THE COURT OF APPEAL

Record No: 149/2022

Edwards J.
Whelan J.
Donnelly J.

Between/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

LISA SMITH

APPELLANT

JUDGMENT of the Court delivered by Mr Justice Edwards on the 8th of March, 2023.

Introduction

1. Following a trial in the Special Criminal Court (i.e "SCC") the appellant was convicted on the 30th May 2022 of Count No. 1 on the indictment, that of an offence of membership of a terrorist group which is an unlawful organisation contrary to ss. 6(1)(b)(i) and 7(2) of the Criminal Justice (Terrorist Offences) Act 2005 (i.e "the Act of 2005"), between the 28th of October 2015 and the 1st of December 2019 inclusive, outside of the State and which if committed in the State would constitute an offence under s. 21 of the Offences Against the State Act 1939 (i.e. "the Act of 1939") as amended by s. 5 of the Act of 2005.

2. The offence was particularised as membership of an organisation styling itself the Islamic State of Iraq and the Levant ("ISIL"), also known as Dawlat al-Iraq al-Islamiyyah, Islamic State of Iraq ("ISI"), Islamic State of Iraq and Syria ("ISIS") and Dawlat al-Islamiyyah fi al-Iraq wa al-Sham otherwise known as "Daesh", and the Islamic State in Iraq and al-Sham.

3. The SCC found the appellant not guilty of Count No. 2 on the indictment, that of the attempted financing of terrorism, contrary to ss. 13(4) and 8(b) of the Act of 2005.

4. On the 22nd of July 2022 the appellant was sentenced by the SCC to a term of imprisonment of 15 months in relation to Count No.1, back dated to 21st June 2022 to account for time spent in custody.

5. The appellant has appealed against the severity of her sentence.

Evidence adduced at trial and the main findings of fact.

6. The appellant's trial in the SCC lasted 37 days in total, spread intermittently between the 25th of January 2022 when the case was opened, and the 22nd of July 2022 when she was sentenced. The SCC delivered its verdict convicting the appellant on the 30th of May 2022, and that court's lengthy judgment (running to 42 pages of transcript) contains the findings of fact upon which it principally relied for the purposes of sentencing. In circumstances where the trial court had made extensive findings of fact in its said judgment, there was no further evidence adduced amounting to a rehearsal of, or summarisation of, the facts, in connection with the subsequent sentencing of the appellant; although brief evidence was heard from a Garda Sergeant Fiona Morrison on the 11th of July 2022 confirming that the appellant had no previous convictions and that she had been compliant with the terms of her bail. The SCC did, however, receive and consider a number of reports submitted on behalf of the appellant (to which more detailed reference will be made later in this judgment), and also heard a plea in mitigation from counsel on behalf of the appellant.

7. In setting out the facts as established in evidence we will of course reference the specific findings of the SCC as set out in its judgment of the 30th of May 2022. However, where we consider it helpful to do so either for completeness, or to provide better context, we will also refer to other evidence heard at the trial that the SCC either did not find it necessary to specifically reference, or perhaps only felt it necessary to reference briefly.

8. We should start by observing that the Irish Defence Forces as statutorily structured are comprised of a Permanent Defence Force (PDF) and a Reserve Defence Force (RDF) (formerly the FCA). The PDF in turn is comprised of the Army, the Aer Corps, and the Naval Service. The SCC received evidence that the appellant, who is originally from Dundalk in County Louth, joined the PDF at the age of 19 years and served for 10 years between 2001 and 2011. She initially served for 5 years as a private soldier in the Army before transferring to the Aer Corps where she served for a further 4 years before finally returning to serve in the transport section of the Army for approximately one further year. While serving in the Aer Corps her duties included acting as a flight attendant on the government jet.

9. The SCC heard evidence that in 2011 the appellant converted to Islam and due to perceived inconsistencies between the demands and requirements of her faith and her professional role in the PDF, including the refusal of her application to be permitted to wear a hijab or head covering while on duty, she applied for discharge from the PDF which was granted in November of the same year.

