

HIGH COURT OF AUSTRALIA

BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

THE QUEEN

APPELLANT

AND

ZAINAB ABDIRAHMAN-KHALIF

RESPONDENT

The Queen v Abdirahman-Khalif
[2020] HCA 36
Date of Hearing: 3 September 2020
Date of Judgment: 14 October 2020
A5/2020

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Full Court of the Supreme Court of South Australia made on 31 October 2019 and, in their place, order that the respondent's appeal against conviction be dismissed.*

On appeal from the Supreme Court of South Australia

Representation

S M McNaughton SC with P J Doyle and C J Tran for the appellant
(instructed by Director of Public Prosecutions (Cth))

M E Shaw QC with B J Doyle for the respondent (instructed by Caldicott
Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

The Queen v Abdirahman-Khalif

Criminal law (Cth) – Terrorism – Membership of terrorist organisation – Where respondent convicted of offence of intentionally being member of terrorist organisation contrary to s 102.3(1) of *Criminal Code* (Cth) – Where s 102.1 provided "member" of terrorist organisation includes person who has taken steps to become member of organisation – Where respondent detained attempting to travel to Turkey – Where respondent's seized electronic devices contained extremist material produced by and expressing support for Islamic State – Where respondent accessed websites containing practical advice for women travelling to Islamic State-controlled territory – Where expert evidence adduced at trial as to nature, aims and ideology of Islamic State – Where conviction quashed on appeal – Whether Crown required to adduce evidence of process by which Islamic State recruited, inducted and accepted members – Whether trial judge misdirected jury as to physical and mental elements of offence – Whether summing up unbalanced.

Words and phrases – "absence of a constitution or rules of membership", "criteria of membership", "elements of the offence", "Islamic State", "member of a terrorist organisation", "membership process", "nature of terrorist organisations", "organisation", "physical and mental elements", "preparatory or anticipatory acts", "proof of membership", "steps to become a member", "terrorism", "terrorist act", "terrorist organisation", "unbalanced summing up".

Criminal Code (Cth), ss 100.1, 102.1, 102.3.

1 BELL, KEANE, NETTLE AND GORDON JJ. This is an appeal against a judgment and orders of the Full Court of the Supreme Court of South Australia, sitting as the Court of Criminal Appeal (Kourakis CJ and Parker J, Kelly J dissenting), quashing the respondent's conviction of an offence of intentionally being a member of a terrorist organisation contrary to s 102.3(1) of the *Criminal Code* (Cth) ("the Code").

2 The principal issue arising on the appeal is whether the majority of the Full Court erred in holding that the evidence that the Crown adduced at trial was incapable of sustaining the conviction because it did not establish how members of the organisation were recruited or selected, or the process by which members were inducted and finally accepted into the organisation. For the reasons which follow, the majority did so err, and the appeal should be allowed.

The facts

3 The respondent was born in Kenya, in a refugee camp in Utanga, on 1 January 1995. She later moved with her family to Kakuma Refugee Camp in Northern Kenya, where she remained until she immigrated to South Australia with her mother and brothers in 2009. She lived with her mother and brothers in an Adelaide suburb and was schooled, first, at the Adelaide Secondary School of English, then at the Islamic College of South Australia and, finally, in years 11 and 12, at the Roma Mitchell Secondary College. She completed year 12 at the end of 2013. While attending the Islamic College, she was generally regarded as a high achiever, and a very high achiever in Arabic, with a genuine interest in Islamic religious studies. She identified as a Sunni Muslim. In January 2014, she began to study for a Diploma in Science and Technology (which is a pathway toward studying nursing) at the University of South Australia, but in March 2016 she ceased study before completion of the course. She became an Australian citizen on 6 May 2015.

4 On 13 July 2016, unbeknown to her family, and using almost all her savings, the respondent purchased a one-way ticket for a flight from Adelaide to Istanbul, Turkey, departing the next day, at a cost of approximately \$1,200. On the next day, without telling her mother and brothers, she went to Adelaide Airport with only carry-on luggage, her passport and her certificate of Australian citizenship. She had with her just \$180 in cash, and, with only \$14.38 remaining in her bank account, she had no means of purchasing a return ticket.

5 She was detained by Australian Border Force officers at the airport and interviewed by Australian Federal Police ("AFP") officers. When asked why she was intending to fly to Turkey, she answered that she was going on a holiday and had booked two nights' accommodation in a hotel at a cost of \$74, which she

Bell J
Keane J
Nettle J
Gordon J

2.

intended to pay out of the cash she had with her. She also said that she had watched videos on YouTube (a video streaming website) of people working for aid organisations and suggested that she might find work of that nature, although she did not know any more details of it than that.

- 6 The respondent's mobile phone was seized by the AFP and found to contain propaganda and other extremist material produced by and expressing support for Islamic State¹. For example, in a blog post downloaded to the respondent's phone, dated 23 November 2014, appeared the following:

"We believe in humbling ourselves before the Prophet Muhammad, and that it is haram to ignore his words. And it is haram to make Takfeer upon those who have earned the highest of degrees and the noblest of positions, of which are the four rightly-guided caliphs (Abu Bakr, Umar, Uthman [and] Ali), the Sahabah (companions of the Prophet), and members of his household.

...

We believe that Jihad fisabilillah (fighting in the path of Allah) is an obligation upon every single Muslim in the effort to liberate occupied Muslim lands. And that the obligation of jihad is one that is constant, to be performed under the commands of a righteous leader or even one that is a sinner, and the biggest sin after Kufr (disbelief in Allah) is to reject or hinder Jihad fisabilillah at a time when it is made Wajib (obligatory) upon every single Muslim.

Imam Ibnu Hazm said: 'There is not a sin after (the sin of) Kufr which is worse, than the sin of one who prevents Jihad against the disbelievers when it is commanded by Islam, and that is the hindering of the Muslims to perform Jihad against the disbelievers with the excuse that a Muslim may be a Fasiq (venial sinner), though this (character of a Fasiq) is not considered as a justification (to prevent jihad).'

...

1 Islamic State is a terrorist group based predominantly in Iraq and Syria that adheres to an extreme Salafist ideology and advocates, by way of dissemination of propaganda, for violent global jihad against the kuffar (non-believers) and enemies of Islam: see [29]-[33], [47] below.

Bell *J*
Keane *J*
Nettle *J*
Gordon *J*

3.

And since the Muslim countries of today are ruled by the laws of the Tawagheet (tyrants) and disbelief, we are convinced of the Kufr and apostasy of the rulers of these lands and their military forces. And to fight them is more obligatory than to fight the leaders of the cross (Crusaders), and we give warnings and reminders that we will fight the forces (whose apostasy and loyalty to the disbelievers are clear) that fight the Islamic State, even if they call themselves with the names of the Arabs or Islam.

...

We hold that those who preceded us in (leaving for) Jihad, they are those who are honoured, and it is our responsibility to support (taking care and be of service to) the families of the Mujahideen and their properties.

...

Rasulullah said: 'Whoever provides for a fighter in the cause of Allah has actually fought, and whoever takes care of the family of a fighter has actually fought.'

7 AFP investigators identified 1,614 image files, 379 audio files and 127 video files of interest on the respondent's mobile phone. One image file depicted the respondent in Islamic dress with a right index finger raised, which evidence adduced at trial established is a salute used by Islamic State members. It was also ascertained that, before purchasing the ticket to Turkey, the respondent had used her mobile phone on a number of occasions to communicate with three Kenyan women referred to as "the Baaqiya sisters".

8 After examination, the mobile phone was returned to the respondent and she was allowed to leave the airport. Within 20 minutes of the phone being returned to her on 18 July 2016, the respondent used it to warn one of the Baaqiya sisters not to contact her. On 11 September 2016, the Baaqiya sisters committed a terrorist attack at Mombasa police station in the name of Islamic State, in which they were killed. Islamic State later claimed responsibility for the attack.

9 On 22 September 2016, a search warrant was executed at the respondent's home and investigators again seized her mobile phone, as well as a laptop computer. Analysis of the seized phone revealed that, since the respondent's release from the airport, she had used the phone to download more Islamic State material and extremist propaganda, and analysis of the seized laptop established that, at least between 21 July 2015 and 27 July 2015, the respondent had used another device to access blogs about Islamic State, hijrah (religious migration to the territory controlled by Islamic State) and practical advice for women travelling

Bell *J*
Keane *J*
Nettle *J*
Gordon *J*

4.

to Islamic State-controlled territory, which at that time included regions of Syria and Iraq.

10 Among the many discovered blog posts discussing hijrah downloaded by the respondent, the following appeared as part of a blog post dated 17 June 2015 authored by Abu Sa'eed Al-Britani (from a video entitled "Message Of A Mujahid"):

"Due to the heavy propaganda of the western media, many sisters start to question whether it is safe to live in Sham as a Muhajirah. ...

Every Muhajir is treated with honor by the State and is provided for in all spheres of life. We get free medical care, free hospitals, free schooling for kids, free accommodation, free healthcare, no water and electricity bills, monthly stipends to all Muhaajirs (both males and females), and the list goes on."

11 In a further post, of 22 July 2015, appeared the following, apparently also authored by Abu Sa'eed Al-Britani (also from a video entitled "Message Of A Mujahid"):

"In migrating to Sham you are benefitting yourself both in this life and in the hereafter. Allaah has commanded us to migrate to Dar Al-Islam from Dar Al-Kufr, and this is an obligation which we are sinning if we do not do. ... In Dar Al-Kufr, a Muslimah is subjugated to the many oppressive laws which control her ... In Sham however, a Muslimah is given her full rights and she is not seen as an object of enjoyment by the public but rather as a dignified sister. ...

There are many questions which a sister needs to reflect upon if she is in doubt about doing hijrah to Dar Al-Islam. I hereby present to you the following cases for you to ponder over. Ask yourself ... Would you want to live in a society where the police and MI5 are constantly hassling your family, or would you want to live in a place where you can openly talk about Jihad without any repercussion? These are just some of the questions which a sister needs to ponder over if she is having any second thoughts about doing Hijrah to Dar Al-Islam here in Sham. ... Furthermore, by migrating to Sham you are not just benefitting yourself but you are also benefitting the Islamic State in its expansion and advancement. By raising your kids here, you are increasing its population and hence creating more Mujaahideen of the future. A society cannot survive without inhabitants and just by you living in Sham you are helping its economy grow. Likewise, by living in Dar Al-Kufr, you are indirectly helping the society advance. ... So

Bell *J*
Keane *J*
Nettle *J*
Gordon *J*

5.

come to the aid of your religion and State and secure an Islamic lifestyle for yourself and your future offspring here in Dar Al-Islam."

12 Among the posts containing practical advice for women undertaking hijrah was a post of 28 March 2015 containing the following:

"Heres a list me and group of sisters here made of what you should pack on your hijrah to the Islamic state. May Allah bring anyone who is sincere here safe and welll yar rab.

[There followed an extensive list of clothes and other personal effects.]

