

HIGH COURT OF AUSTRALIA

GORDON A-CJ,
STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

THE KING

APPELLANT

AND

FAYEZ HATAHET

RESPONDENT

The King v Hatahet
[2024] HCA 23
Date of Hearing: 14 May 2024
Date of Judgment: 12 June 2024
S37/2024

ORDER

- Appeal allowed.*
- Set aside the orders of the Court of Criminal Appeal of New South Wales made on 29 November 2023 (as amended on 5 December 2023) and, in their place, order that:*
 - leave to appeal against sentence be granted; and*
 - the appeal be dismissed.*

On appeal from the Supreme Court of New South Wales

Representation

R J Sharp KC with O P Holdenson KC and C J Tran for the appellant
(instructed by Director of Public Prosecutions (Cth))

M J Avenell SC with P R Coady for the respondent (instructed by Legal Aid NSW)

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 King v Hatahet

Criminal law (Cth) – Sentence – Where respondent convicted under s 6 of *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) – Where s 19ALB of *Crimes Act 1914* (Cth) provides Attorney-General must not make parole order in relation to person involved in, or convicted of, certain terrorist-related activities unless "exceptional circumstances exist to justify making a parole order" – Where sentencing judge sentenced respondent without taking into account likelihood (if any) of release on parole by reason of s 19ALB of *Crimes Act* – Where parole subsequently refused by Attorney-General pursuant to s 19ALB of *Crimes Act* – Whether Court of Criminal Appeal erred in concluding that sentencing judge should have considered application of s 19ALB when sentencing respondent – Whether Court of Criminal Appeal erred in concluding that expectation that parole would be refused due to an application of s 19ALB warranted imposition of lesser sentence.

Words and phrases – "conditions of imprisonment", "executive function", "length of sentence", "non-parole period", "onerous conditions", "parole", "presumption against parole", "prospects of parole", "purpose of sentencing", "sentencing", "terrorism".

Crimes Act 1914 (Cth), ss 16A, 19AB, 19ALB.

Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth), s 6(1)(b).

1 GORDON A-CJ, STEWARD AND GLEESON JJ. In April 2020, the respondent was arrested and charged under s 6(1)(b) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) with the offence of engaging in a hostile activity in a foreign State, namely Syria. In 2021, in the Local Court of New South Wales, the respondent pleaded guilty to, and was convicted of, that offence.¹ In December 2022, he was sentenced to imprisonment for five years, with a non-parole period of three years, commencing on 24 August 2020. The sentence was to expire on 23 August 2025.

2 Consistently with s 16A of the *Crimes Act 1914* (Cth), in sentencing the respondent the sentencing judge took into account, amongst other factors, the probable hardship the respondent's family would suffer as a result of his sentence, as well as the hardship the respondent had already suffered in custody since his arrest. The respondent was found to have been subject to "extremely onerous" custodial conditions and to have experienced additional restrictions and difficulties due to the COVID-19 virus. The sentencing judge did not take into consideration the likelihood (if any) of the respondent being released upon the expiration of his non-parole period.

3 The respondent became eligible for release on parole in August 2023 but parole was refused by the federal Attorney-General pursuant to s 19ALB of the *Crimes Act*. Section 19ALB of the *Crimes Act* requires that parole be refused to a person involved in, or convicted of, certain terrorist-related activities unless the Attorney-General is satisfied that "exceptional circumstances exist to justify making a parole order". In the case of the respondent, the Attorney-General was satisfied that the respondent had carried out "activities supporting, or advocating support for, terrorist acts" for the purposes of s 19ALB(2)(c) of the *Crimes Act*.² It followed that parole could not be ordered unless the Attorney-General was satisfied that exceptional circumstances existed to justify making a parole order. The notice records that he was not so satisfied. No challenge has been made to the validity of the Attorney-General's state of satisfaction. The notice records that the Attorney-General will reconsider the respondent for release on parole within 12 months.

4 Pursuant to s 5(1)(c) of the *Criminal Appeal Act 1912* (NSW), the respondent sought leave to appeal against his sentence. He relied upon one ground of appeal only, namely that the sentence imposed was manifestly excessive in the circumstances of his case. The Court of Criminal Appeal of New South Wales

1 *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 6(1)(b). The maximum penalty is imprisonment for 20 years.

2 See also *Criminal Code* (Cth), s 100.1.

granted leave.³ Subject to one qualification, the Court found that the sentence was not manifestly excessive.⁴ The one qualification concerned the unlikelihood of parole being ordered given s 19ALB.

5 Evidence before the Court of Criminal Appeal, admitted without objection, revealed the Attorney-General's refusal to grant the respondent parole in August 2023.⁵ In those circumstances, Basten A-JA, with whom Davies and Cavanagh JJ agreed, relevantly identified two issues for determination in the context of sentencing for an offence to which s 19ALB applied: (1) in fixing the length of the sentence, is a sentencing judge entitled to take into account the probable effect of s 19ALB and executive practices; and (2) is error demonstrated in this case by the evidence that the respondent had in fact been refused parole by the Attorney-General applying s 19ALB.⁶

6 The Court of Criminal Appeal decided that the likely application of s 19ALB to an offender was a relevant consideration in determining the length of sentence and that the sentencing judge had accordingly erred in failing to take that into account in fixing the respondent's sentence.⁷ In so concluding, Basten A-JA had regard to the established practice that a sentencing court may have regard to the likely circumstances attending a period of incarceration, such as whether the offender will face more onerous conditions than other prisoners,⁸ and was influenced by the dissenting reasons of Brennan and McHugh JJ in *R v Shrestha*, which include an observation that a sentencing judge "cannot be blinkered merely because the likelihood of the occurrence of a material fact depends on the implementing of executive policy".⁹

7 Basten A-JA reasoned that "[a]t least on one view, fixing a non-parole period for a person who has no realistic possibility of release, even if he or she maintains an excellent record of behaviour whilst in prison and undertakes

3 *Hatahet v The King* [2023] NSWCCA 305 at [89].

4 *Hatahet v The King* [2023] NSWCCA 305 at [38].

5 *Hatahet v The King* [2023] NSWCCA 305 at [47].

6 *Hatahet v The King* [2023] NSWCCA 305 at [48].

7 *Hatahet v The King* [2023] NSWCCA 305 at [85]-[88].

8 *Hatahet v The King* [2023] NSWCCA 305 at [52], [84].

9 (1991) 173 CLR 48 at 64; see *Hatahet v The King* [2023] NSWCCA 305 at [71], [84].

