HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **THE KING**

Appellant

and

FAYEZ HATAHET

Respondent

SUBMISSIONS OF THE APPELLANT

PART I FORM OF SUBMISSIONS

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

PART II CONCISE STATEMENT OF ISSUES

2. Is it wrong in principle for a sentencing judge not to take into account the likelihood that an offender will be refused parole in the future to impose a shorter term of imprisonment than would otherwise have been imposed? The Court of Criminal Appeal held "yes". The Appellant submits "no".

PART III SECTION 78B NOTICE

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV DECISIONS BELOW

4. The Court of Criminal Appeal's judgment has the medium neutral citation [2023] NSWCCA 305. The sentencing judge's remarks upon sentence were delivered on 2 December 2022, and are not available online.

PART V RELEVANT FACTS

5. On 25 April 2020, the Respondent was arrested and charged with an offence under s 6(1)(b) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

6. On 26 May 2021, he pleaded guilty in the Local Court of New South Wales to the charge that, between about 25 September 2012 and 13 December 2012, he did engage in a hostile activity in a foreign State, namely Syria, contrary to s 6(1)(b). He was committed to

sentence to the District Court of New South Wales and, on being asked by Judge Baker at the commencement of the plea on 7 October 2022, he maintained that plea of guilty.

7. On 2 December 2022, Judge Baker sentenced the Respondent to imprisonment for five years, with a non-parole period of three years, commencing on 24 August 2020. The head sentence was to expire on 23 August 2025.

8. The Respondent then sought leave to appeal against sentence in the Court of Criminal Appeal on the ground of manifest excess. By the time of the hearing, the Respondent had in fact been refused parole (**CAB 87 [47]**).

9. The Court of Criminal Appeal (Basten AJA; Davies and Cavanagh JJ agreeing) allowed the appeal (**CAB 102**).

10. Basten AJA found "specific error" in the sentence which resulted in a conclusion of manifest excess (**CAB 100 [87]**). The specific error was said to concern "the effects of s 19ALB" (**CAB 100 [86]**). "The expectation (now a reality) that parole would be refused" is the "application of s 19ALB" which the sentencing judge should have, but did not, take into account as a factor mitigating sentence because it contributed to a more onerous experience of imprisonment for the Respondent (**CAB 99-100 [84]-[85]**).

11. Basten AJA concluded that – apart from the specific error – the sentence was not manifestly excessive (**CAB 83 [38]**).

12. It is this "specific error" which is the subject of the present appeal.

PART VI ARGUMENT

A. BACKGROUND CONTEXT

A.1 The sentencing judge's task

13. Part 1B of the *Crimes Act 1914* (Cth) (***Crimes Act***) governs the sentencing of offenders against Commonwealth laws. Section 16A(1) requires a sentencing judge to "impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence", and s 16A(2) provides that, in addition to any other matters, the sentencing judge must take into account such of a specified list of matters as are relevant and known to the sentencing judge.

14. When sentencing a federal offender, a sentencing judge proceeds first to determine whether no other sentence than imprisonment is appropriate in all the circumstances of

the case: s 17A(1). If the sentencing judge determines to impose a sentence of imprisonment, they then determine the term of imprisonment. Then, depending on the term of imprisonment (and other matters the detail of which need not be set out here), the sentencing judge must make a recognizance release order (if it does not exceed three years' imprisonment) under s 19AC or fix a non-parole period (if more than three years' imprisonment or if the offence is subject to s 19AG) under s 19AB, unless satisfied that it is not appropriate to do so.

15. The matters in s 16A(1) and (2) are relevant at each stage of the sentencing judge's task. That is made clear by the language of s 16A(1), which applies in imposing sentence and making orders including those under s 19AC and s 19AB.

16. In explaining the overall sentence to the offender in accordance with the obligation to do so under s 16F, the sentencing judge explains what parole involves "if a parole order is made". Whether an offender is, in fact, granted parole is not one of the specified matters listed in s 16A(2), and the matters that are taken into account in granting parole are not subject to s 16A(1) and (2) of the *Crimes Act*.