Make sure you put a lock on your suitcase and would recommend you take a hard suitcase ~ some brothers and sisters had stuff stolen from their suitcases at the crossover

don't uninstall your whatsapp/telegram [Telegram is an instant messaging service for the transmission of encrypted messages] for the journey you won't be able to get it back for a long while until you get a new number. ...

Dont worry about bringing food you'll be fed well here ...

Put your khimars abayas niqabs gloves etc in your HAND LUGGAGE very important cos when you get to dawlah you'll be putting it on straight away in sha Allah. When you arrive you'll be taken straight to the maqqar females stopped off first.

Remember to bring some turkish money with you~ for taxis, food etc depending how long you'll be staying there

For amniyaat delete all your islamic stuff from your electronics (its hard I know) rip up any Islamic notes or anything incriminating at home so ur family won't figure out where you went the minute you've gone.

...

Remember you will be running in your hand luggage across the border so be smart~ you need back pack. And if you have a suitcase DONT carry many items as hand luggage.. you will regret it. handbags will only weigh you down.

The night we crossed the border it has rained during the day so running in deep wet mud tripping every so often isn't fun so good boots is a must.

Bell J
Keane J
Nettle J
Gordon J

6.

...

Keep your quran audios this will keep you sane (delete everything else islamic tho)".

13 In another post, dated 22 July 2015, apparently by the same author, appeared the following:

"2. WHAT HAPPEN NEXT AFTER I'VE CROSSED THE BORDER?

...

Staying in Makkah is quite challenging due to many factors. Sometimes it can be overcrowded. Less privacy, sharing restroom and etc. But you'll be taken care. As long your stay in Makkah, you're not allowed to go out and this is due to many reasons. Although it's safe to go out, but the authority has responsible over you until your mahram comes to you. Lets say if you need something, you can simply tell to the sister-in-charge and she will get it for you.

I would like to advice you to be patient because sometimes the stay prolonged but you have to keep in mind that Dawlah really have set some paperwork regarding this matter. Alhamdulillah, dawlah able to infiltrate true muhajir and undercover spy during their stay in Makkah.

3. SO IF I'M NOT MARRIED I CAN'T GET OUT FROM MAKKAR?

Sisters, first and foremost I would like to remind you that you have pledge allegiance to Caliph and to obey him is a must *unless he disobey Allah and His Messenger* The caliph has set some protocols and there are reasons behind it. So rather than provoking, accept it."

14 A covert listening device was installed in the respondent's bedroom and later captured the respondent listening to lectures and sermons containing extremist Islamic teachings, nasheeds (Islamic chants)², with which the respondent sometimes sang along, and conversations in which the respondent expressed views consistent with conservative extremist Salafist beliefs and support for the Baaqiya sisters. During one of the captured conversations, the respondent said that one of

2 Dr Roger Shanahan gave evidence that, more particularly, a nasheed is a "sung version of Arabic poetry" that had been appropriated by Islamic State for use in its propaganda materials.

7.

the Baaqiya sisters had provided advice about "hiding the passport somewhere, checking things all the house, she gave me all ideas".

15 The listening device also captured the respondent swearing a bay'ah (a pledge of allegiance) to Abu Bakr al-Baghdadi, then the leader of Islamic State, in these terms:

"I give my allegiance Sheik Abu Bakr al Baghdadi to listen and to obey in good time and bad time, prosperous time, in time of hardship we apply altruism for him and we will not to try to take the authority from the leaders, unless we see a clear disbelieving from them, and we got a clear evidence from god. We give our allegiance to migration and jihad. ... The Islamic State is lasting, lasting ..."

16 On 8 February 2017, the respondent was interviewed again by AFP officers and was asked about various documents which had been located during the earlier execution of the search warrant on her home, including as to why she was in possession (on her laptop and mobile phone) of graphic material that was branded as "al-Hayat" (the Islamic State media outlet) and marked as having emanated from the leader of Islamic State. The respondent denied that her Islamic beliefs accorded with the way in which Islamic State operated.

17 On 23 May 2017, the respondent was arrested and interviewed again by the AFP and ultimately charged with intentionally being a member of a terrorist organisation, namely, Islamic State, between 14 July 2016 and 23 May 2017, contrary to s 102.3(1) of the Code.

Relevant statutory provisions

18 Section 100.1(1) of the Code defines an "organisation" as a body corporate or an unincorporated body, whether or not the body:

- "(a) is based outside Australia; or
- (b) consists of persons who are not Australian citizens; or
- (c) is part of a larger organisation."

19 A "terrorist organisation" is defined in s 102.1(1) as:

- "(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or

Bell *J*
Keane *J*
Nettle *J*
Gordon *J*

8.

- (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4))."

20 A "terrorist act" is relevantly defined in s 100.1 as "an action or threat of action" to cause serious harm that is physical harm to a person or serious damage to property, cause death, endanger life, create a serious risk to health or safety of the public or a section of the public, or seriously interfere with or disrupt an electronic system, where, relevantly, the action is done or the threat is made with the intention of "advancing a political, religious or ideological cause" and "coercing, or influencing by intimidation" the government of the Commonwealth or of a State, Territory or foreign country, or intimidating the public or a section of the public.

21 Section 102.1(1) of the Code defines "member of an organisation" as including:

- "(a) a person who is an informal member of the organisation; and
- (b) a person who has taken steps to become a member of the organisation; and
- (c) in the case of an organisation that is a body corporate – a director or an officer of the body corporate."

22 Section 102.3 creates the offence of membership of a terrorist organisation in the following terms:

"(1) A person commits an offence if:

- (a) the person intentionally is a member of an organisation; and
- (b) the organisation is a terrorist organisation; and
- (c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 10 years.

- (2) Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation."

The Crown case at trial

23 The Crown case at trial was that the respondent had intentionally taken steps to become a member of Islamic State, and was thus a member of Islamic State in contravention of s 102.3(1) of the Code by reason of para (b) of the definition of "member" in s 102.1(1) of the Code.

24 It was not in issue that Islamic State was a "terrorist organisation" within the meaning of s 102.1 of the Code. There were agreed facts that Islamic State was an organisation and a terrorist organisation; that from approximately 2006 onwards, including in its predecessor organisations, it did, on an ongoing basis, directly and indirectly engage in preparing, planning, assisting in or fostering the doing of various terrorist acts; and that, during the period encompassed by the charge, Islamic State was lawfully specified under the *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014* (Cth) as a terrorist organisation.

25 The Crown provided six particulars of conduct in which the respondent was alleged to have engaged as constituting the steps that she had intentionally taken to become a member of Islamic State. They were:

1. Attempting to travel on a one-way ticket to Istanbul, Turkey in order to engage with Islamic State.
2. Possessing and accessing material promoting Islamic State and violent jihad.
3. Communicating with members of Islamic State.
4. Pledging an oath of allegiance (bay'ah) to the then leader of Islamic State, Abu Bakr al-Baghdadi.
5. Expressing support for Islamic State and violent jihad including by recitation of Islamic State and extremist nasheeds.
6. Self-identification as a "muwahideen", a term used as an identifier by Islamic State members.

26 In proof of those particulars, the Crown adduced evidence of the respondent's purchase of the international flight to Turkey, her detention at the airport, the records of her interviews with AFP officers, transcripts of audio files captured by listening devices and the fact of the seizure and analysis of the contents of her electronic devices. The Crown also tendered a representative sample of videos drawn from 62 video files depicting extreme violence found on the respondent's mobile phone and two representative samples of image files stored in

Bell J
Keane J
Nettle J
Gordon J

10.

the respondent's mobile phone. The representative sample of the video files was played to the jury. The files consisted of Islamic State propaganda containing exhortations to migrate to Islamic State and join Islamic State's jihad, as well as extreme violence, including numerous executions. The two representative samples of images also largely consisted of Islamic State and other jihadist propaganda.

27 The Crown adduced further evidence, extracted from the respondent's electronic devices, that the respondent had engaged in Telegram "chat groups" with the Baaqiya sisters and that, in those "chat groups", the respondent used an image of an assault rifle nestled in flowers as her profile picture (as noted above, Telegram is an instant messaging service for the transmission of encrypted messages).

28 The Crown tendered the records of each of the respondent's three interviews with AFP officers. As will be recalled, in the first of those interviews, the respondent said she was going to Turkey for a holiday and possibly to do aid work, and added that she "wasn't planning to go like into Syria". In the second, she confirmed that she had Arabic language skills, and answered questions about a document seized from her possession which bore the handwritten words "Syria" and "I love you". In the third interview, she was asked about various files found on her seized devices and her use of certain apps, including Telegram. She denied attempting to travel to join Islamic State, supporting it, or believing in its version of Islam.

29 The Crown also adduced expert evidence from Dr Roger Shanahan about the nature and activities of Islamic State. As will be seen, the capacity of Dr Shanahan's evidence to sufficiently illuminate what may or may not amount to membership of Islamic State was a matter of contention before the Full Court and this Court. In brief substance, Dr Shanahan's testimony was that Islamic State was an organisation that saw the world in conflictual terms, as divided between Islam and the enemies of Islam. Its members followed an extreme Salafist ideology according to which it is each member's individual religious obligation to wage jihad against the enemies of Islam, with the aim of imposing strict Sharia law on the territory controlled by Islamic State, as it was then, and as it was aimed to expand through offensive global jihad and strategic alliances. Members saw themselves as literally building a state in which Islamic law would prevail, which was to be populated by believers and in which services and support would be provided to members. Hence, the Islamic State motto, "remaining and expanding". As Dr Shanahan put it: "[T]hey wanted to control and administer this rump territory that they had won by force of arms and they wanted to expand it, expand it on the ground militarily but also expand it through achieving allegiance from groups in other countries."

30 Dr Shanahan further explained that Islamic State sought to call Muslims from abroad to come to the areas controlled by Islamic State to help build Islamic State, and sought not just fighters (jihadis) but also doctors, engineers, and women. Migration to Islamic State was conceived of as a religious duty for both men and women. The women were recruited to provide support to the jihadis, and produce and raise children in the appropriate Islamic way in order to build up Islamic State with the indoctrinated youth of the next generation. As Dr Shanahan explained, that accorded to the motto "remaining and expanding", because, "[i]f you've got children as part of your organisation, you're looking at generations of Islamic State not just the here and now". And, as he said, "if you're trying to produce the ideal Islamic society, you also want the ideal Islamic woman as well ... somebody who is ideologically attuned to creating the Islamic State".

31 In order to communicate with its followers and attract recruits, Islamic State used social media and had "online recruiters for other women to travel to Islamic State held territory". Dr Shanahan referred to evidence that women who had found their way to Islamic State-held territory maintained social media profiles for the purposes of being contacted by and recruiting other women.

32 Dr Shanahan further gave evidence that, although there was no template for the pledge of allegiance (bay'ah) that the respondent recited to Abu Bakr al-Baghdadi – it is "an individual oath of allegiance" – the effect of a bay'ah is to undertake to follow the directions of the person to whom it is given, and Islamic State had asked that the bay'ah be given to Abu Bakr al-Baghdadi, as the respondent did. Dr Shanahan also explained the significance of the respondent's one-finger salute to be that the notion of "tawheed" – the unity of God – is central to Islam in general, and to Salafists in particular. "Muwahideen" are people who follow the notion of tawheed, and, although "muwahideen" is not a very common term, members of Islamic State in particular refer to themselves often as muwahideen. The one-finger salute with the right index finger upwards is imagery for identifying as a muwahideen and asserting the tawheed.

