HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **THE KING**
Appellant

and

FAYEZ HATAHET
Respondent

RESPONDENT'S SUBMISSIONS

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. When determining the length of a sentence of imprisonment, is the sentencing judge precluded from taking into account: that pursuant to s 19ALB *Crimes Act 1914*, the Attorney-General will not, or at least it is unlikely the Attorney-General will, make a parole order in relation to the offender; and any consequences of that?

Part III: SECTION 78B NOTICE

3. A s 78B notice is not required.

Part IV: MATERIAL FACTS

4. Mr Hatahet does not contest the facts set out in the prosecution's submissions but says the following are also material.

5. In April 2020 Mr Hatahet was arrested. From 13 May 2020 Mr Hatahet was held in the High Risk Management Correctional Centre at Goulburn. The conditions of this

custody were extremely onerous and significantly more so than for the general prison population: Core Appeal Book (CAB) 80 [26]; see also CAB 45, 47, 57.[1]

6. Given the circumstances of Mr Hatahet's imprisonment, his family suffered greatly and would continue to suffer hardship: CAB 80 [25], 83 [37]; see also CAB 45-46, 57.

7. Given Mr Hatahet's experience, both in terms of his return to Syria in 2013 and the extremely onerous custodial environment he was in, Mr Hatahet was unlikely to reoffend in this way and his prospects of rehabilitation were fairly good: CAB 32-33, 43-45, 56-57.

8. The delay of eight years (between the offence and prosecution), the ongoing contact
10 Mr Hatahet had with authorities after his return (to Australia), the experience he suffered in Syria in 2013 and the extremely onerous custodial environment he would remain in during his sentence meant that specific deterrence and protection of the community did not need to play a significant role in the sentence: CAB 78 [21], 79 [23], 83 [37]; see also CAB 32-33, 43-45, 54, 56.

9. General deterrence was an important sentencing consideration: CAB 79 [23]; see also CAB 54.

10. (At the time of the Court of Criminal Appeal's decision) the Attorney-General had not made a parole order in relation to any person subject to s 19ALB: CAB 87-88 [47], 94 [68], 98 [80].[2]

20 11. Mr Hatahet was refused parole on the basis the Attorney-General was satisfied s 19ALB was engaged and no exceptional circumstances had been established: CAB 87-88 [47].

12. The Attorney-General was most unlikely to make a parole order in relation to Mr Hatahet, absent the kind of circumstances posited in *The Queen v Shrestha* (1991) 173

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1. Basten AJA extracted a passage from Baker DCJ's sentencing judgment saying that Mr Hatahet had been held in the HRMCC at Goulburn since 13 May 2022. This was incorrect; it was 13 May 2020.
2. The Court of Criminal Appeal's interpretations of the statistics were not technically correct. They were the outcomes of parole determinations for offenders who committed offences under ss 80.2C, 101.1-101.6, 102.2-102.8, 103.1-103.3, 119.1-119.7 *Criminal Code 1995* and the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*. Further, s 19ALB only came into effect on 12 December 2019.

CLR 48 as rare, involving compassionate grounds not directly related to questions of rehabilitation: CAB 94 [67]-[68], 99 [83].

13. The Director did not suggest there were any "exceptional circumstances" that would justify the making of a parole order in relation to Mr Hatahet: CAB 87 [46].

14. The expectation (now reality, at the time of the Court of Criminal Appeal's decision) that the Attorney-General would not make a parole order in relation to Mr Hatahet and, as Mr Hatahet served most of his sentence in the HRMCC, meant he suffered a considerably more onerous period of imprisonment and, given his ineligibility for a parole order, will continue to suffer more onerous conditions of imprisonment: CAB 72 [2], 99 [84].

Part V: ARGUMENT

15. The prosecution largely frames its argument by reference to *Hoare v The Queen* (1989) 167 CLR 348 and authorities said to reflect three identified rationales in *Hoare*. The difficulty with this approach is that it is not directed towards the operation of Part IB *Crimes Act 1914*, in particular sentencing in the context of s 19ALB.