A.2 The grant of parole

17. Section 19AKA of the *Crimes Act* sets out the purposes of parole for federal offenders, which are the protection of the community, the rehabilitation of the offender and the reintegration of the offender into the community. The power to grant parole is vested in the Attorney-General: s 19AL. In making that decision, the Attorney-General may have regard to the matters non-exhaustively listed in s 19ALA(1) that are known to them and relevant to the decision.

18. As is evident from the vesting of the power to grant parole in the Attorney-General, the grant of parole is an executive function.[1] "This separation of the functions of the trial judge and that of the parole board [here, the Attorney-General] is a clearly expressed policy of the legislation".[2] The judicial task is to impose a sentence, which includes fixing a non-parole period.

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1 *Power v The Queen* (1974) 131 CLR 623 at 627 (Barwick CJ, Menzies, Stephen and Mason JJ); *Elliott v The Queen* (2007) 234 CLR 38 at [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

2 *Power v The Queen* (1974) 131 CLR at 627 (Barwick CJ, Menzies, Stephen and Mason JJ).

19. In no way does the grant or refusal of parole interfere with the exercise of judicial power constituted by the sentence.[3] That is because "there remains in truth only one sentence which cannot be altered by the paroling authority".[4] Nor does any (legislative or administrative) change in the conditions for the grant of parole interfere with a prior exercise of judicial power in imposing sentence. A non-parole period creates no "right or entitlement" in the offender to their release on parole.[5] Rather, "it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed".[6] The purpose of a non-parole period is simply to identify "the minimum time that a judge determines justice requires that he must serve having regard to all the
10 circumstances of his offence".[7]

B. THE GENERAL RULE IN *HOARE v THE QUEEN*

20. In *Hoare v The Queen*, this Court observed that "there is almost universal agreement in the often contentious field of sentencing law" that the likelihood of an offender having their sentence remitted is not "a circumstance justifying an increase in the head sentence".[8] This the Court described as "[t]he general rule".[9]

21. The general rule stated in *Hoare* was said by this Court to have three rationales.

22. The **first rationale** is that there is no right to remissions and thus no guarantee that an offender will have their sentence remitted at all or to any specific extent.[10] It would thus

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3 See generally *Knight v Victoria* (2017) 261 CLR 306 at [27]-[29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Minogue v Victoria* (2019) 268 CLR 1 at [9], [15], [17]-[21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [32] (Gageler J), [38], [48] (Edelman J).

4 *Lowe v The Queen* (1984) 154 CLR 606 at 615 (Mason J); *Power v The Queen* (1974) 131 CLR 623 at 629 (Barwick CJ, Menzies, Stephen and Mason JJ).

5 *Crump v New South Wales* (2012) 247 CLR 1 at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also at [71] (Heydon J).

6 *PNJ v The Queen* (2009) 83 ALJR 384 at [11]; *Crump v New South Wales* (2012) 247 CLR 1 at [36] (French CJ).

7 *Power v The Queen* (1974) 131 CLR 623 at 629 (Barwick CJ, Menzies, Stephen and Mason JJ); *Deakin v The Queen* (1984) 58 ALJR 367 at 367 (Gibbs CJ, Murphy, Wilson, Brennan and Dawson JJ); *Bugmy v The Queen* (1990) 169 CLR 525 at 530-531 (Mason CJ and McHugh J), 536 (Dawson, Toohey and Gaudron JJ); *Crump v New South Wales* (2012) 247 CLR 1 at [28] (French CJ).

8 (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ). See also *Radenkovic v The Queen* (1990) 170 CLR 623 at 631; *Malvaso v The Queen* (1989) 168 CLR 227 at 232, 236-237; *Carbone v The Queen* (1989) 64 ALJR 51.

9 (1989) 167 CLR 348 at 355 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

10 (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

be too speculative to increase a sentence on account of the possibility of remission or parole.

23. The **second rationale** is that a "basic principle of sentencing law" is that a sentence of imprisonment be proportionate to the gravity of the offence in the light of its objective circumstances, which would be breached if a longer sentence were imposed to offset remissions.[11] To increase the sentence to offset remissions would thus fail to comply with the statutory obligation in s 16A(1) of the *Crimes Act* to impose a sentence of a severity appropriate in all the circumstances of the offence.

