

# What it takes to be a member of ISIS

## *The Queen v Zainab Abdirahman-Khalif* [2020] HCA 36

By Troy Anderson

This matter represents only the third occasion the High Court of Australia has considered the Commonwealth's suite of terrorism offences set out in Part 5.3 of the Criminal Code (Cth) (the Code)<sup>1</sup>. The specific offence that was the subject of the Court's consideration was s 102.3(1), the offence of intentionally being a member of a terrorist organisation, an offence which carries a maximum term of imprisonment of 10 years. The case arose from a 2-1 judgment (Kourakis CJ and Parker J, Kelly J dissenting) of the Full Court of the Supreme Court of South Australia sitting as that State's Court of Criminal Appeal.

The South Australian Full Court had quashed the respondent's conviction on the basis that the Commonwealth could not establish what it would take to become a member of, in this case, ISIS. It was accepted by the respondent both at trial and on appeal that ISIS, or Islamic State, was a 'terrorist organisation' within the meaning of s 102.1 of the Code. Critically for the prosecution, s 102.1 of the Code defines a 'member of an organisation' as including 'a person who has taken steps to become a member of the organisation'.

The Full Court held that the Crown could not prove the steps required to become an ISIS member, how members of the terrorist organisation were recruited or selected, or the process by which members were inducted and accepted into the organisation, consequently, it could not test whether the actions of the respondent amounted to taking steps to become a member or not and on that basis, the prosecution could not succeed. By majority, (Bell, Keane, Nettle and Gordon JJ, with Gageler J in dissent) the High Court disagreed.

By way of background, during 2016 the then 21 year old respondent purchased herself a one-way plane ticket from Adelaide to Istanbul, Turkey: a common destination for people looking to make their way into Syria. The respondent was detained at Adelaide Airport while attempting to board the flight with nothing more than some carry-on luggage and AUD180. The respondent was interviewed by the



*The respondent stated to police that she was interested in doing aid work in Syria, having watched YouTube videos about that topic.*

Australian Federal Police about her reasons for travelling and her mobile phone was seized. The respondent stated to police that she was interested in doing aid work in Syria, having watched YouTube videos about that topic. The contents of the respondent's mobile phone were downloaded. It contained 1,614 images, 379 audio files and 127 video files of what the Crown characterised as ISIS propaganda and extremist material.

Significantly for the Crown's case, one of the images was of the respondent in Islamic dress, with one finger raised, said by the Crown to be consistent with a salute used by ISIS members. The respondent was not permitted to leave Australia.

The respondent's phone was returned to her, but she was arrested 10 weeks later. An analysis of her mobile phone at that time revealed that she had used the phone to communicate with a woman who later carried out a terrorist attack in Mombasa, Kenya, in the name of ISIS. Prior to her arrest, investigators had installed a listening

device in her property which recorded her making a pledge of allegiance to the leader of ISIS and making a number of admissions against interest. Investigators also seized her laptop computer which contained messages written by the respondent concerning what was described as 'practical advice for women undertaking hiraj' and travelling into Syria from Turkey. In addition to her travel plans, the material recorded on her laptop and phone and the surveillance device evidence, the Crown led expert evidence as to the nature and activities of ISIS and its methods of attracting recruits and communicating with those adhering to its ideology. At first instance, the jury returned a unanimous verdict of guilty.

The Commonwealth's case was that the respondent had intentionally taken steps to become a member of ISIS, based on the respondent:

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.

By grant of special leave, the Crown appealed to the High Court. By notice of contention, the respondent contended that the trial judge's summing up was unbalanced and that the trial judge failed to properly direct the jury as to the elements of the offence.

The High Court allowed the appeal and dismissed each of the grounds raised in the respondent's notice of contention. The Court (including Gageler J) held that it



was open to the jury to be satisfied beyond reasonable doubt on the evidence adduced that the respondent intentionally took steps to become a member of Islamic State. Gageler J's dissent was based on his Honour's conclusion that the directions given to the jury were flawed (at [105] and [106]).

The majority held that the nature and purpose of the offence-creating provisions in Pt 5.3 of the Code reflect a legislative judgment that the prevention of terrorism requires some actions to be deemed criminal, notwithstanding that in other non-terrorism related areas of the law the conduct would not be regarded as criminal (at [44]). Further, Part 5.3 of the Code dictates that the legislative provisions must 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 (at [49]). The High Court held that, contrary to the finding of the majority in the South Australian Full court, the offence of taking steps to become a member of a terrorist organisation 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 evidence demonstrating a written constitution or set of rules, the existence of a contractual relationship between members or the manifestation of some form of hierarchy (at [52]).

The appeal was allowed and the respondent's appeal against conviction dismissed. **BN**

**Troy Anderson is a member of the Public Defender's Chambers, the author of *Commonwealth Criminal Law*, published by Federation Press and editor of *The ABC of Evidence*, published by LexisNexis.**

#### ENDNOTES

- <sup>1</sup> The other cases are *Thomas v Mowbray* (2007) 233 CLR 307; (2007) 237 ALR 194; (2007) 81 ALJR 1414; [2007] HCA 33, although it focussed on control orders, rather than the offence provisions and *R v Khazaal* (2012) 246 CLR 601; (2012) 289 ALR 586; (2012) 86 ALJR 884; (2012) 217 A Crim R 96; [2012] HCA 26.