3.

appropriate courses, is likely to adversely affect the offender and his or her mental condition".¹⁰ His Honour thus concluded that the "expectation (now a reality) that parole would be refused", together with the respondent's previous more burdensome incarceration, meant "that he has suffered a considerably more onerous period of imprisonment and, given his ineligibility for release on parole, will continue to suffer more onerous conditions of imprisonment".¹¹ This warranted a "reduction" in the respondent's sentence of one year.¹² Basten A-JA considered that this variation in sentence recognised "that the [respondent] will not get parole when ordinarily he would likely have obtained parole before the end of his sentence".¹³ It followed that the appeal was allowed and the respondent was resentenced to imprisonment for four years with a non-parole period of three years, so that the sentence will now expire on 23 August 2024.

8 The Director of Public Prosecutions (Cth) ("the Director") relies on two grounds of appeal in this Court: first, that the Court of Criminal Appeal erred in concluding that the sentencing judge should have considered the application of s 19ALB when sentencing the respondent; and second that the Court of Criminal Appeal erred in concluding that the expectation that parole would be refused due to an application of s 19ALB warranted the imposition of a lesser sentence.

9 For the reasons which follow, the Court of Criminal Appeal was wrong to take into account the likely application of s 19ALB to the respondent in the resentencing process. The Director's appeal should be allowed. The reduction in sentence must be set aside.

Sentencing under the *Crimes Act*

10 For the purposes of Divs 1 to 4 of Pt IB of the *Crimes Act*, a judge must undertake three distinct steps when sentencing an offender. First, the judge must only pass a sentence of imprisonment if, having considered all other available sentences, he or she is satisfied that no other sentence is appropriate in all the circumstances of the case.¹⁴

10 *Hatahet v The King* [2023] NSWCCA 305 at [52].

11 *Hatahet v The King* [2023] NSWCCA 305 at [84].

12 *Hatahet v The King* [2023] NSWCCA 305 at [85], [88].

13 *Hatahet v The King* [2023] NSWCCA 305 at [88].

14 *Crimes Act*, s 17A.

11 Secondly, if no other type of sentence is appropriate, the sentencing judge must determine the sentence of imprisonment "that is of a severity appropriate in all the circumstances of the offence".¹⁵ In making this determination, the judge must take into account, in addition to "any other matters" that bear upon that issue, a number of matters listed in s 16A(2) "as are relevant and known to the court". They include the nature and circumstances of the offence;¹⁶ the personal circumstances of any victim of the offence;¹⁷ the degree to which the offender has shown contrition;¹⁸ and if the offender has pleaded guilty.¹⁹ The respondent, for the purposes of this appeal, placed particular reliance upon the following matters itemised in s 16A(2):

"(j) the deterrent effect that any sentence or order under consideration may have on the person;

(ja) the deterrent effect that any sentence or order under consideration may have on other persons;

...

(m) the character, antecedents, age, means and physical or mental condition of the person;

...

(n) the prospect of rehabilitation of the person".

12 Thirdly, and relevantly where the term of imprisonment exceeds three years, the judge must fix a single non-parole period in respect of that sentence, save in one instance.²⁰ That one instance is where the court is satisfied that a non-

15 *Crimes Act*, s 16A(1).

16 *Crimes Act*, s 16A(2)(a).

17 *Crimes Act*, s 16A(2)(d).

18 *Crimes Act*, s 16A(2)(f).

19 *Crimes Act*, s 16A(2)(g).

20 *Crimes Act*, s 19AB(1). A different rule for the fixing of minimum non-parole periods for certain terrorist offences, not applicable here, is found in s 19AG of the *Crimes Act*. Generally, where the sentence imposed does not exceed three years, the

parole period is not appropriate having regard to certain matters, including the nature and circumstances of the offence or offences.²¹

13 Importantly, as the plurality said in *Johnson v The Queen*,²² referring to the *Crimes Act*:

"[E]xcept to the extent stated in ss 16A and 16B of the [*Crimes Act*], general common law and not peculiarly local or state statutory principles of sentencing are applicable. That common law principles may apply follows from the use of the words 'of a severity appropriate in all the circumstances of the offence ...' in s 16A(1) and the introductory words 'In addition to any other matters ...' to s 16A(2) of the Act."

14 As is self-evident, the probability of parole being granted following the expiration of a non-parole period, and any consequences arising from a grant of parole being probable or not, are not factors listed in s 16A(2) for consideration by a judge in determining a sentence of imprisonment. Nor are they matters that relevantly form part of the "circumstances of the offence" so as to engage s 16A(1).

15 This is unsurprising. The sentencing judge's task is separate to, and distinct from, the function of the executive in considering whether or not to grant parole under the *Crimes Act*.

Parole under the *Crimes Act*

16 The power to grant parole is vested in the executive branch of government, not the judiciary. Under the *Crimes Act*, the power exercisable by the Attorney-General is found in Div 5 of Pt IB of the *Crimes Act*. The purposes of parole, as defined by the Act, are three-fold: the protection of the community, the rehabilitation of the offender, and the reintegration of the offender into the community.²³

court must make a single recognizance release order and must not fix a non-parole period: *Crimes Act*, s 19AC.

21 *Crimes Act*, s 19AB(3).

22 (2004) 78 ALJR 616 at 622 [15]; 205 ALR 346 at 353.

23 *Crimes Act*, s 19AKA.

17 The Attorney-General must, before the end of an applicable non-parole period, either make or refuse to make an order for the parole of an offender.²⁴ In making this decision, the Attorney-General may have regard to a range of matters identified in s 19ALA(1) of the *Crimes Act* that are known to him or her and which are relevant to the decision. These include the risk to the community if the offender were to be released; the offender's conduct whilst serving their sentence; the offender's satisfactory completion of any programs that have been ordered by a court or otherwise recommended; and the likely effect on the victim, or the victim's family, of the offender's release.²⁵ Consideration of these matters is not subject to s 16A(1) and (2) of the *Crimes Act*.

18 In 2019, s 19ALB of the *Crimes Act* was introduced into Div 5.²⁶ The Revised Explanatory Memorandum to the Bill which, when enacted, inserted s 19ALB into the *Crimes Act* describes the provision as creating a "presumption against parole" for persons convicted of certain terrorism offences, or who have been subject to a control order, or who have made statements or carried out activities supporting, or advocating support for, terrorist acts.²⁷ The presumption was said to have been enacted in response to a "terrorist incident" which had taken place in 2017 involving a person who killed a man whilst on parole.²⁸ This led to a meeting of the Council of Australian Governments which prompted the enactment of s 19ALB.²⁹ The presumption against parole was said to give primacy to the first purpose of parole set out in s 19AKA of the *Crimes Act*, namely the

24 *Crimes Act*, s 19AL(1).