24. The **third rationale** is that to offset potential future remissions "would be to negate in advance the real benefit to the prisoner of remissions for good behaviour and thereby reverse the policy underlying the remissions system", and "would be effectively to turn a legislative system of remissions … on its head" by transforming provisions designed to benefit prisoners into an instrument that increased their head sentences.[12] Doing so would thus be subversive of the legislative scheme.

25. While stated by reference to remissions, the same principle and rationales apply to not increasing a head sentence to account for the possibility of parole being granted.

C. LOWER COURT AND OVERSEAS CASE LAW ON REDUCING SENTENCES

26. This Court did not go on in *Hoare* to rule out the possibility that remissions may be taken into account when imposing sentence in "exceptional circumstances".[13] Indeed, this Court left open the possibility that the availability of remissions may assist a sentencing judge to assess the extent to which some special feature of a case should have a mitigatory effect on sentence.[14]

27. Lower courts in Australia and overseas have **not** embraced this possibility. Quite the contrary. The prevailing position in the Australian Capital Territory,[15] New South

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11 (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

12 (1989) 167 CLR 348 at 354-355 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

13 (1989) 167 CLR 348 at 355 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

14 (1989) 167 CLR 348 at 355 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

15 See *R v Skillin* (1991) 53 A Crim R 311 at 318 (Gallop, Wilcox and Spender JJ). See also *Marlow v Stranger* [1987] ACTSC 17 at [18] (Gallop J); *Okwechime v The Queen* [2023] ACTCA 25 at [223] (McCallum CJ, Mossop and Charlesworth JJ).

Wales,[16] the Northern Territory,[17] Queensland,[18] South Australia,[19] Tasmania,[20] Victoria[21] and Western Australia,[22] as well as in the United Kingdom[23] and New Zealand,[24] is that sentencing judges should **not** take into account the likelihood **or unlikelihood** of parole being granted in imposing a head sentence.

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16 See, eg, *R v Reyes* [2005] NSWCCA 218 at [72]-[75] (Grove J; Wood CJ at CL and Hoeben J agreeing); *Wray v The Queen* (2007) 171 A Crim R 583 at [61]-[66] (Hislop J; McClellan CJ at CL agreeing); *IE v The Queen* (2008) 183 A Crim R 150 at [26]-[28] (Latham J; Spigelman CJ agreeing); *Versi v R* [2013] NSWCCA 206 at [188]-[189] (Adams J); *MPB v The Queen* (2013) 234 A Crim R 576 at [26]-[31] (Basten JA), [86] (Garling J).

17 See, eg, *R v McCubbin* (Unreported, Northern Territory Court of Criminal Appeal, 7 December 1993) at p 4.

18 See, eg, *R v Black* [1948] QWN 28 at 29 (Philp J); *R v Breckenridge* [1966] Qd R 189 at [32] (Douglas J); *R v Brown* (2000) 110 A Crim R 499 at [8]-[10] (McPherson JA); The Hon John Robertson, *Queensland Sentencing Manual* at [15.275].

19 See, eg, *Menz v The Queen* [1967] SASR 329 at 330-331 (Bray CJ, Travers and Mitchell JJ); *R v Brennan* (1984) 36 SASR 78 at 80 (King CJ; Walters and Mohr JJ agreeing); *R v Eckardt* [1971] SASR 347 at 351 (Bray CJ, Mitchell and Wells JJ); Mary Daunton-Fear, *Sentencing in South Australia* (1980) at 99.

20 See, eg, *Burke v The Queen* [1983] Tas R 85 at 87 (Nettlefold), 91 (Cox J); *George v The Queen* [1986] Tas R 49 at 64 (Cox J); *Hyland v The Queen* [1996] TASSC 144 at [36]-[38] (Crawford J), [77]-[78] (Zeeman J); *Enniss v Tasmania* [2012] TASCCA 10 at [17] (Crawford CJ, Blow and Wood JJ); *Taylor v The Queen* [2015] TASCCA 7 at [18] (Pearce J; Blow CJ and Wood J agreeing).

