HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA **S140/2022**

SYDNEY REGISTRY

BETWEEN: **Enrico Robert Charles Delzotto**

Appellant

and

The King

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

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

Part II: OUTLINE OF APPELLANT'S PROPOSITIONS

2. The Questions will be addressed in reverse order: 3, 2 and 1.

3. ***Question 3***: An offence contrary to s474.22A(1) **(JBA 81)** is not committed by a person unless that person has engaged in each of two distinct types of conduct: that the person has both (a) used a carriage service to obtain or access child abuse material and (b) possessed the material (**AD [63]**). Neither is a characteristic of the material; both are conduct of the person necessary for personal liability for the offence. They are therefore "relevant conduct" for the purposes of the application provisions of s16AAB (**JBA 53**; **AD [64], RepD [4]**). While the use of a carriage service could be characterised as a "jurisdictional element", the obtaining or accessing of the material *by the alleged offender* cannot.

4. ***Question 2:*** Section s16AAB is not amenable to the application of the *Bahar*[1] approach, regardless of the correctness (or otherwise) of that approach to provisions of the *Migration Act 1958* (Cth) (**AD [46]**). If the approach in *Bahar* was wrong (see Question 1), this provides even greater support for the answer "no".

The analogy with a maximum penalty is not available

5. The *maximum* penalty for an offence is the most severe disposition possible for any offender for the offence. It therefore represents the disposition reserved for a "worst possible case" and, for that reason, acts as a yardstick for sentencing courts. It also serves as an indication of the relative seriousness of the offence.

6. For a particular disposition to act as the other "end of the yardstick", it would need to be the least severe disposition possible for any offender for the offence (**AD [37]**). Sections 16AAA (**JBA 52**) and 16AAB apply only on conviction (**AD [47]**). For all of the offences listed in those sections courts retain the power to dismiss the charge or discharge the offender, without conviction, under s19B of the *Crimes Act 1914* (Cth) (**JBA 65**; **AD [49]**; **RepD [15]-[16]**). (This is one of many significant differences from the Migration Act provisions considered in *Bahar*, which precluded the operation of s19B for the relevant offences.)

7. Contrary to the submissions of the Respondent at **RD [55]**, s19B does not operate outside the ambit of s16A (**JBA 44**) or without regard to the maximum penalty. Such an order may only be

[1] *Bahar v R* [2011] WASCA 249; (2011) 45 WAR 100 (**JBA 881**)

made after applying s16A(1) and (2) and considering all relevant sentencing factors.[2] An order under s19B is the least severe disposition possible and is therefore reserved for a least serious case (**RepD [15]**). The periods of imprisonment specified in s16AAA and s16AAB (whether modified by s16AAC or otherwise) are not analogous to a maximum penalty (**AD [55]**).

Other reasons why the Bahar approach does not apply to s16AAB

8. There are a number of other reasons why the *Bahar* approach does not apply:

   a. The *Bahar* approach is wrong (see Question 1 below) (**DA [31]-[37]**);

   b. The text and context of the legislation does not support it (**DA [55] – [58]; RepD [5]-[8]**);

   c. The legislative purpose is not sufficiently clear to demand it (**DA[52] - [53], [57], [59]; RepD [19], [22]; JBA 1762 & supp.**) ;

   d. Section 16AAB does not apply to all examples of the offence, but in limited circumstances (offender's age and the timing of a prior conviction) (cf maxima) (**JBA 53; AD [54], [55]**);

   e. The penalty upon conviction is variable due to s16AAC (cf maxima) **(RepD [16])**;

   f. The significant differences from the Migration Act provisions leave no room for "the re-enactment presumption" (**AD [50], [54]; RepD [15], [21]**);

   g. There is a constructional choice and the principle of legality calls for the interpretation which least interferes with personal liberty AD[42]-[43]; RepD [17] – [18]).

The principle of legality, equal justice and personal liberty

9. The correct approach to the principle of legality, at least as it relates to the right to personal liberty, is that stated and applied by the plurality in *NAAJA v NT*.[3] Where there is a constructional choice, a reasonably open interpretation which involves the least interference with liberty ought to be preferred. Where the question concerns the *extent* of intended interference with liberty, the principle should not be restricted or narrowed simply because there is a clear intention to interfere with liberty in some way.

10. Where there exists a constructional choice, and there is tension between equal justice and the right to personal liberty, the construction which least affects liberty ought to be preferred **(AD[42]-[43]; RepD [17] – [18])**. To do otherwise would be contrary to the long-established

[2] See *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332; (2001) 122 A Crim R 568; (2001) 164 FLR 375 at [10]-[15]; [30]-[31]; [92]-[94] (AD Supplementary List of Authorities). This case (and the many which have followed it) is consistent with the text of s16A(3) which clearly indicates that s19B orders come under s16A(1) and (2).
[3] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; [2015] HCA 41 (**JBA 680**)

approach to the resolution of this tension in the law of sentencing – namely that the parity principle can only result in a decrease, not an increase, in a sentence in order to achieve equal justice (**AD [41], RepD [18]**).

11. In this case, the clear and apparent intention of s16AAB is to require a court to sentence a *convicted* offender, who was 18 years or older at the time of the offence, to imprisonment for at least a specified period (subject to reduction under s16AAC). A further, secondary, intention - that the specified period should be reserved for a least serious case and act as one end of a sentencing yardstick – ought not be inferred.

12. ***Question 1***: *Bahar* was wrongly decided because the court did not properly consider the words of the statute or the operation of the principle of legality in relation to the right to personal liberty (**AD [16]-[44]**). The operative words of the Migration Act provisions were directed to the court and did not purport to impose a penalty (**AD [21]**). Notes to the offence provisions referred to the mandatory provisions as limits on conviction and sentencing options, not minimum penalties for which the offences were punishable. The court should not have inferred a legislative intention to create a minimum penalty, to reserve such a penalty for least serious cases or to effect a general increase in sentences. The court in *Bahar* did not take into account the principle of legality in relation to the effect on the right to personal liberty of its constructional choice (**AD [40]**).

13. The decisions which followed *Bahar* were also wrong, including *Karim*[4] with the additional reliance upon equal justice (**AD [38]-[40]**). The court in *Karim*, while acknowledging that its construction would lead to a general increase in sentences, in construing the provisions invoked the principle of legality in relation to equal justice but not the right to personal liberty. Nor did it engage with the tension between the two (**AD [42]**).

14. The court below followed and applied *Bahar* and *Karim* and was led into error in upholding each of the grounds of appeal before it.

Dated: 8 November 2023

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[4] *Karim v R* (2013) 83 NSWLR 268; (2013) 274 FLR 388; (2013) 301 ALR 597; (2013) 227 A Crim R 1; [2013] NSWCCA 23 (**JBA 1113**)