25 *Crimes Act*, s 19ALA(1)(a), (b), (c) and (d).

26 *Counter-Terrorism Legislation Amendment (2019 Measures No 1) Act 2019* (Cth), Sch 1 item 16.

27 Australia, House of Representatives, *Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019*, Revised Explanatory Memorandum at 31 [35].

28 Australia, House of Representatives, *Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019*, Revised Explanatory Memorandum at 2 [2].

29 Australia, House of Representatives, *Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019*, Revised Explanatory Memorandum at 2 [2]-[3].

protection of the community.³⁰ The Revised Explanatory Memorandum then states:³¹

"Like the presumption against bail, the presumption against parole is a mechanism to enhance the management of the particular risks posed by terrorist offenders and other offenders who have expressed support for, or have links to, terrorist activity.

The presumption will operate to prevent terrorist offenders and other terrorism-related offenders being released on parole unless exceptional circumstances exist. This measure sets an appropriately strict test for considering whether to release such offenders on parole, given the nature of the threat posed by such offenders."

Distinction between sentencing and parole

19 There is a fundamental distinction between the judicial function of sentencing an offender and the executive function of determining whether an offender should be released on parole. As earlier explained, the judicial function requires consideration of both the appropriateness of a sentence of imprisonment and the appropriate length of such a sentence, including the fixing of a non-parole period where appropriate. That function is exhausted upon the making of the order which sentences the offender.³²

20 A non-parole period fixed by a sentencing judge does not create a right or entitlement to be released.³³ As the plurality observed in *Power v The Queen*,

30 Australia, House of Representatives, *Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019*, Revised Explanatory Memorandum at 31 [36].

31 Australia, House of Representatives, *Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019*, Revised Explanatory Memorandum at 31 [37]-[38].

32 *Minogue v Victoria* (2019) 268 CLR 1 at 15-16 [14]. See also *Baker v The Queen* (2004) 223 CLR 513 at 528 [29]; *Elliott v The Queen* (2007) 234 CLR 38 at 41-42 [5]; *Crump v New South Wales* (2012) 247 CLR 1 at 16-17 [28], 26 [58].

33 *Crump v New South Wales* (2012) 247 CLR 1 at 26 [60]; *Minogue v Victoria* (2019) 268 CLR 1 at 16 [15].

"there is but one sentence, that imposed by the trial judge, which cannot be altered by the paroling authority".³⁴ Thus in *Minogue v Victoria*, this Court said:³⁵

"In the case of the plaintiff, at all times, there remained only one sentence – imprisonment for life. The fixing of the non-parole period of 28 years said nothing about whether the plaintiff would be released on parole at the end of that non-parole period. It left his life sentence unaffected as a judicial assessment of the gravity of the offence committed. Indeed, the plaintiff has no right to be released on parole and may be required to serve the whole of the head sentence. At best, the non-parole period provided the plaintiff with hope of an earlier conditional release but always subject to and in accordance with legislation in existence at the time governing consideration of any application for parole. Put in different terms, the fixing of a non-parole period does no more than provide a 'factum by reference to which the parole system' in existence at any one time will operate."

21 The general principle is that the prospect of securing release on parole or of obtaining remissions is not relevant to the judicial task of sentencing. The leading decision of this Court is *Hoare v The Queen*.³⁶ That case concerned a provision of the *Criminal Law Consolidation Act 1935* (SA) which required a court when sentencing to "have regard to the fact" that a prisoner may be credited with a maximum of 15 days of remission for each month served in prison.³⁷ The Court of Criminal Appeal of South Australia had formed the view that the practical effect of this section justified a dramatic increase in the length of terms of imprisonment.³⁸ This Court held that this view was mistaken. It decided that it was "well settled as a matter of principle" that the existence of a remission scheme, of a kind then in operation in South Australia, was not of itself "a circumstance justifying an increase in the head sentence".³⁹ The reasons underlying that conclusion were said to be "clear".⁴⁰ There were three.

34 (1974) 131 CLR 623 at 629.

35 (2019) 268 CLR 1 at 16-17 [16] (footnotes omitted).

36 (1989) 167 CLR 348.

37 *Hoare v The Queen* (1989) 167 CLR 348 at 351.

38 *Hoare v The Queen* (1989) 167 CLR 348 at 349-350.

39 *Hoare v The Queen* (1989) 167 CLR 348 at 353-354.

40 *Hoare v The Queen* (1989) 167 CLR 348 at 354.

22 First, a prisoner has no right to remission and there can never be a guarantee
as to how much remission might be earned.⁴¹ The amount of remission would
depend upon the prisoner's future behaviour.⁴² The same observation is equally
true about the grant of parole under the *Crimes Act*.

23 Secondly, it is an elementary principle of law that the sentence of
imprisonment should never exceed "that which can be justified as appropriate or
proportionate to the gravity of the crime considered in the light of its *objective*
circumstances".⁴³ Increasing what would otherwise be a proportionate sentence by
reference to the possibility of future remission would be a departure from this basic
principle. The same is equally true here. Under s 16A of the *Crimes Act*, the
obligation on the sentencing judge is to impose in every case a sentence "of a
severity appropriate in all the circumstances of the offence".

24 Thirdly, increasing sentences by reference to the possibility of future
remissions being earned would turn a legislative system of remissions "on its
head".⁴⁴ The very purpose of granting remissions is to benefit a prisoner for good
behaviour; increasing the sentence from inception would undo that benefit. For the
reasons expressed below, decreasing a sentence because of the low probability of
parole would also turn the legislative purpose of s 19ALB "on its head", but for a
different reason.

25 As the Director submitted, the principle which prevails in New South
Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the
Australian Capital Territory, the Northern Territory, the United Kingdom and New
Zealand is that a sentencing judge should also not take into account the likelihood
of a release on parole in fixing a sentence of imprisonment.⁴⁵

41 *Maguire* (1956) 40 Cr App R 92 at 94; see *Hoare v The Queen* (1989) 167 CLR 348
at 354.

42 *Hoare v The Queen* (1989) 167 CLR 348 at 354-355.

43 *Hoare v The Queen* (1989) 167 CLR 348 at 354 (emphasis in original).

44 *Hoare v The Queen* (1989) 167 CLR 348 at 354.