21 See, eg, *R v Governor of Her Majesty's Goal at Pentridge; Ex parte Cusmano* [1966] VR 583 at 587; *R v Bruce* [1971] VR 656 at 657; *R v Currey* [1975] VR 647 at 651 (Young CJ); *A-G v Morgan* (1980) 7 A Crim R 146 at 155-156; *R v Yates* [1985] VR 41 at 44-45 (Young CJ, Starke, Crockett and Hampel JJ), 48-49 (Murphy J); *R v Roadley* (1990) 51 A Crim R 336 at 344; *R v R* (1992) 62 A Crim R 141 at 144 (Crockett J; Tadgell and Coldrey JJ agreeing); *Re Jackson* [1997] 2 VR 1 at 3; *R v Bolton* [1998] 1 VR 692 at 696; *R v Piacentino* (2007) 15 VR 501 at [64] (Eames JA; Buchanan, Vincent, Nettle and Redlich JJA agreeing); *DPP (Cth) v Besim [No 3]* (2017) 52 VR 303 at [50] (Warren CJ, Weinberg and Kaye JJA); Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed, 2014) at 863-864.

22 *Wicks v The Queen* (1989) 3 WAR at 383-384 (Malcolm CJ), 391 (Wallace J), 394-395 (Brinsden J); *R v Swain* (1989) 41 A Crim R 214 at 216 (Malcolm CJ), 221 (Rowland J); *Sikaloski v The Queen* [2000] WASCA 387 at [19] (Kennedy J; Wallwork and Parker JJ agreeing); *Western Australia v BLM* (2009) 40 WAR 414 at [195] (Buss JA; Miller JA agreeing); *Western Australia v Wallam* (2008) 185 A Crim R 116 at [16] (McLure JA); *Kirby v The Queen* [2003] WASCA 239 at [26] (Anderson and McLure JJ; Malcolm CJ agreeing).

23 See, eg, *R v Maguire* (1956) 40 Cr App R 92 at 94-95 (Goddard LCJ, Cassells and Donovan JJ); *R v Singh* [1965] 2 QB 312 at 320 (Lord Parker CJ); *R v Dilworth* (1984) 78 Cr App R 182 at 183 (Lane LCJ); *R v Cash* (1969) 53 Cr App R 483 at 486-488 (Edmund Davies LJ); *R v Gisbourne* [1977] Crim LR 490 at 491 (Orr and Waller LJJ and Milmo J); D A Thomas, *Principles of Sentencing* (2nd ed, 1979) at 48-49; Christopher J Emmins, *A Practical Approach to Sentencing* (1985) at 128 [6.7.5]; Nigel Walker, *Sentencing: Theory, Law and Practice* (1985) at 198-199 [14.4].

24 *R v Stockdale* [1981] 2 NZLR 189 at 190-191 (McMullin J, for Davison CJ, McMullin and Mahon JJ); Geoffrey G Hall, *Hall on Sentencing in New Zealand* (1987) at 46-47.

28. That position now has a statutory foundation in Victoria,[25] which was believed by the Victorian Parliament to be:[26]

> declaratory of the common law position that the court must not have regard in sentencing an offender to any possibility or likelihood that the length of time actually spent in custody by the offender will be affected by executive action of any kind. Such executive action would include any action which the Adult Parole Board might take in respect of a sentence.

29. The reasons courts throughout the common law world have commanded sentencing judges not to impose a head sentence by taking into account the likelihood or unlikelihood of a grant of parole closely resemble the rationales underpinning the general rule in *Hoare*. These reasons are correct and support the view that the general rule in *Hoare* also applies to prohibit the prospects of parole being taken into account in order to reduce a sentence.

30. *First*, courts have stressed that the prospects of an offender being granted parole are **not relevant to the sentencing task** because they do not bear upon the appropriate sentence to be imposed for the offence.[27]

31. In *R v Bruce*, for example, Smith J (Little and Lush JJ agreeing) said:[28]

> The learned judge in his report raised the question whether sentencing judges ought to take into account the policy of the Parole Board as to granting or refusing parole to people who, like the present applicant, have been paroled on previous occasions. The language of s 534 of the *Crimes Act 1958* would appear to render any inquiry as to the policy of the Board irrelevant, in a case such as the present, both to the fixing of the term of imprisonment and to the decision of the question whether a minimum term should be fixed. The sentencing judge, as has previously been laid down more than once by this Court, is called upon in the first place to determine what is the appropriate term of imprisonment to be imposed. In the exercise of that function there would appear to be no place for any inquiry as to the policy of the Board in relation to parole. Having fixed the maximum term, the court is then, in cases like the present in which the sentence is not less than two years, required by the section to fix a minimum term, except in specified circumstances. The specification of those circumstances is in these terms: "...the court shall not be required to fix a minimum term as aforesaid if the court considers that the nature of the offence and the antecedents of the offender render the fixing of a minimum term inappropriate." Questions as to the policy of the Board would

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25 *Sentencing Act 1991* (Vic) s 5(2AA)(a).