10. The SCC heard evidence that a Ms. Carol Karimah Duffy was an influential person in the appellant's life in 2010 and for a time thereafter until they eventually fell out. Ms. Duffy testified at the trial that she had known the appellant and her family when living in Dundalk as a child but had lost contact with her during the subsequent years. Ms. Duffy was herself a convert to Islam and a Salafist Muslim, explained by the witness in cross-examination as a Sunni Muslim who follows the Salaf, being the traditions and lifestyle of the companions of the prophet Muhammad, (and according to another witness, a Ms.

Gillian McNicoll, those of the prophet's righteous forebears) who are believed to exemplify how best to practice Islam. Ms. Duffy was reacquainted with the appellant when she received a phone call from the Mosque situated across the road from her residence, informing her that an Irish woman, the appellant, was looking to convert to Islam. Ms. Duffy invited the appellant to attend group classes or teaching circles ("halaqahs") in the Mosque to facilitate her instruction on Islam. The halaqahs were based on the Quran, the Hadiths (which Ms. Duffy explained comprise narrations in verse from the time of the prophet Muhammad describing how the prophet practiced his faith) and the Sunnah (a model for Muslims to follow based on the traditions and practices of the prophet Muhammad).

11. Ms. Duffy gave evidence that the appellant did not attend the halaqahs very often as her politicised views on Islam, and in relation to "Jihad" (an Arabic word which literally means "striving" or "struggling"), did not align with those of the other women in the group. Under cross-examination, Ms. Duffy explained there is a distinction between personal spiritual Jihad and Holy War Jihad, and it was the latter, what the witness characterised as "*a harsh end of Islam*", that the appellant was interested in. The witness stated that the appellant was interested in discussing topics such as Al-Qaeda, whether suicide bombings were justified, polygamy, Holy War Jihad, being a "Shaheed" (a martyr for Islam) and how honourable it would be to have a husband who was a Shaheed. In circumstances where the other participants in the halaqahs did not take well to the appellant, because of views she was expressing, Ms. Duffy then began giving the appellant instruction in Islam at her home. The appellant attended three classes during this period.

12. The SCC further heard evidence that after some time the appellant moved into the residence of Ms. Duffy in Williamson's Place, Dundalk as she was experiencing accommodation difficulties at her former rented address. The evidence was that the appellant's landlord wanted to get back the flat she was renting, and she didn't think she could live as a Muslim if she returned to live with her mother. In those circumstances Ms. Duffy offered that she could come and live with herself and her husband.

13. The witness stated that within a month of accepting Islam the appellant was very keen to get married and subsequently at the end of 2010 she developed a relationship with a friend of Ms. Duffy's husband, a Mr. Samir Slimani. There was a Mosque blessing between herself and Mr. Slimani. However, the marriage was not registered in the State's civil marriage register, as Mr. Slimani's immigration status was irregular inasmuch as he was not registered with the Irish Naturalisation and Immigration Service (INIS) and did not have the necessary documents. Ms. Duffy stated in court that the union lasted just a couple of weeks as the appellant felt that Mr. Slimani was not religious enough. Following the breakdown of the relationship the appellant returned in 2011 to live with Ms. Duffy. The witness stated that the appellant then expressed a wish to be married again quickly to a religious man. However, she (Ms. Duffy) had counselled against "*jumping straight in with somebody who is like that.*" The witness said that thereafter the appellant became "*kind of withdrawn*", and it emerged that she was talking to people online about "*the stuff*

she was really interested in". Ms. Duffy said that the appellant, influenced by a person she was communicating with online, became "*more argumentative about the things that us as Muslims we do*", and indeed became offensive to the point where Ms Duffy said, "*I just couldn't listen to it*".

14. There was evidence that during this time the appellant, influenced by her online contact, had become dismissive of the lifestyle of Ms. Duffy and her husband and critical of how they practiced their faith. After a time, the appellant obtained an apartment of her own and left the Duffys' house. Contact thereafter between herself and Ms. Duffy became only sporadic. They eventually had a complete falling out, as a result of which Ms. Duffy stopped all contact between them.

15. In the course of her evidence Ms. Duffy said that she viewed the appellant as naïve as she blindly followed what was being said online and did not actually study or read texts on Islam. She also viewed the appellant as vulnerable in that her interest in the faith may have been due to her being heartbroken and to her believing that if she was a Muslim, the man she was interested in would then want to be in a relationship with her.