33 Dr Shanahan stated that the Telegram app, which was found on the respondent's mobile phone, was "often used by Islamic State" as a mode of communication between members of Islamic State and as a means of publicly claiming responsibility for jihadist attacks. Dr Shanahan also referred to the significance of nasheeds. Dr Shanahan explained that they have "a traditional function" as a form of chanted Arabic poetry, but "[w]hat Islamic State has done has taken that form and turned it into another social media platform for them".

34 On the basis of that evidence, the Crown went to the jury in closing address as follows:

Bell J
Keane J
Nettle J
Gordon J

12.

"In the circumstances of this organisation, the Crown says that a person can be a member without undertaking any formal process, without being on a register, without submitting themselves for approval of the membership of the organisation. What the Crown [says is that] a person can be a member and is a member of [Islamic State] if that person knows of and agrees with and embraces the ideology and aims of the organisation and participates or takes steps to participate in advancing those aims and ideology and goals for the organisation.

So if a person knows of, agrees with and embraces the ideology and aims of the organisation and with intention, for example, puts into place steps to head off to Syria and Iraq or undertakes a pledge to participate in the advancement by offering obedience to the directives of the leaders, the Crown says that that person is taking steps to become a member of the organisation.

...

[T]he Crown says the effect of [Dr Shanahan's evidence] is that the goals – the initial, the primary aim of Islamic State was literally to build a State operating on the basis of Shariah law to gain, to hold and expand physical territory in the area of the Middle East, in particular parts of Syria and Iraq and also some surrounding areas through allegiances that it makes or receives from other organisations but primarily to take an area of land, a patch of dirt in the Middle East and say 'This is our State. It's going to operate in the way in which we want it to operate and it's going to remain and expand' and you'll recall the motto I think Dr Shanahan used, the [Islamic State] motto was 'baqiya wa tatamadad', remaining and expanding.

In order to establish that State on the ground in the Middle East the leadership of Islamic State required people, it required members and obviously it required fighters, people who would come to Islamic State and fight to gain territory, fight to hold territory and it also needed other people to come. I think Dr Shanahan mentioned engineers, doctors and nurses but it also needs women ... If you're going to develop a State you need women to, according to the notions of this organisation, you need women to participate in this State, whether as wives of fighters, nurses or whatever. They need the participation of female members of Islamic State.

The second part or the second arm, if you like, of the dual aims was this notion of engaging in offensive jihad and that is the sort of thing that we hear about in the West all too often, that is taking the fight to the West and the sorts of calls or exhortations that are made by the leadership to kill

<i>Bell</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Nettle</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>

13.

Westerners in the same way that Westerners were killing Muslims and you will remember the speech that Dr Shanahan referred to by a person by the name of Abu Mohammad al-Adnani where he said this, this is al-Adnani said in September 2014: 'You must strike at the West. If you can kill a disbelieving American or European, especially the filthy French or an Australian or a Canadian, or any other disbeliever from the disbelievers waging war then you should do it and kill them in any way that you could.'

...

So bearing in mind those ideologies ... Let me say this: if a person who wholly embraced the ideology and aims of [Islamic State] in its development of an Islamic State in the territory it took by force and violence in Syria and Iraq actively participated in achieving those aims by going to Syria, Iraq, to assist in holding or expanding the territory by being a fighter, that person would be a member. *Likewise if a woman, who agreed with and embraced the ideology and goals of [Islamic State] and the creation of the Islamic State and was a participant in those goals within the territory taken by Islamic State by, for example, marrying or supporting a fighter, or nursing fighters, or otherwise actively assisting in the creation, functioning and operation of that State, she would likewise be a member of Islamic State for the purposes of the offence that you're considering.* That is what the Crown says.

Now bearing in mind the expanded definition of membership, the Crown says that if a woman took steps to do just that, that is to go to Islamic State-held territory with a view to actively participating in the territorial aims of Islamic State in the way in which I've just suggested, if [s]he took steps to do that, well, for the purposes of the charge that you are considering, she would be a member of Islamic State.

...

What the Crown says is that she took steps to become a member on 14 July 2014 by attempting to leave Australia with the intention of entering Islamic State territory. ... [S]he strongly and persistently identified with the view or version of Islam espoused by [Islamic State], that is the extreme right spectrum or Salafist Islamic interpretation which involves ... acting, by taking ... the sorts of measures suggested by Islamic State. That is, in the first place, by establishing its own Sharia society in Iraq and Syria ... [which] she knew ... would involve the harsh dealings with those people described as rafidah, donkeys or filth ... the Shi'a who, amongst the other opponents of [Islamic State], have borne the brunt of Islamic State's terror.

Bell J
Keane J
Nettle J
Gordon J

14.

Those are the ones who have been killed by this group and whose property has been possessed.

...

Let me make this clear: whilst it may seem extraordinary that a person in this country could wholly embrace those ideas, the Crown says that is not enough to make her a member of Islamic State. You need more. The Crown says there is more and that is you need to act, you need to take steps. For once a person takes steps to become a member of Islamic State, then she is a member because then she moves off the sidelines and she moves onto the playing field ... In other words, she steps away from the internet, from a digital reality and she moves into real [life].

... [T]he Crown says that once you act, you are a member of Islamic State, remembering always the other elements of the offence. The Crown says that she acted or in other words took steps to become a member of Islamic State.

The most important thing, the Crown says, is that she set off to go to Turkey, to engage with terrorists with a view of lending her support to Islamic State's venture. In doing so, she became a member of Islamic State. The Crown says that you can be satisfied beyond reasonable doubt that that was her intention when she set off to the airport and walked through towards the outward Customs area, but was then stopped.

...

She intended to participate in the advancement of Islamic State in Syria and Iraq and she intended and knew that she would be a member of that organisation which was carrying out the terrorist activities in the lands that we have spoken of." (emphasis added)

The defence case at trial

35

The defence did not call any evidence but argued that the jury could not exclude the reasonable possibility that the respondent intended to go to Turkey for a holiday and to do aid work, as she had told the police. As defence counsel put the argument:

"So what I say to you about the prosecution theory, the Crown says that this notion of a holiday is a lie, the notion of her doing aid work is a lie, all of that sort of thing, that's said because it doesn't fit the Crown's case concept. But when you actually look at it, it sort of fits the picture of what this young lady is all about.

<i>Bell</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Nettle</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>

15.

If she were going to Istanbul to meet up with someone and then troop from Istanbul – I don't know how far it is, you would have to look at an atlas I guess, but it would certainly be more than a couple of thousand kilometres from north to south Turkey – where is the evidence that she had these contacts that the prosecution speculate that she would have had? There is not the slightest hint of evidence that she had contacts to get her across Turkey. ...

If she's running off to join [Islamic State], you may well wonder – maybe not – why would she go to Turkey? On the prosecution's own case, why would this woman go to Turkey? ... [I]f she wants to join [Islamic State], and this is all a big plan and these people from Kenya [the Baaqiya sisters] are involved, why in Heaven's name isn't she going to Kenya? Why go to Turkey?"

36 The defence also contended that many of the images which had been downloaded to the respondent's devices via the Telegram app may have downloaded automatically or were otherwise capable of innocent explanation by reference to the respondent's deeply held Islamic beliefs; there was no evidence that the respondent had disseminated or distributed any of that sort of material as opposed to merely looking at it; and the fact that "she has a group of internet friends who turn out to be active, crazy terrorists, if you like, is not actually something which advances the Crown case at all because there is no link between that terrorist act that they do on the other side of the world and the [respondent], other than they have this common internet friendship".

The trial judge's summing up

37 The trial judge gave the jury an aide memoire, or jury memorandum, settled in consultation with the prosecutor and defence counsel, setting out the elements of the alleged offence. It included the following:

"*'member'* of an organisation includes:

- (a) *a person who is an informal member of the organisation; and*
- (b) *a person who has taken steps to become a member of the organisation*

The term 'member of an organisation' is not here limited to what might be thought to be the usual meaning of a 'member of an organisation'; namely a clear relationship between a person and an organisation with obvious indicia such as ceremonies, official records, membership cards and the like to verify it. Rather, Parliament has laid down a more expansive

Bell J
Keane J
Nettle J
Gordon J

16.

'inclusionary definition' 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. 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.

There is no 'bright line' which enables one to say that there are sufficient characteristics of a member of an organisation present to conclude that the [respondent] is intentionally a member of an organisation; nor is there any set of necessary conditions, the absence of one of which would render the term 'member of an organisation' inapplicable. Rather, it is a question of fact and degree.

'A person who has taken steps to become a member of the organisation'

As to the second part of the inclusionary definition of member, namely 'a person who has taken steps to become a member of the organisation', there is a continuum along which, at a certain point, one may conclude that a person has intentionally behaved in such a way as to demonstrate that he or she intentionally 'has taken steps to become a member of the relevant organisation' within the meaning of the legal definition reproduced above.

In the present case, the prosecution proceed by reference to this second part of the definition and have specified the particulars of the types of conduct upon which they rely in order to establish this element of the offence thus:

1. Attempting to travel on a one way ticket to Istanbul, Turkey in order to engage with the terrorist organisation, Islamic State;
2. Possessing and accessing material promoting Islamic State and violent jihad;
3. Communicating with members of Islamic State;
4. Pledging an oath of allegiance (bay'ah) to the leader of Islamic State, Abu-Bakr Al Baghdadi;

<i>Bell</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Nettle</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>

17.

5. Expressing support for Islamic State and violent jihad including by recitation of Islamic State and extremist Nasheeds; and
6. Self-identification as 'muwahideen', a term used as an identifier by Islamic State members.

Consideration of the prosecution particulars

As to *Particular One* above, conduct of the [respondent] in booking her flight, keeping it secret from her family, packing, travelling to the airport and attempting to board the flight (if you find such conduct to be proven) are within the required time-frame. It is for the jury to consider whether or not: first, those acts were done in order to fly to Istanbul, Turkey 'in order to engage with the terrorist organisation, [Islamic State]' and, secondly, were 'steps to become a member of [Islamic State]'.

As to *Particulars Two to Six* above, it is for the jury to consider whether or not conduct of these types by the [respondent] occurred between about 14 July 2016 and 23 May 2017 and, if so, whether or not such conduct constitutes 'steps to become a member of [Islamic State]'.

However, 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 [respondent] 'took steps to become a member of [Islamic State]' and is guilty of the charge before the Court if you are satisfied beyond reasonable doubt that the [respondent] intended to travel to Turkey 'in order to engage with the terrorist organisation [Islamic State]' (*Particular One*)."

(footnote omitted)

38 His Honour then took the jury through the aide memoire orally, explaining and expanding upon it as he went, and then summarised the evidence adduced by the Crown by reference to the elements of the offence. At one point in the course of summarising the Crown case, defence counsel complained that the summing up was one-sided and that the trial judge was effectively aligning himself with the Crown case. But after the trial judge had later summarised the defence case, the exception appears to have been abandoned and was not repeated or renewed at the end of the summing up when the trial judge invited exceptions.