26 Explanatory Memorandum, Sentencing and Other Acts (Amendment) Bill 1997 (Vic) at 1.

27 *R v Governor of Her Majesty's Goal at Pentridge; Ex parte Cusmano* [1966] VR 583 at 587 (Gowans J for Winneke CJ, Smith and Gowans JJ); *R v Yates* [1985] VR 41 at 46; *R v Maguire* (1956) 40 Cr App R 92 at 94; *R v Holden* [1963] 2 CCC 394 at [8], [11] (Davey JA for Bird, Davey and Sheppard JJA); *R v Black* [1948] QWN 28 at 29 (Philp J); *Burke v The Queen* [1983] Tas R 85 at 91 (Cox J); *Taylor v The Queen* [2015] TASCCA 7 at [18] (Pearce J; Blow CJ and Wood J agreeing); *Hyland v The Queen* [1996] TASSC 144 at [36] (Crawford J).

28 [1971] VR 656 at 657.

> appear to be irrelevant to the inquiry which the sentencing judge is called upon by those words to make. The antecedents of the offender may, as the statute implies, be such as to persuade the court that the prisoner is not a suitable person to be dealt with under the parole system, but an inquiry into that question is not one into which the question of policy above referred to would enter.

32. *Second*, courts have stressed that it is **too speculative** for a sentencing judge to take prospects of being granted parole into account and that safe predictions cannot be made.[29] The parole authority will be making its determination "in the light of circumstances operating at the expiration of that term"[30] and it will do so on material available to it that will not be available to the sentencing judge.[31]

33. In *A-G v Morgan*, Jenkinson J (Young CJ and Kaye J agreeing) said:[32]

> There is a further reason why regard should not be had to the minimum term when a sentence is being determined upon conviction … Not only are the circumstances at the expiration of the minimum term unpredictable: they include circumstances which are beyond the power of the offender to control. For example, a mental illness of the offender supervening during the minimum term, or first diagnosed during the minimum term, and judged to be likely to cause the offender to commit serious offences while on parole, would have to be taken into account in the exercise of the Parole Board's discretionary power, notwithstanding that the offender bore no moral responsibility for his illness. If that power of the Parole Board, the exercise of which is neither predictable nor controllable by the sentencing judge, is not exercised to release the person sentenced, he will have to serve every day of the sentence, less any remission granted.

34. In *R v Yates*, Young CJ, Starke, Crockett and Hampel JJ (Murphy J agreeing) noted:[33]

> it is statistically more probable than not that a prisoner will be released within a month of the date upon which he becomes eligible, but it cannot be said of any particular prisoner that he will be. It cannot be said that the applicant will be released on or near the date upon which he becomes eligible. Even if he earns full remissions, the question whether he is to be released is a question for the Parole Board. No doubt the Board will reach a decision upon that question in the light of all the information available to it at the time and what that information will be cannot be ascertained now. Nor can it be reliably forecast.

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29 *R v Gisbourne* [1977] Crim LR 490 at 491 (Orr and Waller LJJ and Milmo J); *R v Bolton* [1998] 1 VR 692 at 696 (Callaway JA); *Menz v The Queen* [1967] SASR 329 at 331 (Bray CJ, Travers and Mitchell JJ); *Burke v The Queen* [1983] Tas R 85 at 87 (Nettlefold J).

30 *R v Governor of Her Majesty's Goal at Pentridge; Ex parte Cusmano* [1966] VR 583 at 587 (Gowans J for Winneke CJ, Smith and Gowans JJ); *R v Ryding* (Unreported, South Australian Court of Criminal Appeal, 9 August 1971) at p 3.

31 See *R v Eaton* (1969) 53 Cr App 118 at 120 (Parker LCJ); *R v Glease* [1978] Crim LR 372 at 373 (Eveleigh LJ and Cusack and Jupp JJ).

32 (1980) 7 A Crim R 146 at 155-156.

