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

10

and

ZAINAB ABDIRAHMAN-KHALIF

Respondent

20 **RESPONDENT'S SKELETON OF ORAL ARGUMENT**

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I. CERTIFICATION

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

II. OUTLINE OF PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The appellant's appeal – unreasonable verdict

1. The question whether the verdict was unreasonable must be considered in light of the conduct of the case at trial (RS [15]-[17], [26]), including relevantly that:

   (a) the prosecution advanced a 'steps' case and did not contend the respondent was a formal or informal member whilst in Australia (CCA [48], Tr 1205 BFMV1 229);

   (b) the prosecution case hinged upon flight to Turkey being a relevant 'step' on the basis the respondent intended to go to live in Syria as a wife or nurse (CCA [8], [11], [49], [50]) – there was no suggestion that the respondent intended to engage in any violent conduct there or elsewhere (SU38 CAB 51);

   (c) the prosecution case therefore was that women living in a society established by Islamic State and supporting its ideals by living as wife or nurse were members (CCA [11], [261]).

2. There was no question in this case whether Islamic State was an organisation, and the contention raised by appeal ground 2(b) does not arise.

   (a) The question of membership was to be resolved on the premise that:

   - there was a declared terrorist organisation (*Criminal Code (Terrorist Organisation – Islamic State) Regulation* 2014 (Cth) [JBA4.700]) known as Islamic State, which had been in existence for some time, before it had had any success in establishing a society or territory (CCA [40]-[42]); and

   - the organisation had members and that there must be some criteria or method by which those members were identified (CCA [84]-[89], [252], [255]).

   (b) The majority's observations regarding the meaning of "organisation" were not, on analysis, inconsistent with *Benbrika v The Queen* (2010) 29 VR 593 [JBA3.318] (RS [58]-[59]).

3. Further, the evidence that was led at trial:

   (a) confirmed that Islamic State had members and supporters but did not make clear the extent to which those concepts overlapped or were distinct (RS [49]-[50], CCA [76], [262]-[263]);

   (b) suggested that Islamic State had some level of hierarchical command and structure but was silent or uninformative as to whether women living as nurses or wives, or other people living under the rule of Islamic State and supporting its ideals, were regarded as members (RS [49]-[52], CCA [60], [67]-[68], [256], [257], [261], [264]);

   (c) in so far as it addressed symbols, gestures and other rituals that were associated with Islamic State, did not establish that those things were exclusively associated with Islamic State (as distinct from other Salafist ideologies), let alone that they denoted or brought about membership (informal or formal) (RS [8]-[10], CCA [70]-[75]).

4. The appellant's submissions as to why the absence of evidence to that effect can be put to one side (AS 48]) should be rejected (RS [63]), in that: A5/2020

   (a) the judge did not rule that evidence as to what Islamic State regarded as sufficient to render someone a member was inadmissible, nor would such a ruling have been justified;

   (b) the prosecution did not lead evidence at the trial on all topics which, during the voir dire, Dr Shanahan had touched upon, and there is no basis to infer that it was not possible, due to secrecy or otherwise, for Dr Shanahan or some other witness to give evidence as to who the organisation regarded as its members and according to what criteria or methods (if any).

5. The alternative approaches to the proof of membership should be rejected:

   (a) the prosecution's approach at trial to proof of membership (CCA [80]) set the concept at large and encouraged an evaluative assessment by the jury divorced from how the organisation in question viewed the status of supporters or participants;

   (b) the approach suggested by Kelly J (CCA [221]) in dissent permits membership to be established by a unilateral commitment to or desire to further the objectives of an organisation (RS [61]-[62]). That cannot be sufficient, without more.

6. The majority approach should be upheld:

   (a) the appellant's ground 2(a) mischaracterises the majority reasoning. Whilst the majority considered that the expanded definition ("steps") contemplated a process, that was in the context of an observation that whether or not someone has embarked on a process towards membership could not be decided in a vacuum; something must be known of the organisation's rules, formal or informal, or at least its common practices (CCA [20]-[21]);

   (b) whether the steps must be prescribed or recognised by the organisation or not, if they are steps towards something which is not membership, the prosecution case fails;

   (c) the dispositive reasoning, which turned on an absence of relevant evidence against which the jury could evaluate any connection between the proved conduct of the appellant, her communications, pledge of allegiance, singing and attempt to travel to Turkey, with formal or informal membership of Islamic State (CCA [9]-[10], [82] cf. [259]), was correct.

The respondent's notice of contention – ground 1 (misdirections or inadequate directions)

7. The matters the subject of ground 1 of the notice of contention, which in large part reflect grounds 1 and 1A in the notice of appeal to the Court of Criminal Appeal, were implicitly accepted by the majority, and support, at least, the quashing of the verdict of guilty (CCA [44], [74], [86], [104]).

8. Ground 1.1 (RS [64]-[69])

   (a) the judge's directions conflated the physical and mental elements so as to distract attention from a consideration of whether the conduct particularised was capable of being characterised as a step to becoming a member, and so as to focus unduly on the intention of the respondent;

   (b) the judge's directions as to the legislative rationale for a broad definition of membership, and to the absence of any "bright lines", wrongly encouraged a broad and uncritical approach to whether conduct amounted to steps to becoming a member.

9. Ground 1.2 (RS [70]-[71])

(a) the judge's directions failed to relate the evidence to the legal issues;

(b) the judge's direction failed to identify the extent to which the expert evidence did or did not assist in identifying what amounted to membership of Islamic State (CCA [86]) (cf. SU107-108 CAB 120-121).

The respondent's notice of contention – ground 2 (miscarriage)

10. Ground 2.1 (RS [72]-[74])

(a) Kourakis CJ dealt with a residual group of complaints concerning the summing up, and did so *seriatim* rather than cumulatively (CCA [91]-[109]), and for that reason, erred in not allowing the appeal on the additional ground that the summing up gave rise to a miscarriage.

(b) In addition to the directions and non-directions elsewhere complained of, the cumulative effect of the matters identified at RS [73] was that the summing up was unbalanced and gave rise to a miscarriage: *McKell v The Queen* (2019) 246 CLR 307 [JBA2.293].

(c) The respondent made a contemporaneous complaint about the summing up which was rejected by the trial judge as verging on impertinent (SU 100) [CAB 113].

11. Ground 2.2 (RS [75]-[77])

(a) Where the prosecution case comprises voluminous evidence and the defence case is limited, the trial judge's obligation to clearly and cogently put the defence case may be heightened.

(b) The summing up failed sufficiently to summarise a positive defence case contained in the respondent's records of interview and to bring home to the jury that it comprised material in the case, going well beyond a bare denial, that needed to be negatived beyond reasonable doubt: cf. *R v Soldo* [2005] VSCA 136 [SJBA.4]. The CCA erred by failing to engage with these principles (cf. CCA [93]) and failed to deal with ground 2A of the notice of appeal to the CCA [CAB 213].

Disposition

12. The respondent submits that the appeal should fail, and that in any event:

(a) on the basis of the notice of alternative contentions, the CCA was correct to quash the verdict of guilty (RS [79]);

(b) having regard to all the circumstances including that the term of imprisonment would by now have been fully served had it not been quashed, the discretion not to order a retrial should be exercised: *Director of Public Prosecutions for Nauru v Fowler* (1984) 154 CLR 627 [JBA2.175] at 630-631 (RS [80]).

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