45 *R v Reyes* [2005] NSWCCA 218 at [72]-[75]; *R v Yates* [1985] VR 41 at 44-45;
Director of Public Prosecutions (Cth) v Besim [No 3] (2017) 52 VR 303 at 317 [50];
Brown (2000) 110 A Crim R 499 at 501-502 [8]-[10]; *Wicks v The Queen* (1989) 3
WAR 372 at 383-384, 394-395; *R v Brennan* (1984) 36 SASR 78 at 80; *George v*
The Queen [1986] Tas R 49 at 64; *Skillin v The Queen* (1991) 100 ALR 20 at 27;

26 The reasons for the adoption of such a principle are similar to the reasons identified in *Hoare*. Thus, it is thought to be too speculative for a judge to make a prediction about the probability of a parole order being made: "[n]ot only are the circumstances at the expiration of the minimum term unpredictable: they include circumstances which are beyond the power of the offender to control", including, for example, the offender's future health.⁴⁶ That also includes what a parole board, or here the Attorney-General, might or might not do.⁴⁷ It further includes the possibility that "the legislative scheme, as well as practice and policies, regarding the parole system may validly change from time to time".⁴⁸ A good example of this may be found in *Minogue*; there, an amendment was made to the *Corrections Act 1986* (Vic) many years after Minogue had been originally sentenced and which changed the basis upon which he might be granted parole.⁴⁹

27 The differing and distinct functions of the judicial and executive branches, adverted to above, have also been seen to support a conclusion that the function of a judge in sentencing does not include a consideration of the prospects of release on parole. As this Court observed in *Elliott v The Queen*, subject to the appellate system, the exercise of judicial power with respect to trials is spent upon the subsequent imposition of a sentence: "[t]he controversy represented by the indictment [is thereby] quelled and, allowing for any applicable statutory regime, the responsibility for the future of [an offender passes] to the executive branch of the government of the State".⁵⁰ Indeed, having regard to the function of sentencing, described above and as required by s 16A of the *Crimes Act*, it is correct to observe that any policy of a parole board, or here the Attorney-General, may properly be seen to be "irrelevant".⁵¹

McCubbin v The Queen (unreported, Northern Territory Court of Criminal Appeal, 7 December 1993) at 4; *Maguire* (1956) 40 Cr App R 92 at 94-95; *R v Stockdale* [1981] 2 NZLR 189 at 190-191. See now also *Sentencing Act 1991* (Vic), s 5(2AA)(a).

46 *Morgan* (1980) 7 A Crim R 146 at 155.

47 *R v Yates* [1985] VR 41 at 47.

48 *Minogue v Victoria* (2019) 268 CLR 1 at 17 [17]; see also *Crump v New South Wales* (2012) 247 CLR 1 at 17 [28], 19-20 [36]-[37], 26 [59], 28-29 [71]-[72].

49 (2019) 268 CLR 1.

50 (2007) 234 CLR 38 at 41-42 [5].

51 *R v Bruce* [1971] VR 656 at 657.

28

Moreover, it is now well recognised that, in the fixing of a sentence, attempts to predict what might happen upon the expiration of a non-parole period – described as the "making of an administrative guess"⁵² – would lead to outcomes that are inconsistent with a core object of sentencing, namely, the need to ensure that an offender is adequately punished.⁵³ Here, as already mentioned, the statutory criterion is to fix a sentence "of a severity appropriate in all the circumstances of the offence".⁵⁴ That includes a determination of the non-parole period in accordance with s 19AB, being "a period before the expiration of which, having regard to the interest of justice, [the offender] cannot be released".⁵⁵ As the plurality observed in *Power v The Queen*, the nature and purpose of a non-parole period is "to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence".⁵⁶ Adjusting a sentence arrived at in conformity with the foregoing, whether upwards or downwards, to take account of the probability of parole would result in a sentence which then had precisely ceased to be in conformity with what the law requires.⁵⁷

Respondent's submissions contrary to principle and inconsistent with Pt IB of the *Crimes Act*

29

The respondent sought to distinguish the cases which have adhered to the foregoing expression of orthodox principle on the basis that they all dealt with very different sentencing regimes. *Hoare*, for example, addressed a scheme which obliged a court, when sentencing, to "have regard to the fact ... that the prisoner may be credited ... with a maximum of 15 days of remission for each month served

52 *Power v The Queen* (1974) 131 CLR 623 at 629.

53 *Hili v The Queen* (2010) 242 CLR 520 at 528 [25]; *R v Bruce* [1971] VR 656 at 657; *Re Jackson* [1997] 2 VR 1 at 3.

54 *Crimes Act*, s 16A(1).

55 *Knight v Victoria* (2017) 261 CLR 306 at 318 [8], citing *R v Knight* [1989] VR 705 at 710.

56 (1974) 131 CLR 623 at 629, quoted in *Knight v Victoria* (2017) 261 CLR 306 at 318 [8].

57 *Sikaloski v The Queen* [2000] WASCA 387 at [19].

in prison".⁵⁸ It was also concerned with increases in imprisonment rather than, as here, reductions in the term to be served.

30 The answer, the respondent said, was to be found in the terms of s 16A and no more. In that respect, it was accepted as uncontroversial by the parties that a sentencing judge may have regard to the likely circumstances attending a period of imprisonment, such as the imposition of conditions that are more onerous in nature. This was said to be reflected in some of the matters identified in s 16A(2), such as specific and general deterrence, the character, age, and physical or mental condition of the offender, the prospect of rehabilitation and the effect of any sentence on the offender's family or dependants.⁵⁹ It was submitted that the significantly reduced probability of parole could well be relevant to these types of factors. They simply represent different ways of making necessary enquiries about the future welfare of an offender and any diminished prospects of parole are relevant to that issue. The respondent also relied upon the reference to "any other matters" in the chapeau to s 16A(2); that might, it was submitted, accommodate a consideration of the likelihood of parole although it was not shown that it was a matter a court "must" take into account.

31 The respondent also relied upon the fact of the Attorney-General's decision to refuse him parole as confirmation of what had always been his dim prospects of release following the expiration of his non-parole period. In other words, and contrary to the usual case, it would have involved no speculation on the part of the sentencing judge to have assumed that his parole would be refused.

32 The respondent did not contend that the prospects of parole would need to be considered in every case; nor indeed did the possible application of s 19ALB always compel such an enquiry. Rather, the relevance of future parole to the sentencing task would depend upon the facts of a given case. Here, it was said that the onerous conditions of the respondent's past incarceration, and the near certainty that he was always going to be refused parole after three years of imprisonment, mandated a consideration of an application of s 19ALB when he was sentenced.