33 [1985] VR 41 at 45-46.

35. Further accentuating the uncertainty is the fact that parole ultimately lies in the discretionary judgment of the executive.[34] It could only be "a forecast about the effect of executive policy on the service of the term imposed", which is to say a prediction about "the possible effect of present executive policy on the term or conditions of imprisonment the court proposes"[35] that could be taken into account.

36. Even if executive policy could be guessed at by the sentencing judge with what they regard as a degree of confidence, "[t]he liberty of the subject under the common law is not to be set at hazard upon a statistical probability, nor curtailed in the expectation, no matter how well grounded, that an agent of the Executive Government or a Parole Board will choose to set him free before the law's sentence has run its course".[36]

37. But in truth, it would be nothing more than the "making of an administrative guess".[37] As King CJ said in *R v Brennan* (in the context of remissions and fixing non-parole periods, but of equal or added force in respect of the head sentence), to take executive policy into account "assumes that the law as to good conduct remissions will remain the same for the duration of the sentence; it assumes that the prisoner will receive the maximum remissions for good conduct; it assumes that the conditions of parole fixed by the Board will be acceptable to the prisoner. None of those assumptions is justified".[38]

38. And as the Court of Criminal Appeal said in *R v Maguire*, "A prisoner has no right to remission. … A prisoner has a prospect and a hope of remission".[39]

39. *Third*, courts have stressed that taking the prospects of parole into account can **subvert the relevant legislative scheme** for parole.[40] In *Sikaloski v The Queen*, for example, Kennedy J (Wallwork and Parker JJ agreeing) said, after referring to statutory provisions

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34 See *R v Yates* [1985] VR 45 at 47 (Young CJ, Starke, Crockett and Hampel JJ; Murphy J agreeing); *Re Jackson* [1997] 2 VR 1 at 3 (Callaway JA; Southwell and Coldrey AJJA agreeing); *R v Singh* [1965] 2 QB 312 at 320 (Lord Parker CJ); *A-G v Morgan* (1980) 7 A Crim R 146 at 156; *R v Stockdale* [1981] 2 NZLR 189 at 190-191 (McMullin J, for Davison CJ, McMullin and Mahon JJ).

35 *R v Roadley* (1990) 51 A Crim R 336 at 344 (Crockett, O'Bryan and McDonald JJ).

36 *A-G v Morgan* (1980) 7 A Crim R 146 at 156 (Jenkinson J; Young CJ and Kaye J agreeing).

37 See and compare *Power v The Queen* (1974) 131 CLR 623 at 629 (Barwick CJ, Menzies, Stephen and Mason JJ).

38 (1984) 36 SASR 78 at 80. See also *Hyland v The Queen* [1996] TASSC 144 at [37] (Crawford J), [78] (Zeeman J).

39 (1956) 40 Cr App R 92 at 94-95.

40 See *Menz v The Queen* [1967] SASR 329 at 330-331 (Bray CJ, Travers and Mitchell JJ); *R v Eckardt* [1971] SASR 347 at 351 (Bray CJ, Mitchell and Wells JJ); *R v Ryding* (Unreported, South Australian Court of Criminal Appeal, 9 August 1971) at p 2; *R v Booth* [2001] 1 Qd R 393 at [22] (MacPherson JA; Thomas JA and White J agreeing).

governing eligibility for parole, that "it is not for a sentencing Judge either to increase or to reduce the head sentence in order to avoid the impact of the Act".[41]

40. Very occasionally, lower courts have taken into account the prospects of parole in imposing sentence, but not without controversy.

41. In *R v Allen*, Street CJ said that "the likely remission date is relevant and proper to be taken into account by a sentencing judge on every matter requiring decision by him" so long as it is not considered so as to increase the sentence.[42] But as this Court expressly noted in *obiter dicta* in *R v Paivinen*, "it is impossible to reconcile *R v Allen* with the established authorities".[43] No case has cited or followed *Allen* on this issue since.