16. The SCC later heard evidence that in October 2012 the appellant made "Hajj" (the undertaking of a pilgrimage to the Sacred Mosque at Mecca, constituting one of the religious duties of Islam).

17. During the appellant's trial, evidence was also given by a Ms. Gillian McNichol, a fellow convert to Islam, who had been a teacher at the Islamic Cultural Centre of Ireland (ICCI) in Clonskeagh in Dublin and who recalled the appellant from her time teaching there. The witness was unsure as to the exact date when she first met the appellant but thought it could have been between 2010 – 2013. At any rate, that meeting took place during a halaqah at the Clonskeagh Mosque at which she was teaching. She recalled the appellant because the appellant had approached her to discuss a dream that she (the appellant) claimed to have had about the prophet Muhammad.

18. The circumstances in which the witness came to be a teacher at the ICCI emerged during the witness's cross-examination. She explained that she had studied the two foundations of Islam, being the Quran and the Sunnah, for seven years with the Women's Institute for Islamic Studies, an online organisation in Egypt, including studying the basics of Tawhid (the Islamic theology of the oneness of God) and Aqidah (the Islamic creed or belief system), and had learned to read Arabic. At a certain point she had become uncomfortable with some of the teaching being conducted at the Mosques in Clonskeagh and on the South Circular Rd, in Dublin, believing that the ideology being promoted was "*more akin to Jihadism*" and that it was "*too ideological*" and "*too divisive*". Whether or not she was correct in her stated belief, that was her evidence. However, it should be recorded that the SCC also noted and accepted the evidence given at trial by Sheikh Halawa, Ireland's most senior Muslim cleric and Imam of the Islamic Cultural Centre in Clonskeagh to the effect that (quoting the SCC's judgment) "*Islamic State had nothing to do with Islam for the reason that their interpretation of Islam was very isolated and not accepted by any of the Muslims, was exclusivist, was superficial and because they*

adopted a very violent methodology in order to impose their ideology on others". At any rate, in circumstances where Ms. McNichol had studied to the level indicated, she believed she was qualified to teach and had something to offer Muslim women in that respect, namely to teach an interpretation of Islam that better aligned with her understanding of the true nature of it than that which was then being taught by some in Dublin mosques. She therefore approached the women's co-ordinator at the Mosque in Clonskeagh and offered her services, which were accepted.

19. The witness testified that while teaching at Clonskeagh she participated in a Facebook group in which she connected with other Muslim sisters around the world. At some point, recalling her encounter with the appellant, she had checked out the appellant's Facebook page and was alarmed at what she saw. She was unsure as to when this was, expressing difficulty in placing it before or after the appellant had made Hajj, but remembered that the page bore the avatar of a man on a white horse holding an Islamic State flag which she believed signified the appellant's ideology stating "[…] *that's how you know the way that that person is on. So, you know their ideology is upon that particular teaching*", later adding, "*[i]t's a known fact that this is the banner of someone or a group who is following this particular ideology*".

20. Later in the trial the SCC heard from an expert in Middle East political and religious conflict, a Dr Florence Gaub, who confirmed that Islamic State was very skilled in using traditional Islamic images to cloak itself in the Islamic religion. Thus, she explained, the white horse features in Islamic State propaganda, as it is a significant image in Islam based upon a narrative in Islamic scholarship in which the prophet Muhammad was said to have flown through the night from Mecca to Jerusalem upon a flying white horse.

21. Ms. McNichol expressed agreement with defence counsel in the course of being cross-examined that there was an element of danger in seeking information about Islam online, stating that there were "*a lot of misguided groups out there*" and that these groups are telling people who are looking for guidance that "*[…] this is the right way, no this is the right way, and they're given all sorts of different opinions and translations and stuff like this which is obviously misleading to them and it also leads to a lot of misguidance, yes.*"

22. It was against this background in relation to the personal history of the appellant that the SCC heard and accepted evidence that a terrorist organisation known as the Islamic State of Iraq and Syria ("Islamic State" or "ISIS") had developed and evolved over a period of years following after the invasion of Iraq by an international coalition of forces in 2003. In that regard the SCC accepted the history of this organisation as outlined in evidence given by Dr Gaub at the trial. The SCC expressed itself to be satisfied that this is the organisation, membership of which was criminalised by the relevant provisions of the Act of 2005. The court further heard and accepted evidence that in 2010 Abu Bakr al-Baghdadi took over leadership of ISIS and that following a period that has become known as the Arab Spring, which occurred across the Middle East and North Africa, there was unrest, national conflict, violence and government repression in Syria from 2011 onwards.