16. The issue in *Hoare* was whether the South Australian Court of Criminal Appeal misconstrued and misapplied s 302 *Criminal Law Consolidation Act 1935* in that it acted on the basis that the practical effect of the section was to require a dramatic increase in the length of terms of imprisonment and non-parole periods for offences committed after the commencement of the section: 349-350. Section 302 required a sentencing court to have regard to the fact, where applicable, that the offender may be credited, pursuant to another Act, with a maximum of 15 days of remission for each month served in goal: 351. The further workings of the remission system are set out at 351-353, as are some historical observations on remissions, as a system beneficial to the offender.

17. It was in this context that this Court said it was well settled as matter of principle that the existence of a *remissions* system was not, *of itself*, a circumstance justifying an *increase* in the head sentence: 353-354; cf prosecution's written submissions (PWS) [20]. The three rationales underlie this general rule: 354. It is a general rule removed from the operation of Part IB: cf PWS [25].

18. The prosecution refers to – or at least footnotes – many authorities it says translates the rationales and general rule in *Hoare* to prohibit the prospects of parole being taken into account in order to reduce a sentence: PWS [29]-[39]. Yet, these cases all arise from the particular statutory regimes in issue in them. A number of them are about remissions. They include cases from 1950s England and 1960s British Columbia. To the extent it is apparent from the reasons, none of those regimes may be equated with that in Part 1B, in particular s 19ALB.

19. Further, the three propositions the prosecution derives from these cases do not survive consideration as against Part IB.

20. *First*, the prosecution puts 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: PWS [30]-[31].

21. But all components of a sentence must reflect the appropriate sentence for the offence: s 16A(1). The "*nature and circumstances of the offence*" is but one of many mandatory, non-exhaustive matters the sentencing judge must take into account: s 16A(2)(a). The prospects of parole would have to be relevant to at least one other matter pertaining to the offence, viz "*the deterrent effect that any sentence…may have on other persons*": s 16A(2)(ja).

22. Moreover, s 16A(2) requires consideration of matters beyond those relevant just to the offence. The prospects of being granted parole must bear upon several matters pertaining to the offender, viz "*the deterrent effect that any sentence…may have on the person*", "*the need to ensure the person is adequately punished for the offence*", "*the …age…physical or mental condition of the person*", "*the prospect of rehabilitation of the person*" and "*the probable effect that any sentence…would have on any of the person's family or dependents"*: s 16A(2)(j), (k), (m), (n) and (p) respectively. Not specially mentioned, but potentially related to some of these matters, is the onerousness or hardship of custody.

23. *Secondly*, the prosecution puts that it is too speculative for a sentencing judge to take the prospects of being granted parole into account and that safe predictions cannot be made: PWS [32]-[38].

24. In the usual run of sentencing and parole decisions, that might be right; but not necessarily in the context of s 19ALB. Section s 19ALB(1) precludes the Attorney-

General from making a parole order unless he or she is satisfied that "*exceptional circumtances*" exist to justify the making of the order. Even if not limited to compassionate grounds not directly related to questions of rehabilitation, as Basten AJA remarked, the circumstances engaging the purposes of parole will not suffice, unless there is some matter specific to the circumstances of the offender: CAB 87 [46] cf 99 [83]. The fact that, as at the time of the Court of Criminal Appeal's decision, the Attorney-General had not made a parole order for any affected offender gives force to the difficulty an offender will have showing exceptional circumstances.

25. As such, it may be that a sentencing judge can make a safe prediction about the prospects of parole being granted or not. The shorter the sentencing being imposed, and the more time already served on remand, the greater will be the validity of the sentencing judge's prognostication. If an assessment cannot not be made, then the sentencing judge could simply decline to take the matter into account.

26. Lastly, it should not be forgotten that the sentencing process already and necessarily involves consideration of future circumstances, in particular in relation to the matters identified in [21]-[22] above.