10 42. In *Wray v The Queen*, Hulme J would have considered the Parole Authority's practice in not granting parole to a person who did not admit their guilt of the offence, but his Honour was in dissent[44] with McClellan CJ at CL and Hislop J in the majority. His Honour maintained his position in *IE v The Queen*, but Spigelman CJ and Latham J followed the majority in *Wray*.[45]

43. In *R v Anderson*, White J found a sentence to be manifestly excessive taking into account, among other things, "the real risk that the applicant might serve all of his sentence or well beyond the two and a half years intended by the learned sentencing judge".[46] This is inconsistent with established authorities in Queensland to the effect that "a judge's duty is to sentence a prisoner according to the terms of the Code. It is no concern of his as to
20 what the Parole Board may or may not do".[47]

44. More recently, in *R v SEB*, Dalton JA (Boddice JA and Crow J agreeing) took into account the likelihood that the offender would not be granted parole and would likely spend time in immigration detention while awaiting more removal as relevant to the burden of his sentence.[48] That presents much the same issue as the correctness of the case

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41 [2000] WASCA 387 at [19].

42 [1983] 1 NSWLR 219 at 222C-D (Street CJ; Nagle CJ at CL and Maxwell J agreeing).

43 (1985) 158 CLR 489 at 495 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

44 (2007) 171 A Crim R 583.

45 (2008) 183 A Crim R 150.

46 [2004] QCA 74 at [22] (White J; Williams JA and McMurdo J agreeing).

47 *R v Black* [1948] QWN 28 at 29 (Philp J); *R v Brown* (2000) 110 A Crim R 499 at [8]-[10] (McPherson JA). See also The Hon John Robertson, *Queensland Sentencing Manual* at [15.275] ("It is suggested that the decision in this case [*Anderson*] is not consistent with long-established authority such as the cases referred to above [*Black* and *R v B*]").

48 [2023] QCA 69.

under appeal here in so far as it concerns parole. However, it concerns the operation of the *Migration Act 1958* (Cth) upon those who have committed offences and, despite the divergence of views among the jurisdictions,[49] it is not an issue before this Court in this appeal.

D. ERRORS IN THE COURT OF CRIMINAL APPEAL'S APPROACH

45. Against this background, the errors in the Court of Criminal Appeal's approach below can be simply stated.

46. The **first error** is the finding (**CAB 89 [52], 99 [84]**) that the likelihood or unlikelihood of being granted parole is relevant to the sentencing task under s 16A(1) and (2) of the *Crimes Act*.

47. It is not a circumstance of the offender. To take this into account is to guess at what the executive will do. It is a prediction about the executive, whose discretionary decisions are out of the offender's control. It is unlike the familiar assessment that a sentencing judge makes about the offender's prospects of rehabilitation, which is a prediction about the offender.

48. Nor is it a circumstance of the offence. Again, that is because speculation about the grant of parole is centrally a prediction about what the executive will do, taking into account different factors on the material then before the executive. Certainly, it is not a circumstance that **mitigates** the potential sentence to be imposed. **If anything**, the more stringent requirement for parole that Parliament has set speaks to the greater seriousness of the offence, much like a standard non-parole period can be used as a yardstick.[50]

49. Basten AJA sought to shoehorn this consideration into the traditional matters relevant to sentence by considering it through the lens of the onerousness of imprisonment. It will be more onerous, his Honour posited, to be in prison while believing that you will not be granted parole. But as this Court said, unanimously, in *Knight v Victoria*, having a difficulty in obtaining parole, or even being refused parole, does not make the sentence

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[49] In New South Wales, Western Australia and the Northern Territory, removal and deportation are irrelevant: see, eg, *Kristensen v The Queen* [2018] NSWCCA 189 at [34] (Payne JA; R A Hulme and Button JJ agreeing); *Ponniah v The Queen* [2011] WASCA 105 at [48] (Mazza J; Pullin and Buss JJA agreeing); *R v MAH* [2005] NTCCA 17. In Victoria, Queensland and the Australian Capital Territory, they are relevant: see, eg, *Allouch v The Queen* (2018) 276 A Crim R 1 at [39]-[40] (Beach and Weinberg JJA); *Guden v The Queen* (2010) 28 VR 288; *R v UE* [2016] QCA 58; *R v Aniezue* [2016] ACTSC 82.