23. Further evidence was received and accepted that at or about the time that the appellant made Hajj with a group of women from the Mosque in Clonskeagh (which as stated earlier was in October 2012), she had developed an acquaintanceship online with an American national and fellow convert to Islam, a Mr. John Georgelas, (also known variously as Yahya Abu Hassan, Yahya Al-Bahrumi, Ioannis Georgeilakis and Abu Hassan). The evidence was that Mr. Georgelas and his wife, Ms. Tanya Joya Choudhury, had moved to Egypt in 2011.

24. The SCC heard and accepted evidence that in September 2013 the appellant travelled initially to Egypt where she met Mr. Georgelas, his wife, and their associate a Mr. Frederick Collier who was a German national, and from there the appellant had travelled with Mr. Georgelas and his wife to Syria via Turkey where they remained for a few weeks. Ms. Choudhury then left Syria following a series of disagreements with her husband, travelling first to the United Kingdom and then on to the United States of America. However, Mr. Georgelas had remained in Syria with the appellant.

25. While there, the appellant married a Tunisian national named Ahmed Mukhrani who was a member of a Jaish-i-Mohammed, a militant group that had been operating in Syria at that time. At the end of 2013, the appellant and her husband travelled to Tunisia, following which the appellant returned to Ireland alone in September 2014 for medical treatment.

26. Following the fall of Raqqa in Syria in January 2014, and of Mosul in Iraq in June 2014, the group known as Islamic State announced the re-establishment of a Caliphate with Abu Bakr al-Baghdadi as its Caliph, and further claimed global authority over all people of Muslim faith. Mr. Al-Baghdadi called upon followers of Islam to emigrate as a matter of religious obligation to areas under the group's control, i.e., to make "Hijrah". The SCC found, based on evidence that it had received, that Hijrah or migration (and also "Bay'ah", the swearing of an oath of allegiance to a Caliph, which will be discussed later) were longstanding and venerable Islamic concepts which were appropriated for the purposes of the Islamic State organisation.

27. The group also divided the world into areas of adherence and non-adherence. prescribing that those not of Muslim faith ("kuffar") and those of Muslim faith who did not share the specific ideology and religious interpretation favoured by the group ("apostates"), be subjected to violence up to and including death. The SCC was satisfied that the acquisition of foreign adherents was of specific importance to the Islamic State organisation at that time, both in terms of their contribution to the structures and operations of the organisation and the publicity or propaganda value to be derived by it from foreigners travelling long distances to supply their services to the Caliphate.

28. Further, while it was accepted that foreign women were somewhat constrained in the roles that they could perform when residing in areas under the control of the organisation, the SCC was satisfied that such women nevertheless had a particular publicity and media value to the organisation. It was also accepted that the Islamic State organisation attributed value to women as mothers of future citizens, particularly to those who were sufficiently attracted by it to travel long distances to take up residence there.

29. In its judgment on the 30th of May 2022 the SCC expressly found that "*[c]onsequently, travel to the territory controlled by the group in these circumstances constituted an explicit act of allegiance by Ms Smith to that group*". The circumstances in which the appellant made Hijrah and travelled to ISIS controlled territory in 2015 will be elaborated upon later in this chronology.

30. The SCC noted that the difficulty for foreigners of making Hijrah was ostensibly recognized by Mr. al-Baghdadi who referred to "*a Hadith concerning the special responsibility that arose in relation to travellers to the Caliphate.*" The SCC found confirmation of this when later considering a Facebook message from the appellant in response to an enquiry by her sister as to her wellbeing and safety after she had herself made Hijrah, in which she wrote "*No, well looked after by the Islamic State*", adding that she was there with many sisters from all over the world.

31. Returning to the chronological narrative, after the appellant had returned to Ireland from Tunisia for medical treatment in 2014 she continued online contact with Mr Georgelas and also with other members of the group with which she had been associating.