33 For the following reasons, that submission must be rejected. First, it would subvert the very point of Parliament's creation of a presumption against parole in s 19ALB to reduce a term of imprisonment on that basis. That presumption is Parliament's response to the specific nature of the threat posed by offenders who are subject to s 19ALB and the greater need to protect the community from those threats. It would make little, if any, sense to reduce a sentence of imprisonment,

58 Former s 302 of the *Criminal Law Consolidation Act 1935* (SA).

59 *Crimes Act*, s 16A(2)(j), (ja), (m), (n) and (p).

which otherwise is of a severity appropriate in all the circumstances, because of that presumption. In short, any such reduction would undo the very work the presumption was intended to do.

34 Secondly, the contention that the respondent's imprisonment was more burdensome because of his reduced prospects of parole is misconceived. A similar submission was rejected by this Court in *Minogue*.⁶⁰ Because there is only ever one sentence imposed by a court (subject to any appeal), and because the issue of parole is left to the executive branch of government, who may legitimately change the conditions for securing parole at any time, the prospect of a reduced chance of parole does not itself constitute the imposition of a greater burden arising from that sentence. As the plurality said in *Minogue*:⁶¹

"The plaintiff has not lost any opportunity to be considered for release on parole – he is still eligible to be granted parole, by reason of the expiration of the non-parole period, but the circumstances in which parole may be granted by the executive have been severely constrained. His punishment is no more severe; it remains a sentence of life imprisonment."

35 Like the plaintiff in *Minogue*, the respondent has not lost his opportunity to be considered for parole and his sentence of five years remains as it always was, notwithstanding the prospects of parole (and leaving aside the reduction in term ordered below). In any event, it should be doubted whether there was a sufficient evidentiary basis for the finding made by Basten A-JA that the reduced chance of obtaining release on parole would be likely to adversely affect the mental condition of an offender. Nor was there any evidence that the reduced prospect of parole had an effect on issues of deterrence, the prospect here of rehabilitation, or any consequences for the respondent's family or dependants.

36 Moreover, and contrary to the respondent's submissions, the common law principles derived from the decision of this Court in *Hoare* and the intermediate court decisions described above are of utility.⁶²

37 That is because the logic behind those principles is equally applicable here. Thus, it remains the case that issues of speculation and remoteness preclude

60 (2019) 268 CLR 1.

61 (2019) 268 CLR 1 at 18 [21]; to similar effect see also *Knight v Victoria* (2017) 261 CLR 306 at 323-324 [29].

62 The relevance of the common law principles was confirmed in *Johnson v The Queen* (2004) 78 ALJR 616 at 622 [15]; 205 ALR 346 at 353.

consideration of the prospects of parole in discharging the sentencing task. It would be practically impossible for a court to predict what "exceptional circumstances" might exist in the years ahead which might, to the Attorney-General's satisfaction, justify the making of a parole order. That judgment is to be contrasted with a court's appreciation of the seriousness of the offending and the conditions of imprisonment known to it at the time of sentencing. Such matters properly bear upon the sentencing task. That conclusion is fortified by the very terms of s 19ALB, which may be triggered by events which take place after the completion of an offender's criminal trial. A person might, for example, make statements supporting terrorist acts for the purpose of s 19ALB(2)(c), but only after they have been sentenced, and in circumstances where a court could not have foreseen the making of such statements at the time of sentencing.

38 To similar effect, the concerns of *Hoare, Minogue* and the other authorities referred to above with distinguishing between the function of the executive and that of a court, and with the need to ensure that sentencing, correctly determined in accordance with established principle (and here with the terms of s 16A), is not then distorted by best guesses at the prospect of parole, do, with respect, apply with equal force to this case.

39 It follows that the Court of Criminal Appeal erred in determining that the respondent's reduced prospects of securing release on parole constituted a species of burden that was relevant in applying s 16A of the *Crimes Act*. The respondent's sentence should not have thereby been reduced.

40 For the foregoing reasons the appeal should be allowed. The orders of the Court of Criminal Appeal should be set aside and in lieu thereof it should be ordered that leave to appeal against sentence be granted but the appeal be dismissed.

JAGOT J.

The appeal

41 Section 19ALB(1) of the *Crimes Act 1914* (Cth) provides that the Commonwealth Attorney-General must not make a parole order in relation to certain classes of persons unless satisfied that exceptional circumstances exist to justify the making of a parole order. This appeal concerns whether a sentencing judge erred in sentencing the respondent without taking into account the likelihood (or lack thereof), by reason of s 19ALB, that the respondent would be granted parole in the future.

42 For the reasons which follow, the sentencing judge in the District Court of New South Wales (Judge Baker SC) did not err by not considering s 19ALB in sentencing the respondent. Rather, the Court of Criminal Appeal of New South Wales (Basten A-JA, Davies and Cavanagh JJ agreeing) erred in concluding that the sentencing judge, in not considering s 19ALB, erred and that, when considered, s 19ALB warranted the imposition of a lesser sentence than that imposed by the sentencing judge.⁶³

Background

43 The respondent was charged on indictment on two counts of engaging in hostile activity in a foreign State, namely Syria, with the intention of achieving one or more specified objectives contrary to s 6(1)(b) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). Following his arrest, the respondent was refused bail and, because he was classified as an extreme high risk restricted ("EHRR") inmate, was held in the High Risk Management Correctional Centre ("the HRMCC") at Goulburn. There was evidence before the sentencing judge that conditions of imprisonment at the HRMCC were "extremely onerous" compared to conditions under which other prisoners, not classified as EHRR, were held in custody. The respondent pleaded guilty to one count, the other having been discontinued.

44 The sentencing judge sentenced the respondent to a term of imprisonment consisting of a non-parole period of three years⁶⁴ and a head sentence of five years commencing from 24 August 2020. In both fixing the total sentence and setting the commencement date of the sentence, the sentencing judge took into account, amongst other things, that the respondent had been held in custody in the extremely onerous conditions at the HRMCC. The head sentence was due to expire on

63 *Hatahet v The King* [2023] NSWCCA 305 at [89], [90], [91].

64 Section 19AB(1) of the *Crimes Act 1914* (Cth) required the sentencing judge to fix a non-parole period, subject to certain immaterial exceptions.

23 August 2025 and the respondent first became eligible for parole on 23 August 2023.⁶⁵

45 The respondent appealed against sentence on the ground that it was manifestly excessive. The Court of Criminal Appeal granted the respondent leave to appeal, allowed the appeal, and sentenced the respondent to a term of imprisonment of four years, with a non-parole period of three years, the sentence having commenced on 24 August 2020. As a result, the head sentence will expire on 23 August 2024.