39 After deliberating for just over three hours, the jury returned a unanimous verdict of guilty.

Bell J
Keane J
Nettle J
Gordon J

18.

The appeal to the Full Court

40 Despite defence counsel's concurrence in the trial judge's directions, the respondent then appealed to the Full Court on amended grounds of appeal as follows:

- (1) The trial judge erred in his directions as to what was required, and/or as to what was sufficient, to establish that a person is intentionally a member of a terrorist organisation for the purposes of s 102.3(1) of the Code, having regard to the definition of "member" in s 102.1 of the Code.
- (1A) Alternatively to ground one, the trial judge erred in failing to direct, either at all or adequately, the jury as to how they might apply the evidence relied upon by the Crown as to the proof of intentional membership of a terrorist organisation and as to the legal elements they needed to consider.
- (2) The fair trial of the respondent miscarried as a result of the unbalanced summing up by the trial judge.
- (2A) Alternatively, the fair trial of the respondent miscarried as a result of failure by the trial judge to properly present the defence case.
- (2B) Alternatively, the fair trial of the respondent miscarried as a result of the trial judge not directing the jury in terms which avoided choice reasoning and in failing also to direct the jury that it was necessary but not sufficient that they reject the respondent's innocent explanations as reasonably possibly true.
- (3) The verdict is unreasonable and cannot be supported having regard to the evidence.

41 Kourakis CJ, with whom Parker J substantially agreed, considered³ that the evidence adduced at trial was capable of supporting an inference that the respondent was a supporter of Islamic State, its extremist ideology and its terrorist activities. His Honour also found⁴ that the evidence supported an inference that the respondent had intended to travel to Turkey to make contact with members or supporters of Islamic State in Turkey, with the intention of travelling into the areas

3 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [8].

4 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [8].

of Syria, Iraq and Turkey controlled by Islamic State, either for the purposes of providing medical assistance to fighters and others or to marry an Islamic State fighter. His Honour took the view⁵, however, that there was no evidence as to how members other than fighters participated in the organisation, no evidence as to how members were recruited or selected, and no evidence of any process by which prospective members were inducted and finally accepted into the organisation. On that basis, his Honour concluded⁶ that there was "no evidence against which to evaluate any connection between the proved conduct of the [respondent], her communications, pledge of allegiance, singing and attempt to travel to Turkey, with formal or informal membership of Islamic State". It followed, his Honour held⁷, that the respondent's conviction could not be supported on the evidence. His Honour further explained⁸ that conclusion thus:

"Importantly, the very notion of a step implies a membership process. That process can only be determined by the organisation – not by its prospective members. If every prospective member were free to design his or her own path to membership, whatever it is that he or she ultimately joins can hardly be described as an organisation, or at least will not be an organisation for the purposes of Part 5.3 of the Criminal Code. To put it another way, an organisation cannot be constituted by an otherwise disorganised group of people who share an intention or wish to be a member of it.

The idea of a step towards becoming a member also serves to distinguish a mere supporter from someone who has taken some or all of the steps necessary to become a member or informal member. Whether or not a person has embarked on a process towards membership cannot be decided in a vacuum. Something must be known about the organisation's rules, formal or informal, or at least its common practices.

...

5 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [9].

6 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [10].

7 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [14].

8 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [20]-[21], [63], [76], [79], [82].

Bell J
Keane J
Nettle J
Gordon J

20.

The call to Muslims described by Dr Shanahan is not a recruitment of members of Islamic State, the organisation, but an invitation to migrants to live, work and fight for its utopian Islamic State.

...

Dr Shanahan was never asked to explain whether ... he meant to draw a distinction between supporters and members of Islamic State, the organisation, or whether he meant that all supporters were members. If the former, the prosecution led no evidence from which the jury could distinguish supporters from members, formal or informal, of Islamic State, and in particular from which the jury could find that the [respondent] was one or the other. If the latter, the prosecution must necessarily fail, because, if that were the case, Islamic State could be no more than an amorphous group of people.

...

In his closing address, the prosecutor [put that]:

'[I]f a person knows of, agrees with and embraces the ideology and aims of the organisation and with intention, for example, puts into place steps to head off to Syria and Iraq or undertakes a pledge to participate in the advancement by offering obedience to the directives of the leaders, the Crown says that that person is taking steps to become a member of the organisation.

...'

...

The organisation so described by the prosecutor is an amorphous body of people. The prosecution case so framed was bound to fail for two reasons. First, the dearth of evidence adduced on this issue was incapable of establishing that all persons with those attributes were, even informal, members of Islamic State. Secondly, and even if all such persons, together presumably with all fighters, engineers, doctors and others who contributed useful skills to the insurgency, were members of some entity, that entity was an unstructured mass of people and not an organisation."

42 Kelly J, in dissent, came to the opposite conclusion. As her Honour reasoned⁹:

"[M]uch of the argument on appeal focussed on [the] theoretical proposition ... whether wives or nurses or residents of territory occupied by Islamic State, would or would not be members of the organisation known as Islamic State.

To my mind, that argument distracted from the critical issue on this appeal, which is whether [the respondent], by engaging in the conduct proved against her, committed the offence against s 102.3. ... The critical issue that needed to be decided was this: what was her intention when she booked her one-way flight to Turkey, went down to the Adelaide Airport and attempted to board that plane with nothing but her carry-on bag and insufficient funds to get back to Australia? ...

The Judge was right to direct the jury that they could only find that the [respondent] took steps to become a member of Islamic State if they were satisfied beyond reasonable doubt that she intended to travel to Turkey in order to engage with what she knew to be the terrorist organisation Islamic State. ...

In my view, to assume that wives and nurses could not be members of Islamic State as much as any fighter is to oversimplify the matter ... [and] ignores two critical matters that emerged on the evidence at trial about Islamic State practices. Firstly, there was evidence from Dr Shanahan that at the time of the alleged offending, Islamic State (the organisation) was encouraging women to travel to Islamic State (the newly claimed territory) to assist in the building of the Caliphate. The role for women anticipated by such a call to action was that they assist to populate and expand and consolidate a physical presence in the claimed territory. Dr Shanahan also gave evidence that women were being used as online recruiters to persuade other women to join the organisation in conflict areas. Secondly, ... there was evidence of an attempted terrorist attack, carried out by three women with whom the [respondent] had some ongoing contact, for which Islamic State claimed responsibility. In consideration of that fact alone, there was clearly a role for women in Islamic State beyond that of marriage, nursing and motherhood.

9 *Abdirahman-Khalif v The Queen* [2019] SASFC 133 at [214]-[216], [219], [220].

Bell J
Keane J
Nettle J
Gordon J

22.

So, in my view, regardless of what role a woman takes in or on behalf of the Islamic State, whether it is as a fighter, a nurse, a wife, a recruiter or all of the above, it is her intention in doing so that may or may not bring her within the provisions of the Criminal Code ... [I]t is the specific actions and, crucially, the specific intentions of each of those women that will be determinative of membership. ... A female supporter of Islamic State the organisation, who relocates to Islamic State the territory, marries a soldier, and raises her children in that State is demonstrating a commitment to one of the goals of Islamic State, namely to consolidate a physical population stronghold over land. Providing that she had the requisite fault element, that woman would be no less a member of Islamic State than a woman who makes a commitment to further a different goal of Islamic State, namely to engage in jihadist acts of violence."

43 As will be seen, her Honour was correct.

Member of a terrorist organisation

44 The offence created by s 102.3(1) appears in Div 102 of Pt 5.3 of the Code. Division 102 is headed "Terrorist organisations" and creates a series of offences which, to varying degrees, depend upon proof of an accused's affiliation with a "terrorist organisation" as defined in s 102.1. In addition to the membership offence created by s 102.3(1), they include directing the activities of a terrorist organisation¹⁰, recruiting for a terrorist organisation¹¹, providing, receiving or participating in training with a terrorist organisation¹², getting funds to, from or for a terrorist organisation¹³, providing support for a terrorist organisation that would help the organisation engage in a terrorist act¹⁴ and intentionally and knowingly associating with a member or members of a terrorist organisation¹⁵. As has

10 Code, s 102.2.

11 Code, s 102.4.

12 Code, s 102.5.

13 Code, s 102.6.

14 Code, s 102.7.

15 Code, s 102.8.

elsewhere been observed¹⁶, the offence-creating provisions in Pt 5.3 of the Code, including Div 102, reflect a legislative judgment that the prevention of terrorism requires certain preparatory or anticipatory acts to be subject to criminal sanction notwithstanding that such acts would not usually fall within the range of conduct generally regarded as criminal. This legislative choice is apparent in the extended definition of "member of an organisation" in s 102.1 as encompassing "tak[ing] steps to become a member of the organisation", and in the broad definition of "organisation" in s 100.1 as a body corporate or unincorporated body, whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation. In the Explanatory Memorandum on the *Security Legislation Amendment (Terrorism) Bill 2002* (Cth) it was said that this extended definition was included to "defeat any argument that a group of persons is not an organisation because it does not have a particular formal attribute or structure"¹⁷.

45 Although it was not in issue at trial that, during the period encompassed by the charge, Islamic State was a "terrorist organisation" within the meaning of s 102.1 (having been lawfully designated as such under the *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014*), it is apparent that a central strand of Kourakis CJ's reasoning was that an essential feature of an "organisation" under s 100.1 of the Code is the existence of a structure that delineates members from non-members. In particular, Kourakis CJ posited¹⁸ that, having regard to the "ordinary meaning" of the word "organisation", there cannot be an "organisation" absent a group of people who have, relevantly, expressly or by implication "agreed to ... control the membership of their group in order to promote success in achieving their objects". And because, as Kourakis CJ interpreted the evidence, there was no evidence as to Islamic State's organisational structure or its membership, including how members were inducted and accepted

16 *Lodhi v The Queen* (2006) 199 FLR 303 at 318 [66] per Spigelman CJ (McClellan CJ at CL and Sully J agreeing at 324 [96], 327 [111]); *Ul-Haque v The Queen* [2006] NSWCCA 241 at [37] per McClellan CJ at CL (Kirby and Hoeben JJ agreeing at [46], [47]); *Lodhi v The Queen* (2007) 179 A Crim R 470 at 489 [79] per Spigelman CJ, 531 [229] per Price J; *Benbrika v The Queen* (2010) 29 VR 593 at 615 [65]-[66] per Maxwell P, Nettle and Weinberg JJA.

17 Australia, House of Representatives, *Security Legislation Amendment (Terrorism) Bill 2002*, Explanatory Memorandum at 9.

18 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [26], [29].

Bell J
Keane J
Nettle J
Gordon J

24.

into the organisation, his Honour concluded¹⁹ there was no evidence against which to evaluate any connection between the proved conduct of the respondent and formal or informal membership of Islamic State.