32. These included (i) a Mr. Robert Muza Cerantonio, (ii) a Mr. Isa Kocoglu , (iii) a Mr. Adam Brookman, and (iv) a Mr. Mishkat Sufyaan Islam, as well as (v) a Mr. Nadim Mufti Ahmed and (vi) the aforementioned Mr. Frederick Collier.

33. With respect to Mr. Georgelas, the SCC found that he was a significant influence on the appellant. The judgment records:

> "*Ms Smith knew this man well over a long time period in real life as well as online. We are satisfied that the full sweep of the evidence, including that of Ms Choudhury shows that Mr Georgelas was undoubtedly an adherent to and member of the Islamic State organisation long before the declaration of the caliphate in 2014. His membership was active and at a significant level. He was a propagandist and proselytiser on behalf of that terrorist group and his activities in that regard were clear and obvious to all of his family and close friends, including Ms Smith. No doubt he was very effective in these activities due to his obvious intelligence and erudition. His activities on behalf of Islamic State extended beyond advocacy. As noted above, he was injured in the course of paramilitary activities and was photographed with weapons in 2015, just prior to Ms Smith deciding to travel to Syria. Mr Georgelas had pleaded guilty in a Texas court in August 2006 to one count of unauthorised computer access and was sentenced to 34 months imprisonment. This related to infiltration of the computers of a Jewish American political action group.*"

34. The SCC also alludes in its judgment to evidence that Mr. Cerantonio had pleaded guilty in 2019 in the Supreme Court of Victoria, Australia to an offence of preparing a foreign incursion into the Philippines and was sentenced to 7 years' imprisonment.

35. It further noted that Mr. Isa Kocoglu had pleaded guilty in 2019 before the Supreme Court of Victoria to two offences contrary to the Crimes (Foreign Incursions and Recruitment) Act 1978, an Australian federal counter-terrorism statute, and was sentenced to 31 days' imprisonment.

36. Further, the appellant, while on a social media group chat on Facebook, details of which were received in evidence by the SCC, had attached to one of her postings a media article concerning Mr. Brookman with whom she had previously had Facebook exchanges, entitled "*Adam Brookman, Islamic State returnee will land in Australia today. The first alleged member of the Islamic State to return to Australia was being escorted into Sydney on Friday after giving himself up*." The SCC noted that there was no formal evidence before it of any criminal conviction relating to Mr. Brookman. Nevertheless, the court noted further discussions in the group chat about this event, with the appellant posting that Mr. Brookman had been forced to join ISIS but was against them, querying why he had come back, and observing "*But if they look through the history on FB, et cetera, they will definitely charge him*", and opining that "*he is facing 25 years*", demonstrating in the court's view that the appellant was "*clearly aware of the incriminating nature of their Facebook activities*."

37. There was evidence that Mr. Sufyaan, who was also a participant in the social media group chat, had urged fellow group members to exercise secrecy and discretion when discussing such issues online or when discussing the external activities of group members. In the SCC's assessment this demonstrated that this was not "*simply an innocent Facebook group interested in discussion of contemporary political and religious matters*."

38. The SCC found that the pronouncement of the Caliphate in June 2014 "*became a topic of intense discussion and interest for Ms Smith and her correspondents*." Considerable time at the trial was taken up with evidence concerning the appellant's internet and social media activities both before and after this event. The SCC noted that her internet discussions had been characterised by her counsel as polite, restrained and made in a spirit of discussion and of seeking answers to her reservations and enquiries. The SCC did not accept this, holding that her social media discourse evidenced her mind-set and citing numerous examples of what it characterised as "*totally unacceptable and inappropriate expressions and sentiments*".

39. The judgment records findings that:

> *"On the 14th of March 2013, Mr Georgelas underlined to her the prime importance of changing their governments and changing the beliefs of those closest to them. He called for punishment for not calling for the khilafah, for not fighting the enemy of Allah and for not making Hijrah. In reply, Ms Smith expressed her hope for a khilafah soon and that Allah would grant them victory. In that context she articulated it as a desire to be involved and her frustration with doing nothing.*

By July 2013, Mr Georgelas spoke of the German brother, presumably Mr Collier, distributing his literature about the khilafah in Syria. Ms Smith replied that it was nice to have someone on the inside, that she would do the same if she got there and that she wanted to go there for reasons other than getting married.