46 In allowing the appeal, the Court of Criminal Appeal rejected the contention that the sentence the sentencing judge imposed was manifestly excessive but held that the sentencing judge erred in principle by not taking into account the respondent's "ineligibility for release on parole" by reason of s 19ALB of the *Crimes Act*, so that the respondent "will continue to suffer more onerous conditions of imprisonment",⁶⁶ which the Court of Criminal Appeal concluded warranted a reduction in the sentence imposed by the sentencing judge. In re-exercising the sentencing discretion, Basten A-JA said:⁶⁷

"Where there has otherwise been no error established on the part of the sentencing judge, there is no basis to interfere with the non-parole period of 3 years. However, the additional term of two years should be reduced to one year, being a sentence expiring on 23 August 2024. That variation recognises that the [respondent] will not get parole when ordinarily he would likely have obtained parole before the end of his sentence. If compassionate grounds amounting to exceptional circumstances arise within that period there is a chance he will obtain conditional release, but the chance is low and his liberty will then be subject to supervision."

Statutory provisions

47 This appeal concerns provisions in Pt IB of the *Crimes Act* ("Sentencing, imprisonment and release of federal offenders"), containing ss 16 to 22A and including, most relevantly, s 19ALB. Section 19ALB of the *Crimes Act*, by s 19ALB(2), applies to three classes of persons, including, in s 19ALB(2)(c), a person who the Attorney-General is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of Pt 5.3 of the *Criminal Code* (Cth) ("Terrorism"). Basten A-JA said, and it is not

65 The Commonwealth Attorney-General refused the respondent parole on 21 August 2023.

66 *Hatahet v The King* [2023] NSWCCA 305 at [84].

67 *Hatahet v The King* [2023] NSWCCA 305 at [88].

in dispute, that when the respondent was sentenced "there would have been good reason to assume ... that the Attorney would be so satisfied in relation to the activities of the [respondent]".⁶⁸ Accordingly, when the respondent was sentenced, it was very likely that s 19ALB(1) would apply to him. Section 19ALB(1) provides:

"Despite any law of the Commonwealth, the Attorney-General must not make a parole order in relation to a person covered by subsection (2) unless the Attorney-General is satisfied that exceptional circumstances exist to justify making a parole order."

48 Section 19AL(1) of the *Crimes Act* is a "law of the Commonwealth" despite which s 19ALB(1) operates. Section 19AL(1) provides that:

"The Attorney-General must, before the end of a non-parole period fixed for one or more federal sentences imposed on a person, either make, or refuse to make, an order directing that the person be released from prison on parole (a *parole order*)."

49 Section 19ALA(1) specifies matters "that are known to the Attorney-General and relevant to the decision" to which the Attorney-General may have regard in making a decision under s 19AL. By s 19ALA(2), s 19ALA(1) does not limit the matters that the Attorney-General may consider in making a decision under s 19AL.

50 By s 19AB(1), a sentencing court is required to fix a single non-parole period in respect of a federal sentence of imprisonment as specified, unless satisfied that a non-parole period is not appropriate in accordance with s 19AB(3).

Consideration

51 Whether a sentencing judge is bound to consider the potential operation of s 19ALB on a person being sentenced to a term of imprisonment involves the proper construction of the provisions of Pt IB of the *Crimes Act*. If the allegedly relevant factor is not expressly stated to be relevant (as in this case), its relevance is to be determined "by implication from the subject-matter, scope and purpose of the Act".⁶⁹ Further, if "a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the

68 *Hatahet v The King* [2023] NSWCCA 305 at [46].

69 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.

factors to which the decision-maker may legitimately have regard".⁷⁰ In this case, the subject-matter, scope and purpose of the *Crimes Act* indicate that, in imposing a sentence of a term of imprisonment, a sentencing court is not to consider the likelihood, or lack thereof, that a person may be granted parole, including by operation of s 19ALB of the *Crimes Act*.

52 The fundamental obligation of a sentencing court is stated in s 16A(1) of the *Crimes Act* and is that:

"In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence."

53 Section 16A(2) then provides that:

"In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

..."

54 The matters nominated in s 16A(2) do not include the likelihood, or lack thereof, of the person obtaining parole. This is unsurprising as, at the time of sentence and the fixing of a non-parole period, a sentencing judge will not be able to assess the potential for the person to be granted or refused parole other than by reference to some of the factors referred to in s 19ALA(1). Many of the factors specified in s 19ALA(1), however, concern matters which cannot be known or fully known at the time of sentence (for example, the risk to the community of releasing the person on parole (s 19ALA(1)(a)), the person's conduct while serving their sentence (s 19ALA(1)(b)), and whether the person has satisfactorily completed programs ordered by a court or recommended by the relevant State or Territory corrective services or parole agency (s 19ALA(1)(c))).

55 This is consistent with the position at common law that a sentencing court is not to consider the likelihood, or lack thereof, of a person being granted release after having served a non-parole period. The reasons for this position at common law have been variously expressed, including: (a) as a matter of principle, it is necessary to fix the head sentence first, lest that sentence, being the term "which justice according to law prescribes, in the estimation of the sentencing judge, for the particular offence committed by the particular offender",⁷¹ be influenced by speculation as to the prospect of release of the person at the expiry of a minimum

70 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

71 *Morgan* (1980) 7 A Crim R 146 at 154.

sentence or non-parole period; (b) release on parole or after a minimum period has expired depends on the exercise of discretion by the Executive by reference to circumstances as they exist at that time, which cannot be known to the sentencing court;⁷² (c) the exercise of the discretion by the Executive "is neither predictable nor controllable by the sentencing judge", and a person's liberty should not depend on speculation "no matter how well grounded";⁷³ (d) in sentencing, "the Court is not concerned with remissions for good conduct nor with the policy of the Parole Board", as the duty of a sentencing judge is in the first place to determine what is the appropriate term of imprisonment⁷⁴ to be imposed;⁷⁵ and (e) a sentencing court could only give effect to a consideration of the likelihood of a person being released earlier than the maximum sentence imposed by "increasing the length of the term of imprisonment that [the sentencing court] would otherwise have imposed", which "would not only be contrary to principle but also contrary to the clear intention of Parliament" to impose the sentence "which in all the circumstances [the sentencing court] considers to be appropriate to the offence and to the offender".⁷⁶

56 By analogy, the only way a sentencing court could give effect to the taking into account of s 19ALB(1) (which prevents the Attorney-General from making a parole order unless satisfied that exceptional circumstances exist to justify the making of such an order) is to decrease the head sentence of imprisonment that the sentencing court otherwise would have imposed (as, indeed, the Court of Criminal Appeal did). In so doing, however, the sentencing court will not, contrary to s 16A(1) of the *Crimes Act*, impose a sentence "that is of a severity appropriate in all the circumstances of the offence".