46 The problem with his Honour's reasoning, however, is that it is unsupported by the statutory text, context and purpose of the terrorist provisions. As was observed in *Benbrika v The Queen*²⁰, to which Kelly J referred but Kourakis CJ did not, the concept of an "organisation" under s 100.1 of the Code is not amenable to an exhaustive or rigid definition. It raises a question of fact and degree about which there cannot always be an unequivocal and objective answer. The same is true of membership of an organisation. Some organisations may be so constituted that the criterion of membership and the steps that are sufficient or necessary to become a member are clear²¹. More probably, however, in the case of terrorist organisations, such details may be shrouded in mystery. Hence, as the trial judge correctly directed the jury, it was for the jury to discern the nature of the organisation and, in effect, from the nature of its membership as it emerged from the evidence, to decide whether the steps which the respondent was proved to have taken were steps intentionally taken to become a member of Islamic State.

47 It is apparent from the expert and other evidence that the Crown adduced at trial that Islamic State was an organisation that combined association with polity. As has been seen²², it existed to remain and expand through the acquisition of territory by violent jihad, the formation of alliances, natural population increase, and the extermination of the kuffar (non-believers) elsewhere throughout the world. To that end, it deployed member jihadis to wage violent jihad, and it deployed the remainder of its members to support and sustain those jihadis and expand its population. As the evidence disclosed, its ideology was that both jihadis and those who so supported the jihadis were fighters for the cause. And for those purposes, it sought out prospective members from around the world, through online recruiting, with posts and other propaganda designed to induce candidates

19 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [9].

20 (2010) 29 VR 593 at 620-621 [80]-[84] per Maxwell P, Nettle and Weinberg JJA.

21 See generally, eg, *Woodford v Smith* [1970] 1 WLR 806; [1970] 1 All ER 1091 (note); *Lawton v Bidgerdii Aboriginal & Torres Strait Islanders Corporation Community Health Service Central Queensland Region* [2004] FCA 1474; *Pettit v South Australian Harness Racing Club Inc* (2006) 95 SASR 543.

22 See [29]-[33] above.

to subscribe to the Salafist ideology, to accept that it was their religious obligation to use violence against non-believers, to give effect to that obligation by pledging allegiance to the Caliph, Abu Bakr al-Baghdadi, and ultimately, in obedience to that obligation, to migrate to the territory controlled by Islamic State to serve as a member of Islamic State society either as a jihadi or in support of jihadis.

48 It is true, as Kourakis CJ observed²³, that Dr Shanahan did not state explicitly that the combination of embracing the Salafist ideology, swearing allegiance to the Caliph, and answering the call to go to Sham (Islamic State-controlled territory) to serve in support of the jihadis were *the* criteria of "membership" of Islamic State or passed beyond the realm of mere support of and for Islamic State to the point of taking of steps to join Islamic State. But that does not mean that it was not open to the jury to be satisfied that they were steps intentionally taken to become a member of Islamic State.

49 As was held in *Benbrika* in effect, the nature and purpose of the provisions found in Pt 5.3 and, in particular, Div 102 of the Code dictate that they must be taken to extend to groups devoid of structural hierarchy that function in secrecy, with little formality, without a written constitution or set of rules, and without a contractual relationship between members. In such cases, the existence of the terrorist organisation is thus more readily proved by evidence of what it does than by abstract analysis of its structure. And where such evidence does establish that persons have so informally associated together for the purposes of carrying out terrorist acts or supporting those who carry out terrorist acts, it is open to a jury to find that they are members of that terrorist organisation despite the absence of a constitution or rules of membership.

50 This construction of the provisions found in Div 102 is consistent with the approach adopted in other jurisdictions that have criminalised membership of terrorist organisations. For example, in the United Kingdom, in the context of the largely equivalent offence under the *Terrorism Act 2000* (UK) of "belong[ing]" or "profess[ing] to belong to" a proscribed organisation²⁴, it has been observed²⁵ that:

23 *Abdirahman-Khalif v The Queen* [2019] SASFC 133 at [9]-[10].

24 *Terrorism Act 2000* (UK), s 11(1).

25 *Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264 at 275 [23] per Latham LJ. As to the role of proscription in facilitating ease of proof of a range of offences aimed at the prevention of terrorism, see generally Lynch, McGarrity and

Bell J
Keane J
Nettle J
Gordon J

26.

"The intention [of the provision] is to criminalise membership of a proscribed organisation in the light of the statutory purpose to which we have referred. Proof of membership may sometimes be difficult; hence profession of membership is itself a criminal offence."

51 In *Sheldrake v Director of Public Prosecutions*, Lord Bingham of Cornhill subsequently observed²⁶ that the meaning of "profess" was so uncertain that some persons liable to be convicted and punished for professing to belong to a proscribed organisation might be guilty of no conduct which could reasonably be regarded as blameworthy or such as should attract criminal sanctions. His Lordship referred by way of illustration to someone who, in jest, claimed to be a member of a proscribed organisation, as well as someone who joined a proscribed organisation not knowing that it was so proscribed²⁷. It followed, as it was held²⁸, that the provision would thus be such a clear breach of the presumption of innocence enshrined in Art 6(2) of the European Convention on Human Rights that, in order to comply with Strasbourg jurisprudence as interpreted by the United Kingdom courts, the defence provision²⁹ had to be read as imposing an evidential, as opposed to legal, burden of proof on the accused.

52 The offence of taking steps to become a member of a terrorist organisation in s 102.3(1) of the Code operates differently, in that it requires the Crown to prove that a person both intentionally takes steps to become a member of a terrorist organisation and knows that the organisation is a terrorist organisation³⁰. But, like the United Kingdom offence provision, it allows for the practical difficulties associated with the penetration of the unstructured and opaque nature of terrorist organisations to be surmounted by proof falling short of demonstration of a written

Williams, "The Proscription of Terrorist Organisations in Australia" (2009) 37 *Federal Law Review* 1 especially at 2-3.

26 [2005] 1 AC 264 at 312 [48].

27 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at 311-312 [47]-[48].

28 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at 314 [53].

29 *Terrorism Act 2000* (UK), s 11(2).

30 See [22] above.

constitution or set of rules, the existence of a contractual relationship between members, or manifestations of some form of structural hierarchy.

53 Contrary to Kourakis CJ's reasoning, it is also to be remembered that it was a formally admitted fact that Islamic State was a terrorist organisation³¹. Hence, whatever the degree of Islamic State's unstructuredness relative to other, more formally constituted organisations, there was no a priori reason why persons who embraced the Salafist ideology, swore allegiance to the Caliph, and answered the call of the Islamic State online recruiters to leave surreptitiously and travel to Sham to serve Islamic State in support of the jihadis, could not be regarded as members of Islamic State. Still less should it be accepted that, if so, Islamic State would be such "an unstructured mass of people" as to be incapable of recognition as an organisation and thus fall outside the scope of the definition of a "terrorist organisation".

54 And finally, and just as importantly, as Kelly J observed³² in effect, it is hardly to the point that, in addition to the steps that the respondent was shown to have taken, there might have been other steps that the respondent would need to have taken in order to be admitted to membership of Islamic State. Nor should it be regarded as significant that whatever steps the respondent took or might have taken, she might ultimately have failed to achieve membership of the organisation. The question was not whether the respondent had taken all, or even any, of the steps necessary to become a member, but whether, by taking the steps that she was shown to have taken, she had intentionally taken steps to become a member. And as Kelly J rightly observed³³, "[t]here [was] no reason why, in determining whether the physical element of the offence is proved, the jury [could not] have regard to the [respondent's] state of mind".

55 Given the evidence of the contents of the respondent's electronic devices and of the listening device intercepts, given the respondent's evident embrace of the Salafist idea that "[w]hoever provides for a fighter in the cause of Allah has actually fought, and whoever takes care of the family of a fighter has actually fought", and given the evidence of the steps that the respondent was shown to have taken, which included swearing allegiance to the Caliph, and answering the call to go to Sham to serve in support of the jihadis by attempting to fly to Turkey by one-way flight without informing her family and without the resources to return, it

31 See [24] above.

32 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [212]-[215].

33 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [208].

Bell J
Keane J
Nettle J
Gordon J

28.

cannot reasonably be doubted that it was open to the jury to conclude that the respondent thereby intentionally took steps to become a member of Islamic State.

Notice of contention

Ground 1.1 – misdirection with respect to elements

(1) Essential link

56 Under cover of a notice of contention, it was contended on behalf of the respondent that the trial judge erred in directing the jury as to the elements of the offence, by conflating the physical and mental elements thus:

"[T]he matter of the [respondent's] 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 [respondent] 'took steps to become a member of Islamic State' and is guilty of the charge before the court if you are satisfied beyond reasonable doubt that the [respondent] intended to travel to Turkey 'in order to engage with the terrorist organisation Islamic State' ...

[I]f 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 [respondent] to become a member of Islamic State then, if you are satisfied beyond reasonable doubt, would establish the charge.

...

Now, with possibly one exception I understand that the issue here is not really as to what the [respondent] 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.

...

[T]he rest of the things [in the list of particulars relied upon by the Crown] 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 [Islamic State], as I understand the issues in the case."

57 Counsel for the respondent submitted that by so directing the jury, the trial judge conveyed that the real issue was the respondent's purpose in attempting to fly 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".

58 That submission is without merit. The direction was formulated by the trial judge with the active encouragement of defence counsel in order to bring home to the jury, as defence counsel put it in his submissions to the trial judge, that the episode giving rise to the respondent's arrest at the airport in July was "[t]he indispensable link ... the very linchpin of the prosecution case ... and because it occupies such pre-eminence as the Crown case, then we'd say that's something that would have to be proved beyond reasonable doubt"³⁴.

59 There is no question that the attempted trip to Turkey was at the centre of the Crown case. As defence counsel argued in his submissions to the trial judge in support of the trial judge directing the jury in the way that his Honour did:

"If one harks back to the prosecution opening and the way this matter has been packaged before the jury, the great emphasis in the trial has been the episode giving rise to the [respondent's] arrest at the airport in July. Your Honour coined the phrase 'The indispensable link' ... Well we would grab that and run with it."

60 The trial judge was accordingly right to direct the jury that they could not convict unless satisfied beyond reasonable doubt that the steps surrounding the attempt to travel to Turkey were intentionally taken by the respondent to become a member of Islamic State.

(2) Guidance as to what constituted steps

61 It was further contended on behalf of the respondent that the trial judge erred in failing to 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 to the concept of "steps

34 See and compare *Shepherd v The Queen* (1990) 170 CLR 573 at 583-585 per Dawson J.

Bell J
Keane J
Nettle J
Gordon J

30.

to become a member". That is not correct either. The trial judge specifically directed the jury as to how they might approach that question, as follows:

"[The] conduct of the [respondent] in booking her flight, keeping it secret from her family, packing, travelling to the airport and attempting to board the flight (if you find such conduct to be proven) are within the required time frame. It is for the jury to consider whether or not: first, those acts were done in order to fly to Istanbul, Turkey, 'in order to engage with the terrorist organisation Islamic State' and secondly, were 'steps to become a member of Islamic State'.

As to particulars 2-6 above, it is for the jury to consider whether or not conduct of these types by the [respondent] occurred between about 14 July 2016 and 23 May 2017 and, if so, whether or not such conduct constitutes 'steps to become a member of Islamic State'.