In the same month, on the We Hear We Obey page, she bemoaned the watered down version of Islam that she was getting, arguing that Christians and Jews never got their lands by peace and harmony. Also arguing that force and fighting were the only ways of getting things done in this world and adding that Hijrah was the first step.

Also in July, Mr Georgelas informed her that Mr Cerantonio was on the run and that a move to the Philippines to live under Sharia was off the agenda. She replied, "LOL," and prayed for his protection."

40. Importantly, the judgment records the nuanced finding that:

> "*Ms Smith's social media conversations during and after 2013 are not in themselves conclusive evidence of membership of Islamic State but firmly established the hardening of her attitudes leading up to and after her visit to Egypt and then Syria."*

41. The SCC found that it was clear that she was influenced in these matters not by Ms. Duffy or Ms. McNichol but by her internet correspondence with those previously mentioned, which continued up to and after the declaration of the Caliphate by Abu Bakr al-Baghdadi. The SCC's judgment records that:

> "*By the 23rd of June 2014 their online discussion continued with Ms Smith querying the propriety of ISIS mass executing Iraqi soldiers and of ISIS killing people walking down the street and in a taxi. Mr Georgelas informed her that they were commanded by Allah to strike fear to their enemies and beyond. In his view the purpose of scaring other Shia Muslims justified the killing of Shia soldiers. He stated that he had no problem cutting off their heads so that they would be disgraced in this life and tormented in the next. Ms Smith replied, "LOL, who cares about the soldiers?*"

42. After the declaration of the Caliphate, the appellant expressed her unease with it in further exchanges on the 1st of July. She then referred on the 8th of July to her husband's denial that Mr al-Baghdadi was his Caliph and to his refusal to give Bay'ah. The judgment goes on to record:

> "*On the 9th of July she copied an article that noted that Muslim scholars and movements from across the Sunni Islamic spectrum had rejected the caliphate declared by the Islamic State group. Mr Georgelas replied that the leaders and scholars have done nothing for the people for the past hundreds of years. Ms*

Smith took up this theme by agreeing that at least Mr Al Baghdadi had got up and done something while the rest just sat and talked.

In August Mr Georgelas reassured her about the good work of ISIS in Syria by destroying regime bases. In reply, Ms Smith regretted that her then husband was still showing no interest in making Bay'ah or Hijrah to the Islamic State.

On the 29th of August Nadim al Muhajeer posted on We Hear We Obey about the new release of Dabiq No.3, a call to Hijrah, accompanied by photographs of the cover and some interior pages. Ms Smith enquired, "Is it in Arabic on the website as well as English?"

By September she contemplated the possibility of making Hijrah without getting divorced. In the same month Ms Smith posted on the We Hear We Obey Facebook page enquiring whether the beheading of the journalist James Foley was fake or whether this had been confirmed by ISIS. This image is also visible in the photograph of the magazine previously posted on the 29th of August. One of the other users posted in response a picture relating to this event from Dabiq magazine issue three. Ms Smith posted, "How do you download or log into this magazine? Every time I can't." It will be recalled that Dr Gaub gave evidence that this edition of the magazine which was in effect the in house magazine of the Islamic State organisation was entirely devoted to the question of Hijrah.

In October she reposted a lengthy tract on whether Hijrah was allowed, "For women to go to Jihad"."

43. The SCC was satisfied that there was no room in any of these exchanges for confusion on her part as to the umbilical cord that joined Mr. al Baghdadi, the Caliphate declared by him and ISIS or the Islamic State organisation.