57 Further, the likelihood, or lack thereof, of the offender being granted a parole order for any reason, including by operation of s 19ALB, cannot be a circumstance of the offence within the meaning of s 16A(1) as that potential cannot be known at the time of sentencing and is outside the control of the sentencing court. The "expectation (now a reality)"⁷⁷ of the respondent being "ineligible" for

72 See, for example, *R v Yates* [1985] VR 41 at 47; *Re Jackson* [1997] 2 VR 1 at 3.

73 *Morgan* (1980) 7 A Crim R 146 at 156.

74 Assuming, in accordance with s 17A(1), that the sentencing court is satisfied that no other sentence is appropriate in all the circumstances of the case.

75 *R v Yates* [1985] VR 41 at 44-45. See also *Hoare v The Queen* (1989) 167 CLR 348 at 353-356 (albeit in the context of remission).

76 *R v Yates* [1985] VR 41 at 46.

77 Due to the Commonwealth Attorney-General refusing the respondent parole on 21 August 2023.

release on parole, which the Court of Criminal Appeal relied upon as justifying the reduction of the head sentence,⁷⁸ was and remains speculative. When imposing the sentence, the sentencing judge could not have known that the Attorney-General would refuse to make a parole order (as the Attorney-General did on 21 August 2023). Section 19ALB(1) undoubtedly makes it more difficult for a person to whom it applies to obtain a parole order, but a sentencing court can no more speculate about whether, at the time a person becomes eligible for parole, there will or will not exist circumstances the Attorney-General is satisfied are exceptional under s 19ALB(1) than it can about the person's conduct while serving their sentence.

58 Additionally, there is no logical connection between a speculated or well-founded lack of potential for an offender to obtain a parole order by reason of s 19ALB(1) and the offender's conditions of imprisonment. The Court of Criminal Appeal reasoned that, given the respondent's "ineligibility" for release on parole, the respondent "will continue to suffer more onerous conditions of imprisonment".⁷⁹ This can mean only that the respondent will continue to suffer more onerous conditions of imprisonment for the period of two years after the expiry of the non-parole period (three years) and before the expiry of the head sentence (five years) compared to the conditions of imprisonment that would be experienced by an offender not classified as EHRR. This comparison exposes that the reason the respondent will continue to suffer more onerous conditions of imprisonment is his classification as EHRR, not the application to him of s 19ALB(1). The sentencing judge properly considered and gave weight to the consequences of the respondent's classification as EHRR in determining the sentence.

59 Finally, and perhaps most importantly, that the only way a sentencing court could give effect to the taking into account of s 19ALB(1) is by decreasing the sentence it otherwise would have imposed as the sentence of a severity appropriate in all the circumstances of the offence as required by s 16A(1) of the *Crimes Act* is important. It means that taking into consideration s 19ALB(1) in imposing a sentence of imprisonment would directly conflict not only with s 16A, but also with the legislative intention underlying the enactment of s 19ALB itself. The legislative intention was to create a presumption against the release of certain offenders (those "who have demonstrated support for, or have links to, terrorist activity"⁸⁰) in order to satisfy "the overriding need to protect the community".⁸¹ If

78 *Hatahet v The King* [2023] NSWCCA 305 at [84]-[85].

79 *Hatahet v The King* [2023] NSWCCA 305 at [84].

80 Australia, Senate, *Parliamentary Debates* (Hansard), 1 August 2019 at 1425.

81 Australia, Senate, *Parliamentary Debates* (Hansard), 1 August 2019 at 1425.

the Court of Criminal Appeal is correct in its construction of the legislative provisions, rather than the community being protected by the presumption against such offenders being granted parole other than in exceptional circumstances (so that they are not released from prison before expiry of their head sentence), the community will be exposed to such offenders being sentenced for lesser periods than would be the case but for the enactment of s 19ALB. Subversion of legislative intention of this kind, by a process of statutory construction, is impermissible.

60 Accordingly, in exercising the sentencing discretion in accordance with s 16A of the *Crimes Act*, a sentencing court must not take into account the potential or lack of potential for the offender to obtain parole including by reason of s 19ALB of the *Crimes Act* applying (or likely applying) to the offender.

61 The appeal should be allowed. The orders proposed in the reasons for judgment of Gordon A-CJ, Steward and Gleeson JJ should be made.

62 BEECH-JONES J. Subject to what follows, I agree with the judgment of Gordon A-CJ, Steward and Gleeson JJ.

63 The dispositive part of the judgment of the New South Wales Court of Criminal Appeal the subject of this appeal is the following passage, which identified the supposed error on the part of the sentencing judge:⁸²

"The expectation (now a reality) that parole would be refused, combined with the fact that the [respondent] has served most of his sentence in the HRMCC (which was taken into account by the sentencing judge), means that he has suffered a *considerably more onerous period of imprisonment* and, given his ineligibility for release on parole, will continue to suffer *more onerous* conditions of imprisonment." (emphasis added)

64 The Court concluded that such consideration warranted a reduction in the sentence imposed by the sentencing judge, who took no account of "this application" of s 19ALB of the *Crimes Act 1914* (Cth).⁸³

65 At the hearing of this appeal, attention was focused on the identification of the comparator deployed by the Court to reach the conclusion that the respondent had suffered a "considerably more onerous period of imprisonment" and would continue to so suffer for the balance of his period of imprisonment.⁸⁴ If this conclusion was only referable to a comparison between the respondent's custodial conditions and those experienced by the general prison population, then it involved an orthodox approach to identifying the potentially harsher effect of the *day-to-day conditions* of incarceration on a particular offender compared to the general prison population, which can be considered under s 16A of the *Crimes Act*.⁸⁵ That was the approach of the sentencing judge, who found that the respondent's custodial conditions were "extremely onerous and significantly more so than the general prison population". However, if the comparator deployed by the Court was the day-to-day custodial conditions of the general prison population, then it could not support a finding of error on the part of the sentencing judge.

66 Senior counsel for the respondent contended that the above passage referred to the respondent's sentence being more onerous than what was envisaged by the sentencing judge. Another possibility is that the reference in the above passage to

82 *Hatahet v The King* [2023] NSWCCA 305 ("*Hatahet*") at [84].

83 *Hatahet* [2023] NSWCCA 305 at [85].

84 *Hatahet* [2023] NSWCCA 305 at [84].