...

The prosecution case ... has ... stressed the position that it does not suggest that in flying to Turkey in order to engage with Islamic State the [respondent] had it in mind to equip herself with some sort of armaments, assault rifle or what have you, and join the Mujahideen on the battle field or indeed engage in any other violent conduct there or elsewhere. That is not the prosecution case, as I understand it. Rather it is that Islamic State, consistently with propaganda actually found to have been on the phones of the [respondent] ... promoted its caliphate, and that is the land it was physically occupying in Syria, the caliphate. Promoted its caliphate as a State – an actual State, you know, passports and so forth, I mean, the accoutrements of a State – as a State and a society with Shari'ah law, strict Shari'ah law and which actively urged Sunni Muslims of conservative Muslim religious view, and particularly females and particularly medical students, who were both in short supply, to perform hijrah; that is to say, to come home, as it were, to Islamic State and join in and be part of that society. And that if a female wishes, become married and have children within that society and be supported by it."

(3) No bright line

62 Counsel for the respondent complained that the trial judge had directed the jury that there is:

"no 'bright line' which enables one to say that there are sufficient characteristics of a member of an organisation present to conclude that the

31.

[respondent] is intentionally a member of an organisation; nor is there any set of necessary conditions, the absence of one of which would render the term 'member of an organisation' inapplicable. Rather, it is a question of fact and degree."

And that:

"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."

It was submitted that so to direct the jury wrongly encouraged the jury to take the view 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".

63 That submission distorts the reality of the trial in two respects. First, as both the prosecutor and the trial judge emphasised in their respective addresses to the jury, it was not the Crown case that merely booking a ticket to Turkey with the thought of becoming a member of Islamic State was sufficient in itself to constitute taking steps towards becoming a member of Islamic State. As has been seen, the Crown case was that it was the combination of embracing the Salafist ideology, swearing allegiance to the Caliph, and answering the call of Islamic State to go to Sham to serve as a member of Islamic State in support of the jihadis, which took the respondent's actions beyond the realm of mere support of Islamic State to the point of intentionally taking steps to join Islamic State. Nor was there any doubt about that on the part of defence counsel. In final address to the jury, as has been seen, he told them that it was a matter for them whether the acts identified by the Crown were steps taken to become a member.

64 Secondly, it was common cause at trial, and it was correct to observe, as the trial judge did, that, although preparatory acts are not ordinarily proscribed as criminal offences, the prevention of terrorism led Parliament to create an offence of taking steps to become a member of a terrorist organisation which is capable of applying at an early stage of a person's movement towards membership, and

Bell J
Keane J
Nettle J
Gordon J

32.

potentially participation in the activities, of a terrorist organisation³⁵. The jury needed to be made to understand that the offence is one that is designed to embrace preparatory acts which in the case of most other offences would be conceived insufficient even to amount to an attempt to commit an offence³⁶. It would have been preferable for the trial judge not to refer to what it was that led Parliament to legislate as it did. But it was not incorrect and evidently defence counsel did not consider that it needed correction or qualification.

(4) No necessary conditions

65 Counsel for the respondent further contended that the trial judge had erred in directing the jury that there was no set of necessary conditions from which the absence of any one condition would render the term "member of an organisation" inapplicable. Invoking observations of McHugh J in *Fingleton v The Queen*³⁷, counsel submitted that it was incumbent on the trial judge to direct the jury specifically as to the criteria to be applied and as to the distinctions to be observed in determining whether any particular conduct was within the terms of s 102.3(1), particularly given that the offence created by the provision is a novel one.

66 That submission is also unpersuasive. McHugh J's observations in *Fingleton* (which were not reflected in the judgments of the other members of the Court) centred on what his Honour considered to be the failure on the part of the trial judge in that matter to direct the jury to consider whether the Chief Magistrate's beliefs about the Co-ordinating Magistrate's lack of loyalty and confidence in her leadership constituted "reasonable cause" for her issue of a show cause letter to the Co-ordinating Magistrate – in short, a failure sufficiently to alert the jury to the possibility of a defence not taken but open on the evidence³⁸. That did not occur in this matter. As has been seen, the "defences" in this matter were

35 See [44] fn 16 above.

36 cf *R v Cheeseman* (1862) Le & Ca 140 at 145 per Blackburn J [169 ER 1337 at 1339]; *R v Borinelli* [1962] SASR 214 at 218-219 per Napier CJ, Mayo and Travers JJ; *Director of Public Prosecutions v Stonehouse* [1978] AC 55 at 68 per Lord Diplock.

37 (2005) 227 CLR 166 at 197-198 [80], 199 [84].

38 See *Fingleton v The Queen* (2005) 227 CLR 166 at 198 [81]-[82], 200-202 [87]-[90]. See and compare *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ.

that the acts on which the Crown relied were insufficient to amount to acts to become a member, and that the respondent did not intend to become a member. Both were the subject of detailed directions.

Ground 1.2 – failure to relate evidence to elements

67 It was also contended that the trial judge erred in failing to relate the evidence to the legal issues by failing "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 [respondent] did to that evidence".

68 That contention is misplaced. It is premised on the erroneous notion already dealt with³⁹ that the Crown could not succeed in establishing that the respondent had intentionally taken steps to become a member of Islamic State without adducing expert evidence as to the steps that a prospective member of Islamic State must take in order to be admitted to membership of that organisation. As the trial judge correctly directed the jury, the matter was to be decided by bearing in mind the nature of a terrorist organisation like Islamic State, as it emerged from the evidence, and deciding by reference to that whether the jury were satisfied that the acts on which the Crown relied went sufficiently far to constitute taking steps to become a member of that organisation:

"[W]e will be shortly turning to a different and critical element of the charge, namely that the person or the [respondent] is intentionally a member of a terrorist organisation. Now, I think you are probably ahead of me here because when you are trying to assess whether a person is a member of something you need to know what that something is, the nature of it, because the indicia, the accompaniments, the things you look for in relation to membership are going to be quite different [for] ... a cricket club ... on one hand and a terrorist organisation on the other. You do not exactly have membership cards and membership rolls, do you, in the latter situation.

So it is that when you come to assess whether a person is a member of an organisation that assessment will have to pay regard to the type of organisation we are talking about and so, in order to do that, you have got, for what help it will be to you, those definitions and the process of defining how you get to a terrorist organisation.

...

39 See [46]-[55] above.

Bell	J
Keane	J
Nettle	J
Gordon	J

34.

As to the second part of the inclusionary definition of member, namely, 'a person who has taken steps to become a member of the organisation', there is a continuum along which, at a certain point, one may conclude that a person has intentionally behaved in such a way as to demonstrate that he or she intentionally 'has taken steps to become a member of the relevant organisation' within the meaning of the legal definition reproduced above."

Ground 2.1 – unbalanced summing up

69

Finally, it was contended that the trial judge's directions to the jury were unbalanced, because of the cumulative effect of the matters already mentioned and several further contentions, some of which substantially overlap, being: (1) the direction that the jury could not convict unless satisfied beyond reasonable doubt that the respondent intended to engage with Islamic State tended to suggest that it was sufficient to convict to be satisfied of that intention beyond reasonable doubt and thus the trial judge should have drawn the jury's attention to the possibility that they might find the offence not proved irrespective of the respondent's state of mind; (2) the assertions of innocence made by the respondent in her records of interview were supported by positive assertions of intention to seek out aid work, and, whereas the trial judge focussed on the question of whether the respondent's innocent explanations were lies, his Honour should have directed the jury that they could not convict unless they could exclude those innocent explanations beyond reasonable doubt; (3) although the trial judge had referred to the defence case in terms of defence counsel's final address, his Honour invited the jury to consider and contrast two rival submissions of whether the respondent's intention on 14 July 2016 was "completely innocent" or "something more sinister", without stressing that it was open to acquit even if the respondent had a sinister intention; (4) the trial judge used language such as "real clues" and "real help" and "real continuing pattern" with respect to the evidence, thereby tending to suggest that there was a particular correct answer implicitly known to his Honour which the evidence might reveal; (5) the trial judge subtly endorsed the Crown case as comprehensive by commenting "my goodness, it has put a lot of evidence before you"; (6) the trial judge undermined the defence case when summarising defence counsel's arguments, by observing in relation to one of the arguments: "[t]hat was put with all seriousness, I assume, by [defence counsel], this is a serious case"; (7) the trial judge discouraged the jury from applying the onus of proof by requiring defence counsel to identify and establish any innocent hypotheses and commented that the defence had not called any witnesses responsive to the Crown witnesses; (8) the trial judge encouraged the jury to think that there might be other evidence not 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; and (9) the trial

judge had identified the matters that his Honour considered supported the Crown case and thus aligned himself with the Crown case in the course of summing up.

70 Nothing about the matters previously mentioned was unbalanced and, subject to what must later be said about the sixth of the further contentions paraphrased above, the summing up, generally, was not unbalanced.

(1) Intention to engage with Islamic State

71 The direction that the jury could not convict unless satisfied beyond reasonable doubt that the respondent intended to engage with Islamic State did not suggest that it was enough to convict to be satisfied that the respondent had that intention. As has been mentioned⁴⁰, the trial judge explained the facts that the Crown had to prove in order to establish guilt beyond reasonable doubt and the direction in relation to the respondent's intention to travel to Turkey was crafted with the aid of defence counsel for the respondent's benefit. The trial judge dealt explicitly with the respondent's assertion of innocence.

(2) Innocent explanations and lies

72 It is true that the trial judge did not specifically refer to the respondent's statement to police that she was interested in seeking aid work. But his Honour emphasised that the jury should take into account all that the respondent said in the interviews, both for and against the respondent, giving it all such weight as the jury considered appropriate; and in the context in which that direction was given, the jury can have been in no doubt that they were to have regard to all of the respondent's answers to police questions. The trial judge's reference to lies was conventional and necessary. The Crown had emphasised in final address that the jury should treat the respondent's explanations of why she sought to travel to Turkey as lies, and, although the Crown did not go as far as suggesting that the lies were evidence of consciousness of guilt⁴¹, the trial judge was bound to give the jury a *Zoneff* direction⁴², as his Honour did, in order to avoid the risk of the jury conceiving of them in that fashion.

40 See [56]-[59] above.

41 cf *Edwards v The Queen* (1993) 178 CLR 193.

42 See *Zoneff v The Queen* (2000) 200 CLR 234 at 245 [23]-[24] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

Bell J
Keane J
Nettle J
Gordon J

36.

(3) Completely innocent or more sinister

73 The complaint about the trial judge's formulation of whether the attempted trip to Turkey was "completely innocent" or "something more sinister" is captious. Read in the context of the explanation of drawing inferences of intent of which that description formed part, it would surely have been regarded by the jury as nothing more than a quick and not tendentious way of drawing the contrast between the Crown and defence cases. Just as importantly, it was followed immediately by a direction to look at everything that led up to the attempt and everything that went after it, to provide clues as to what was really happening at the time.