[50] See *Muldrock v The Queen* (2011) 244 CLR 120 at [27], [31] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

of imprisonment more burdensome for the sentenced offender.[51] It is only conceivably more onerous for an offender to have difficulty obtaining parole if the offender is entitled to expect to be granted parole, yet an offender cannot reasonably have any such entitlement or expectation given the inherent susceptibility of parole to changing legislative and executive determinations. The last sentence of **CAB 89 [52]** is noteworthy in this regard. There was no evidence at all before the sentencing judge to support that speculation, which was in any event framed in a highly qualified manner ("At least on one view …").

50. This first error reflects the second rationale underpinning the general rule in *Hoare*, and the first rationale identified in the body of lower court authorities summarised in Part C above (at paragraphs [30]-[31]). In short, considering the prospects of parole being granted to reduce the term of imprisonment imposed finds no foothold in the sentencing task.

51. The **second error** is that, even taking into account s 19ALB and the more onerous hurdle it establishes before parole can be granted, a sentencing judge could not be sufficiently confident about prospects of parole in the future to place weight on this at sentence. By way of example of the possibilities: a new government could be elected (and thus a new Attorney-General be appointed); or the same government could remain in place but, permissibly, its policy considerations may change; or quite simply, for reasons peculiar to the offender, the Attorney-General may decide to grant them parole in the particular circumstances of their case.

52. This second error reflects the first rationale underpinning the general rule in *Hoare*, and the second rationale identified in the body of lower court authorities summarised in Part C above (at paragraphs [32]-[38]). In short, considering the prospects of parole being granted to reduce the term of imprisonment imposed is too speculative.

53. The **third and most telling error** is that Basten AJA's analysis undermines, dramatically, the legislative intention in enacting s 19ALB of the *Crimes Act*.

54. Section 19ALB was inserted into the *Crimes Act* by the *Counter-Terrorism Legislation Amendment (2019 Measures No 1) Act 2019* (Cth). The extrinsic materials make clear what is manifest from the statutory text: this was inserted to better protect the community

[51] (2017) 261 CLR 306 at [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

by making it **more difficult for certain persons to be released into the community** where they may engage in terrorist acts.[52]

55. If Basten AJA's analysis be correct, then the **invariable result** will be that the operation of s 19ALB of the *Crimes Act* (making it harder for them to be granted parole in the future) will justify some **mitigation of sentence** as part of the instinctive synthesis. This simply cannot have been the legislative intent in inserting s 19ALB into the *Crimes Act*. An amendment, made as part of a suite of amendments, to ensure that offenders are not released too early **on parole** when they may still pose a threat to the community will have been transformed into an instrument to reduce the **head sentence**. The net result will be that such an offender will reach unsupervised liberty **at an earlier time** than if s 19ALB had not been enacted. That is contrary to the evident legislative intention referred to above.

56. That shows that Basten AJA's conclusion was wrong. His Honour applied a wrong principle which is inconsistent with the purpose of the provision upon which his Honour's analysis depended.

57. This third error reflects the third rationale underpinning the general rule in *Hoare*, and the third rationale identified in the body of lower court authorities summarised in Part C above (at paragraphs [39]-[44]). In short, considering the prospects of parole being granted to reduce the term of imprisonment imposed undermines the applicable statutory regime for parole.

PART VII ORDERS SOUGHT

58. The Appellant seeks the orders in the Notice of Appeal.

PART VIII ESTIMATE OF TIME FOR ORAL ARGUMENT

59. The Appellant will require 1½ hours, which includes time for reply.

Dated: 3 April 2024

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[52] Commonwealth, *Parliamentary Debates*, Senate, 1 August 2019 at 1424-1425; Statement of Compatibility, Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019 (Cth) at [2]-[3], [5]-[6], [32]-[33], [36], [47]-[48], [51]; Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019 (Cth) at [36]-[38]; Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019* (October 2019) at xi.

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **THE KING**

Appellant

and

FAYEZ HATAHET

Respondent

10 **ANNEXURE TO THE APPELLANT'S SUBMISSIONS**

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the particular statutes and Conventions referred to in these submissions.

No	Description	Version	Provision(s)
1	*Crimes Act 1914* (Cth)	As at 2 December 2022	ss 16A, 17A, 19AB, 19AC, 19AKA, 19AL, 19ALA, 19ALB
2	*Counter-Terrorism Legislation Amendment (2019 Measures No 1) Act 2019* (Cth)	As enacted	
3	*Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)	As at 25 September 2012	s 6(1)(b)

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