85 See, for example, s 16A(2)(k), (m).

the respondent serving a "more onerous period of imprisonment"⁸⁶ was to the respondent's sentence being likely to be more onerous than either the general prison population serving sentences for federal offences or a hypothetical offender serving the same sentence, because the release of (at least some of) those prisoners on parole is not governed by s 19ALB of the *Crimes Act*. Either way, even when combined with the harsh day-to-day custodial conditions the respondent experiences, the above passage is not stating any more than that the respondent is likely to serve a greater proportion of his overall sentence in custody than those prisoners in custody for federal offences who are not subject to s 19ALB. This observation is most likely correct, but it is also irrelevant. It is irrelevant because, as the judgments of Gordon A-CJ, Steward and Gleeson JJ on the one hand and Jagot J on the other demonstrate, as with the approach to remissions, the fixing of the total sentence and the fixing of the non-parole period are not to be undertaken by reference to an assessment of whether or not an offender is likely to be released on parole at the conclusion of their non-parole period.⁸⁷ Otherwise, there is no basis for concluding that the sentencing judge sentenced the respondent on the basis that he would be released at the conclusion of his non-parole period.

67 The error of the Court is exemplified by the approach their Honours adopted in fixing the appropriate sentence to be imposed on the respondent, as revealed by the following:⁸⁸

"Where there has otherwise been no error established on the part of the sentencing judge, there is no basis to interfere with the non-parole period of 3 years. However, the *additional term* of two years should be reduced to one year, being a sentence expiring on 23 August 2024. That variation recognises that the [respondent] will not get parole when ordinarily he would likely have obtained parole before the end of his sentence. If compassionate grounds amounting to exceptional circumstances arise within that period there is a chance he will obtain conditional release, but the chance is low and his liberty will then be subject to supervision." (emphasis added)

68 This passage reveals a number of additional material errors of relevance to this appeal. First, it refers to an "additional term", which appears to be a phrase derived from the now repealed *Sentencing Act 1989* (NSW).⁸⁹ Under that

86 *Hatahet* [2023] NSWCCA 305 at [84].

87 See reasons of Gordon A-CJ, Steward and Gleeson JJ at [21]-[28], [38]-[39] and reasons of Jagot J at [54]-[55].

88 *Hatahet* [2023] NSWCCA 305 at [88].

89 Section 4(1).

legislation, a court was required to set a "minimum term of imprisonment" and an "additional term during which the [offender] may be released on parole".⁹⁰ There is no equivalent component of a sentence imposed for a federal offence under the *Crimes Act*. One can identify a period of time between the expiry of the non-parole period and the expiry of the sentence, but that period has no statutory status or particular significance under the *Crimes Act*. The closest analogy in the *Crimes Act* to the concept of the "additional term" that appears to have been used in the above passage is the statutory phrase "parole period".⁹¹ However, subject to an immaterial exception, that phrase only refers to the period of a sentence that an offender serves in the community commencing on their *release* from prison on parole.⁹² This only serves to confirm that any non-parole period fixed under s 19AB of the *Crimes Act* does not represent a period of time the expiry of which yields some entitlement, unconditional or otherwise, on the part of an offender to be released. Instead, it is the "period before the expiration of which, having regard to the interest of justice, [an offender] cannot be released".⁹³

69 Second, the above passage reveals an approach to re-sentencing by an intermediate court of appeal that is inconsistent with *Kentwell v The Queen*.⁹⁴ *Kentwell* held that, once any error on the part of the sentencing judge is established, the court must exercise the sentencing discretion afresh.⁹⁵ If the exercise of that discretion results in a conclusion that a lesser sentence is "warranted in law", then the court must re-sentence the offender.⁹⁶ The independent exercise of the sentencing discretion that the court is obliged to undertake if it finds error cannot be performed by "merely adjusting the sentence actually passed to allow for the error identified".⁹⁷ However, in observing that there was no separate error in the fixing of the respondent's non-parole period, leaving the non-parole period unaltered and then shortening the period between the expiry of the non-parole

90 *Sentencing Act 1989* (NSW), s 5(1).

91 See, for example, *Crimes Act 1914* (Cth), s 16F(1)(a).

92 *Crimes Act*, s 19AMA.

93 *Knight v Victoria* (2017) 261 CLR 306 at 318 [8].

94 (2014) 252 CLR 601 ("*Kentwell*").

95 *Kentwell* (2014) 252 CLR 601 at 617-618 [42].

96 *Kentwell* (2014) 252 CLR 601 at 618 [42]-[43], see also at 616 [38], citing *R v Simpson* (2001) 53 NSWLR 704 at 720-721 [79].

97 *Kentwell* (2014) 252 CLR 601 at 617 [40], citing *Baxter v The Queen* (2007) 173 A Crim R 284 at 287 [19]; see also *Kentwell* (2014) 252 CLR 601 at 617-618 [42].

period and the expiry of the sentence, the Court of Criminal Appeal did exactly that.

70 Had the Court undertaken the re-sentencing task in this case in accordance with *Kentwell*, it would have exposed the error in the earlier part of its reasoning in relation to hardship and non-parole periods.⁹⁸ *Kentwell* required the Court to address the criteria in s 16A of the *Crimes Act* in determining the respondent's sentence and fixing the appropriate non-parole period under s 19AB, bearing in mind the significance of that period as described above. If that task had been undertaken with that understanding and otherwise in accordance with the *Crimes Act*, it would have confirmed that what the Court referred to as the "additional term" was merely the arithmetical difference between the total sentence and the non-parole period. As noted, that period has no statutory status under the *Crimes Act* and cannot be adjusted by reference to an assessment of the likelihood of an offender being released on parole.

71 Had the sentencing discretion been exercised in a manner consistent with *Kentwell*, it would have also confirmed that, while individual hardship occasioned to an offender from their custodial conditions could be considered as part of the process of "instinctive synthesis"⁹⁹ undertaken in determining the sentence and fixing any non-parole period, such hardship cannot be somehow isolated so as to warrant a reduction of the "additional term". Instead, the effect of the Court's approach was to fix a new total sentence of four years by starting with the non-parole period of three years imposed by the sentencing judge and then adding a reduced "additional term" of one year on the basis that the respondent was unlikely to be released at the end of his non-parole period. This involved a reasoning process that did not conform with the *Crimes Act*.

72 The Court of Criminal Appeal was wrong to find error on the part of the sentencing judge and erred in its approach to re-sentencing. The orders proposed by Gordon A-CJ, Steward and Gleeson JJ should be made.

98 *Hatahet* [2023] NSWCCA 305 at [84].

99 *Markarian v The Queen* (2005) 228 CLR 357 at 378 [51], see also at 386 [70].