(4) "Real help" and "real clues"

74 There is also no merit in the complaint that the trial judge suggested a "correct answer" by referring to "real clues" and "real help". What his Honour in fact said was this:

"Because sometimes, when you are trying to work out what did happen on an occasion, what later happens sometimes gives you real clues, indeed sometimes real help, as to really what was happening at that earlier time."

That was entirely neutral.

(5) Large volume of evidence

75 The complaint that the trial judge endorsed the Crown case by referring to the large volume of evidence adduced by the Crown is unfounded. The remark formed part of a conventional direction that the Crown did not have to prove everything of which the Crown had adduced evidence and contained no suggestion of endorsement of the Crown case. It was as follows:

"Ladies and gentlemen, the prosecution do not have to, as it were, establish all of the things that it puts before you and my goodness, it has put a lot of evidence before you. It certainly does not have to prove each and every aspect of it. Nor does it have to prove each of the potential or possible steps that it alludes to. What it does have to prove beyond reasonable doubt to your satisfaction is that the [respondent] did in fact take steps, some steps to become a member of an organisation. As I say, that is a matter for you to decide in the light of all of the evidence when looking at the continuum that I have mentioned to you."

(6) Assumed to be put in all seriousness

76 The trial judge's remark that he assumed that a submission made by defence counsel was put "with all seriousness" was as follows:

"[W]ithout going into the detail at all at this stage, I just draw your attention to a contrast, as it were, between the defence and the prosecution and you always have to look at both sides of the coin.

So yesterday in the context of the Mombasa matter ... and the question of the [respondent's] knowledge of it beforehand, [defence counsel] said this to you ...: 'if [the respondent] knew about it, members of the jury, if she's in some kind of conspiracy with these girls [the Baaqiya sisters], you may well ask why did she not go to Kenya? Why go to Istanbul? When she knows all of this is going to be happening, she would be off to Kenya to be with her mates to blow up the police station and become a green bird.' *That was put with all seriousness, I assume, by [defence counsel], this is a serious case.*" (emphasis added)

77 That was exceptionable. The tone of the remark was snide, and, as this Court has indicated more than once in recent times, it is not the proper function of trial judges to pass comments, particularly snide comments, regarding the quality of counsel's arguments⁴³. That said, however, the argument as put by defence counsel was evidently so jejune that it cannot reasonably be supposed that the trial judge's remark might have led the jury to a different perception of the argument, or of the defence case more generally, than they would have arrived at in any event. Despite the impropriety of the remark, it was in effect no more than an unfortunate observation in the course of a detailed summing up, and, therefore, not productive of a miscarriage of justice.

(7) Innocent hypotheses

78 By contrast, there is no substance in the complaint that the trial judge subtly discouraged the jury from applying the onus of proof by requiring the defence positively to identify and establish any innocent hypotheses. Relevantly, what his Honour said was this:

43 See *Castle v The Queen* (2016) 259 CLR 449 at 470-471 [61] per Kiefel, Bell, Keane and Nettle JJ. See also, eg, *RPS v The Queen* (2000) 199 CLR 620 at 637 [42] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ; *McKell v The Queen* (2019) 264 CLR 307 at 324 [48] per Bell, Keane, Gordon and Edelman JJ.

Bell J
Keane J
Nettle J
Gordon J

38.

"Finally on this general approach to circumstantial evidence and speaking in a general way here, I am not referring to particular facts, particular cases, I speak in a general way, you are entitled to use common sense in the jury room, and I am sure you will. You are entitled to carefully consider the hypothesis of innocence that is being suggested by the defence to be applicable in the case. In other words, what is the theory that the defence are really putting forward and saying the prosecution can't negate this, can't disprove it? What are they really saying? What did it entail?"

79 There is no suggestion in that passage of reversing the onus of proof, and, if there were any doubt about it, the trial judge later further directed the jury as follows:

"The third matter is that in the area of circumstantial evidence, I directed you that the evidence must be such as to be inconsistent with any reasonable hypothesis of innocence. That, of course, is correct. In what I said following that I did not mean to suggest that it was up to the [respondent] to formulate such an hypothesis because the position is that if you the jury consider there is such an hypothesis of innocence after all of the evidence has been thoroughly considered, then you must acquit."

(8) Evidence not available to police

80 The trial judge did encourage the jury to think that it was easy to overestimate the degree to which police may be able to recover evidence in a given case. His Honour's remark was as follows:

"[Defence counsel] went on to say that if there was any trace of a contact the police would have found it and that they have vast resources and can do all sorts of things. He later stated: 'You might ask yourselves, members of the jury, "Is this young woman that good at planning and then hiding it?", when you know the resources that could look into what she's been up to.' Ladies and gentlemen, of course you take those submissions into account and give them what regard you consider appropriate. *But if I can just say this, it is entirely a comment by myself which you can entirely take or leave as you please, but it may be fair to say as a matter of balance that it is easy to overestimate the degree to which police may be able to recover evidence in a given case.*' (emphasis added)

81 As his Honour made clear, however, his observation was a comment that the jury were free to ignore. And while it was arguably unwise to make any such

comment, it was not wrong as such⁴⁴. Evidently, it was justifiable as a means of responding to an extravagant defence submission⁴⁵, and it did not create any risk of imbalance by depriving the jury of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence⁴⁶.

(9) Identifying matters relied on by the Crown

82 Finally, there is no substance in the complaint that the trial judge's summing up was unbalanced by reason of his Honour identifying matters that he considered supported the Crown case. The passage of the summing up which is impugned was as follows:

"So very briefly, and again not saying all that [the prosecutor] said, but if you go through the Tumblr blogs ... they include the following advice: take no check-in baggage, just hand luggage; travel light so as to be able to get across the border, that is illegally get across the border into [Islamic State] lands; three, do not tell your family of your plans to leave; four, take conservative female Muslim wear; five, do not take Apple phones, only Android phones; six, delete all incriminating material from your phone; seven, bring any certificates you have concerning medical studies; eight, you do not have to speak fluid Arabic; nine, general advice 'to the sisters' and you can look at that for yourselves, what all of that is about.

So [the prosecutor] invites you to look at the contents of those blogs and compare the advice you see in there with what the [respondent] actually did and, for example, the state of her baggage as recorded in the photographic exhibits that we have at Adelaide Airport and, on the basis of all of that, he contends to you that it becomes quite clear that this was not a last-minute sightseeing holiday to Turkey."

44 See *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [49] per Gaudron, Gummow, Kirby and Hayne JJ; *Mahmood v Western Australia* (2008) 232 CLR 397 at 403 [16] per Gleeson CJ, Gummow, Kirby and Kiefel JJ.

45 See and compare *Castle v The Queen* (2016) 259 CLR 449 at 470-471 [61] per Kiefel, Bell, Keane and Nettle JJ.

46 See *B v The Queen* (1992) 175 CLR 599 at 605 per Brennan J.

Bell *J*
Keane *J*
Nettle *J*
Gordon *J*

40.

83 That was no more and no less than an accurate summary of an aspect of the prosecutor's argument which it was incumbent upon the trial judge to summarise for the benefit of the jury.

Conclusion

84 It follows that the appeal should be allowed. The orders of the Full Court made on 31 October 2019 should be set aside, and, in their place, it should be ordered that the respondent's appeal against conviction be dismissed.

85 GAGELER J. I would uphold the contention of the respondent that the trial judge failed adequately to direct the jury as to the application of the evidence relied on by the prosecution to prove intentional membership of a terrorist organisation. On that basis, I would dismiss the appeal. Against the background of the evidence and procedural history recounted by the majority, I can explain my reasons quite briefly. In doing so, I adopt the nomenclature and abbreviations of the majority.

86 Departing in some respects from the standard scheme of the general principles of criminal responsibility set out in Ch 2 of the Code⁴⁷, s 102.3 spells out exhaustively and compendiously the "physical elements" and "fault elements" of the offence it creates. A person commits the offence of "membership of a terrorist organisation", without more, if three specified elements of the offence are satisfied. The first element is that "the person intentionally is a member of an organisation". For that element to be satisfied, the state of affairs that the person is in fact a member of an organisation must exist, that state of affairs must be the product of an exercise of the person's will⁴⁸, the person must be capable of exercising control over that state of affairs⁴⁹, and the person must mean that state of affairs to exist⁵⁰. The second element is that "the organisation is a terrorist organisation". The third is that "the person knows the organisation is a terrorist organisation".

87 The second and third of those elements were not in issue in the trial. As to the second, the character of "Islamic State" as a "terrorist organisation" was the subject of formal agreement. The agreement was that "Islamic State" met each of the two alternative limbs of the definition of "terrorist organisation" in s 102.1(1) of the Code. It was an organisation directly and indirectly engaged in preparing, planning, assisting in or fostering the doing of terrorist acts within the meaning of para (a) of the definition. And it was the organisation specified in the *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014* (Cth) for the purposes of para (b) of the definition.

88 The second part of the agreement brought to the identification of "Islamic State" a measure of precision lacking from the first part of the agreement. That was because the Attorney-General, as the Minister administering the Code, was

47 See McSherry, "Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws" (2004) 27 *University of New South Wales Law Journal* 354.

48 Sections 4.1(1)(a), 4.1(2), 4.2(1) and 4.2(2) of the Code.

49 Sections 4.1(1)(a), 4.1(2), 4.2(1) and 4.2(5) of the Code.

50 Sections 4.1(1)(a), 4.1(2), 4.2(1) and 5.2(1) of the Code.

required by s 102.1(2) of the Code to be satisfied on reasonable grounds that the organisation to be specified was one that either directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act or advocated the doing of a terrorist act before the Governor-General was permitted to make the Regulation. The grounds for the Attorney-General's satisfaction as to both of those matters in relation to "Islamic State" were set out in a Statement of Reasons. The Statement of Reasons became an attachment to an Explanatory Statement to the Regulation⁵¹ which was registered on the Federal Register of Legislation maintained under the *Legislation Act 2003* (Cth). The Explanatory Statement, including the Statement of Reasons, was therefore available to be considered in confirming the meaning of "Islamic State" as specified in the Regulation or in fixing that meaning to the extent that the meaning was ambiguous or obscure⁵².

89 The Statement of Reasons identified "Islamic State" as the "Iraq and Syria-based Sunni extremist group and former al-Qa'ida affiliate" that had originally been specified in 2005 for the purposes of para (b) of the definition of "terrorist organisation" under the Arabic name "Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn"⁵³ and that had been re-specified in 2013 for the purposes of para (b) of the definition of "terrorist organisation" under the name "Islamic State of Iraq and the Levant (ISIL)"⁵⁴. The Statement of Reasons explained that "[o]n 29 June 2014, the group proclaimed an Islamic caliphate in areas it controls and changed its name to Dawla al-Islamiya, or the Islamic State". "The use of the name Islamic State", it explained, "does not represent a change in the leadership, membership or methods of the group that was originally proscribed in 2005, but reflects the expansion of its operating area and its announcement of an Islamic caliphate".

90 The Statement of Reasons identified "Islamic State's current leader and proclaimed caliph" as "Ibrahim Awwad Ibrahim Ali al-Badri ... usually known as Abu Bakr al-Baghdadi or Abu Du'a". As to the leadership of "Islamic State", the Statement of Reasons stated:

"The Islamic State has a hierarchical structure, featuring an overall leadership council and provincial governments in both Iraq and Syria.

