10]).

10 79. Whilst the majority[54] rejected various of the other complaints standing alone, it is submitted that, were it to become relevant to the disposition of this appeal, this Court should conclude that the summing up was otherwise unbalanced, or involved a risk of miscarriage, based upon a consideration of the entirety of the matters to which reference has been made above.

80. That is to say, even were this Court to conclude that the CCA ought not to have entered an acquittal, this Court should uphold the order quashing the conviction, and should in that eventuality order a retrial unless persuaded that, in view of the Court's assessment of the sufficiency of the evidence, and the consideration that the respondent has served much of the sentence imposed[55], the discretion not to so order[56] should be exercised.

VII. TIME ESTIMATE

20 81. The respondent estimates that 2 ¼ hours will be required to present oral argument.

5 June 2020

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54 Kelly J's treatment of these grounds was brief and essentially involved agreeing with the Chief Justice (CAB271 [225]).

55 The head sentence was three years and the non-parole period was 2 years and 3 months, backdated to commence on 23 May 2017.

56 *Director of Public Prosecutions for Nauru v Fowler* (1984) 154 CLR 627 at 630-631, *R v A2* (2019) 93 ALJR 1106; [2019] HCA 35 at [84]-[85].