27. *Thirdly*, the prosecution puts that taking the prospects of parole into account can subvert the relevant legislative scheme for parole: PWS [39]. The relevant legislative scheme for parole here is that in Part IB. While it may be accepted that the purpose of the introduction of s 19ALB was to make it more difficult for certain persons to be released into the community (PWS [54]), that does not mean that that difficulty, and its consequences, are then neutral in their effect upon the other considerations relevant to determining the appropriate sentence. Here, Basten AJA considered it especially relevant on the topic of onerousness of Mr Hatahet's custody: CAB 99 [84]. But it was also potentially relevant, for example, to deterrence; a sentence of imprisonment 4 years with no parole has a greater deterrent effect than one of 5 years with parole given after 3 years.

28. Contrary to the prosecution's submissions, the Court of Criminal Appeal did not err: cf PWS [45].

29. The prosecution says the Court of Criminal Appeal's *first* error was finding that the likelihood or unlikelihood of being granted parole is relevant to the sentencing task

under s 16A(1) and (2). The prosecution says this is an error considered against the first proposition above (second rationale in *Hoare*): PWS [46], [50]

30. As in [21]-[22] above, however, it is a factor which assumes relevance, both to the offence and the offender, given the matters in s 16A(2). For the reasons in [24]-[26] above, it is also not necessarily as impermissibly speculative as the prosecution puts. In the particular circumstances of this case, the Court of Criminal Appeal considered itself in a position to apprehend that the Attorney-General would not make a parole order; and that the consequence of that would be a more onerous experience of custody for Mr Hatahet: cf PWS [47]-[49]. This was an orthodox consideration in mitigation of the length of the sentence, not "shoehorn[ing]": cf PWS [49].

31. The prosecution refers to *Knight v Victoria* (2017) 261 CLR 306 at [29] to assert that having a difficulty in obtaining parole, or even being refused parole, does not make the sentence of imprisonment more burdensome for the sentenced offender: PWS [49]. This is not precisely what this Court said, which was "*By making it more difficult for Mr Knight to obtain parole after the expiration of the minimum term…nor does it make the sentences of life imprisonment "more punitive or burdensome to liberty*". Those remarks must be understood in the context of life sentences.

32. The last sentence of CAB 89 [52] was a generalised statement in a discussion of principles, not a statement of fact about Mr Hatahet: cf PWS [49].

33. The prosection does not state the Court of Criminal Appeal's second error succinctly, but it seems to relate to the allegedly speculative nature of the inquiry into whether a parole order will be made: cf PWS [51]. The prosecution says this is an error considered against the second proposition above (first rationale in *Hoare*): PWS [52]. This is already addressed above.

34. The prosecution says the third error is that the Court of Criminal Appeal's analysis dramatically undermines the legislative intention in enacting s 19ALB: PWS [53]. The prosecution says this is an error considered against the third proposition (third rationale in *Hoare*): PWS [57]. This is addressed at [27] above.

35. The prosecution's doomsaying in PWS [55] is not warranted. The Court of Criminal Appeal did not determine that the existence of s 19ALB had to be taken into account, favourably to offenders subject to it, in every case. As above, there may be cases where a sentencing judge is not confident about considering what may occur in the furture.

There may be cases where there is no particular additional hardship to an offender if required to serve the full term of imprisonment. There may be cases where the need for specific deterrence and protection of the community are so strong that considerations of the offender's personal situation carry little to no weight. These things all depend on the individual case.

36. The appeal should be dismissed.

Part VI: NOTICE OF CONTENTION OR CROSS-APPEAL

37. Not applicable.

Part VII: ESTIMATE OF TIME FOR ORAL ARGUMENT

38. One hour.

Dated 23 April 2024

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ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019.* The Respondent sets out below a list of the statutory provisions referred to in these submissions.

No	Description	Version	Provision(s)
1	*Crimes Act 1914* (Cth)	As at 2 December 2022	ss 16A, 19ALB
2	*Criminal Law Consolidation Act 1935* (SA)	As at 8 December 1986 to 31 December 1988	s 302