51 Explanatory Statement, Select Legislative Instrument No 108, 2014.

52 Section 13(1) of the *Legislation Act 2003* (Cth) read with s 15AB of the *Acts Interpretation Act 1901* (Cth).

53 See *Criminal Code Amendment Regulations 2005 (No 1)* (Cth).

54 See *Criminal Code (Terrorist Organisation – Islamic State of Iraq and the Levant) Regulation 2013* (Cth).

Regional and specialist cells act with relative autonomy under general direction from senior leaders."

Under the heading "Membership", the Statement of Reasons continued:

"The Islamic State has several thousand members in Iraq, mostly young Iraqi Sunni men. Its numbers have been boosted in 2014 by its success in capturing Iraqi cities and coercing or convincing Sunni tribes to ally with the group. It has also claimed responsibility for several mass prison breaks throughout Iraq that have freed hundreds of its members, most of whom are still at large.

In Syria, the Islamic State has several thousand additional members drawn from both Syrian nationals and foreign fighters. Due to the Islamic State's Iraqi origins, a large number of its Syria-based senior operatives and leadership are Iraqi nationals. Fighters in both countries are able to pass freely across the border, which is no longer recognised by the Islamic State."

91 The agreement that the organisation specified in the Regulation as "Islamic State" was the relevant "terrorist organisation" served to frame the critical issue in the trial as to whether the respondent was "intentionally ... a member of an organisation". The issue was whether the respondent was intentionally a member of the organisation specified in the Regulation as "Islamic State", being the particular organisation described in the Explanatory Statement.

92 The prosecution case that the respondent was intentionally a member of the terrorist organisation identified as "Islamic State" was not put on the basis of the ordinary meaning of the term "member" as applied to that organisation. The prosecution case was put rather on the basis that the respondent fell within para (b) of the extended definition of "member" in s 102.1(1) of the Code because the respondent was "a person who [had] taken steps to become a member of the organisation". The prosecution sought to rely for the taking of the requisite "steps" on the respondent having engaged in six categories of conduct, ranging from "[a]ttempting to travel on a one-way ticket to Istanbul, Turkey in order to engage with the terrorist organisation, Islamic State" to "[s]elf-identification as 'muwahideen', a term used as an identifier by Islamic State members".

93 Drawing on observations in *Lodhi v The Queen*⁵⁵ concerning the policy adopted by the Commonwealth Parliament in enacting the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) to insert Pt 5.3 into the Code in the

55 (2006) 199 FLR 303 at 318 [66].

aftermath of 11 September 2001, the trial judge directed the jury in relation to para (b) of the extended definition of "member" in s 102.1(1) as follows:

"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."

94 Drawing on observations in *Benbrika v The Queen*⁵⁶ concerning the breadth and flexibility of the term "organisation" in the context of Pt 5.3 of the Code, the trial judge went on to direct the jury as follows:

"There is no 'bright line' which enables one to say that there are sufficient characteristics of a member of an organisation present to conclude that the [respondent] is intentionally a member of an organisation; nor is there any set of necessary conditions, the absence of one of which would render the term 'member of an organisation' inapplicable. Rather, it is a question of fact and degree."

95 Those directions were not wrong. They correctly stated the law so far as they went. The problem is that they did not go far enough in identifying for the jury the factual issues that needed to be determined by the jury if it was to be satisfied beyond reasonable doubt that the respondent had intentionally taken steps to become a member of the particular organisation specified in the Regulation and described in the Explanatory Statement. The directions were insufficient in that respect to discharge the overarching responsibility of the trial judge "(1) of deciding what [were] the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues [were]"⁵⁷.

96 The deficiency in the directions was exacerbated by the abstracted and overbroad way in which the prosecution chose to put its case in its closing address. The prosecution put to the jury that "a person can be a member and is a member of [Islamic State] if that person knows of and agrees with and embraces the ideology and aims of the organisation and participates or takes steps to participate in advancing those aims and ideology and goals for the organisation". From that it followed, according to the prosecution, that "if a person knows of, agrees with and embraces the ideology and aims of the organisation and with intention, for

56 (2010) 29 VR 593 at 607-623 [32]-[98].

57 *Alford v Magee* (1952) 85 CLR 437 at 466. See also *Fingleton v The Queen* (2005) 227 CLR 166 at 196-198 [77]-[80].

example, puts into place steps to head off to Syria and Iraq ... that person is taking steps to become a member of the organisation".

97 The trial judge went some way towards correcting the overreach of the prosecution submission when his Honour directed the jury that it could only find that the respondent "took steps to become a member of [Islamic State]" if it was satisfied beyond reasonable doubt that the respondent intended to travel to Turkey "in order to engage with [the] terrorist organisation Islamic State". But the direction did not go far enough. The problem that remained was a problem that lurked in the unexplicated content of the word "engage".

98 Section 100.1(1) of the Code contains a definition of "organisation" for the purposes of Pt 5.3. The definition makes clear that an organisation is a "body" that "consists of persons". No doubt, as the prosecution argued in an earlier case, the body must be "a standing body of people with a particular purpose; not a transient group of conspirators who may come together for a single discrete criminal purpose"⁵⁸.

99 A "member" of an organisation in that statutory context – even an "informal member" within para (a) of the extended definition of "member" in s 102.1(1) – is necessarily a person who is identifiable by reference to objective circumstances as one of the body of persons of whom that organisation consists. A person can sympathise with or support an organisation, agreeing with and embracing the ideology and aims of the organisation and even taking steps to promote that ideology or to advance those aims, without thereby becoming identified as one of the body of persons of whom the organisation consists.

100 Though it is true that "[a] policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct"⁵⁹, the Commonwealth Parliament has not gone so far in enacting and maintaining Pt 5.3 of the Code as did the United Kingdom Parliament in providing in s 11 of the *Terrorism Act 2000* (UK) that "[a] person commits an offence if he belongs or professes to belong to a proscribed organisation". "The scope of 'profess'", Lord Bingham of Cornhill remarked in *Sheldrake v Director of Public Prosecutions*⁶⁰, was "so uncertain that some of those liable to be convicted and punished for professing to belong to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly

58 *R v Ul-Haque* (unreported, New South Wales Supreme Court, 8 February 2006) at [51].

59 *Lodhi v The Queen* (2006) 199 FLR 303 at 318 [66].

60 [2005] 1 AC 264 at 312 [48].

attract criminal sanctions". The offence-creating provision was held in that case to infringe the presumption of innocence guaranteed by Art 6(2) of the European Convention on Human Rights, requiring it to be "read down" in accordance with the *Human Rights Act 1998* (UK).

101 The underlying purpose of the offence of "membership of a terrorist organisation" created by s 102.3 of the Code was and remains that identified by the Parliamentary Joint Committee on Intelligence and Security in its *Review of Security and Counter Terrorism Legislation* conducted in 2006 under the *Intelligence Services Act 2001* (Cth) following its receipt of the *Report of the Security Legislation Review Committee* as required by s 4 of the *Security Legislation Amendment (Terrorism) Act*. The purpose, as then identified by the Parliamentary Joint Committee, is "to stop people from participating in entities/organisations that engage in or promote terrorism"⁶¹.

102 In my opinion, a person cannot be said to be a person who has intentionally "taken steps to become a member of the organisation" within para (b) of the extended definition of "member" in s 102.1(1) of the Code unless two conditions can be shown to have been met. The first is that the person has engaged in conduct intending that conduct to be a step in causing a state of affairs to come into existence. The second is that, were that state of affairs to come into existence, the person would be identifiable by reference to that state of affairs as one of the body of persons of whom the particular "organisation" in question consists.

103 Adequately to identify the factual issues to be determined in order for the jury to be satisfied beyond reasonable doubt that the respondent had intentionally taken steps to become a member of the organisation identified in the Regulation as "Islamic State" therefore required more than that the trial judge instruct the jury that it needed to be satisfied beyond reasonable doubt that the respondent had attempted to travel to Turkey intending to "engage" with "Islamic State". The trial judge needed to go on to instruct the jury that it needed to consider the nature of the intended engagement with "Islamic State" and to be satisfied beyond reasonable doubt that engagement of that nature, were it to occur, would result in the respondent becoming objectively identifiable as one of the body of persons of whom the organisation identified in the Regulation and described in the Explanatory Statement consists.

104 In the Full Court of the Supreme Court, Kourakis CJ took the view that the only evidence from which any conclusions could be drawn about the structure of

61 Australia, Parliament, Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) at [5.76].

"Islamic State" and about the nature of its membership was that of Dr Shanahan⁶², whose evidence did not squarely address the place of women within its organisational structure⁶³, did not clearly distinguish the organisation from the caliphate it had proclaimed⁶⁴, and did not clearly distinguish supporters from members⁶⁵. In taking that view, his Honour appears to have given no weight to inferences available to be drawn from material shown to have been downloaded by the respondent from the internet which had been tendered by the prosecution.

105 The prosecution appeal to this Court proceeded on the basis, uncontradicted by the respondent, that the material had been admitted into evidence at the trial without relevant restriction as to its use. The extracts from that material quoted by the majority in this Court sufficiently illustrate that it was open to the jury on the totality of the evidence to be satisfied that the respondent intended more than just to live in the "Sham" as a "Muhajirah" (immigrant girl) and there either to marry a "Mujahid" (fighter) or to act as a nurse tending to "Mujahideen" (fighters). The inference was open that she intended from the time she arrived in Turkey to pledge her allegiance to the Caliph and voluntarily to subject herself to the direction and discipline of "Islamic State" operatives. The same material also left it open to the jury to have concluded that doing so would have rendered her identifiable as one of the body of persons of whom the organisation identified in the Regulation and described in the Explanatory Statement consists. That conclusion would have been open to the jury whether or not the respondent would have been formally recognised as a member of the organisation by the leadership of the organisation, a topic on which the evidence is silent.

106 My concern, however, is not that the evidence did not leave it open to the jury to convict but that the directions given to the jury did not adequately identify the issues of fact of which the jury needed to be satisfied beyond reasonable doubt on the evidence in order to convict. In my opinion, the directions were inadequate in consequence of which there occurred a miscarriage of justice in that the respondent was deprived of a chance of acquittal fairly open to her.

107 The ground of appeal in s 158(1)(c) of the *Criminal Procedure Act 1921* (SA) being established, the orders of the Full Court allowing the appeal against conviction and quashing the conviction must stand. The circumstance that the respondent has now served nearly the whole of the sentence imposed on her for

62 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [56].

63 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [68].

64 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [62]-[63].

65 *Abdirahman-Khalif v The Queen* [2019] SASCF 133 at [75]-[76].

the offence with which she was charged has the consequence that the discretion conferred by s 158(3) is in my opinion appropriately exercised to leave undisturbed the judgment and verdict of acquittal which the Full Court ordered to be entered rather than to substitute an order for a new trial⁶⁶.

⁶⁶ cf *Parker v The Queen* (1997) 186 CLR 494 at 520, 530-531.