44. Moving into 2015, the judgment notes as an example of "*totally unacceptable and inappropriate*" sentiments expressed by the appellant that:

> "*On the 24th of June [2015] at 6.33 am, Ms Smith messaged the group, 'I've just seen there that the Islamic State kill spies by locking them in a cage and drowned them. Another four locked in a cage and fired upon by a rocket launcher, seriously, is this allowed in Islam?' One might have thought that this was a very good question to which the answer was patently in the negative. She continued, 'I'm just asking, is there a certain way to do things when it comes to killing and battles?'*
>
> *There followed lengthy blood thirsty and convoluted justifications for this extreme violence from the group members Nadim Mufti Ahmed and Mishkat Sufyaan Islam. Mishkat informed her of the concept of Qisas and stated that the Prophet was very harsh to some people. He continued, 'There is a need to instill fear in the heart of Kuffar for those spies. Need management of savagery IS will progressively be brutal and more brutal in the initial stages of the State. There is no mercy, and the*

enemy should be scared, this is all part of the strategy. The book argued that this is how the Prophet, and the companions did it too, a stage of massacre and no mercy to make people accept the new law in a situation of chaos, lawlessness.'

This is followed by a further lengthy tract on the same theme for the need for violence at other stages and on making the enemies think before they might attack. All of this wisdom is drawn from a book. To this grotesque material Ms Smith simply replied, 'Okay, now I understand why they were drowned, and I didn't know the other half of the story, interesting book'."

45. The SCC's judgment goes on to note further discussions amongst the online group just two days later on the 26th of June 2015, concerning an incident in which tourists on a beach in Tunisia had been attacked, resulting in the deaths of 19 people. Ms. Smith introduced the subject at 9.56pm with a link to an Al Jazeera report. Having diverted to another story regarding the beheading of a man in Grenoble by an attacker carrying an Islamic flag, Ms. Smith returned to the Tunisian incident at 10.28pm stating, "*Can't wait to hear the full story, tourism bye bye HHH*" (which the SCC took to mean "*Ha, ha, ha*"). The judgment records that Nadim Mufti Ahmed replied, "*Well no tourism for non Muslims anymore LOL*". Ms. Smith replied, "*That's what I mean*". Later she remarked, "*Imagine walking with a gun and no one paying attention, LOL*", which was followed by a remark about Muslims doing something worthwhile instead of going to jail for disobeying Allah.

46. The judgment further records that:

"*Later again on the 12th of July 2015, Ms Smith spoke longingly in messages to five other group members about being in Syria for aid. Mr Georgelas was there at that time. At 10.30 pm he posted in response, 'Yeah, it's always nice sitting down with neighbours, drinking Shai and watching beheading videos with their children.' Ms Smith replied, 'No thanks, men will be men'. This was accompanied by a tears of laughter emoji. Mr Georgelas proceeded to describe listening to air raids, gunshots, distant explosions and other things. Ms Smith then referred to doing army exercises.*

Later in the thread Mr Cerantonio messaged at 6.31 am, 'It was a Muslim who did the attack in Tennessee, killed four marines,'. Ms Smith replied, 'For real? Subhanallah, I like when they target marines, et cetera and no civilians, it's like they are making a point of who their fight is with and then people will say they only target soldiers, politicians'."

47. The SCC found the appellant to be inquisitive, single minded, determined and ready to reject any stance or opinion that did not coincide with her own. It considered that this was best illustrated by her decision to travel to Syria in 2015 and by her "*unequivocal and pointed rejection of the various entreaties from both her Tunisian husband and her Irish family*" not to do so. The judgment notes,

"*[h]er attitude to them was that continuation of their relationships with her was contingent on their imitating her beliefs and making Hijrah by travelling to Syria. Otherwise, she informed them that she would not be seeing them again. As she told her sister on Facebook, 'We are in war and I won't be back'. She was also prepared to deceive them as her intentions [were] to travel to Syria rather than to return to Tunisia.*"

48. The evidence, as accepted by the SCC, was that when the appellant, who was travelling on an Irish passport applied for and obtained only weeks previously, travelled to Syria for the second time in 2015, she did so via Turkey. She arrived at the border on a one way ticket by means of broken travel, having deceived her family as to her whereabouts. The border was controlled by ISIS supporters who were concerned to ensure that neither the organisation nor its territory was infiltrated by non adherents, spies, or other unwelcome infiltrators. She was vetted and interviewed upon arrival, had her mobile phone and other personal effects taken from her, and, being unaccompanied by a husband, was required to stay at a "maḍāfa", a type of hostel where women without husbands lived a communal life until they either married and then left to live with their husbands, or if already married were in a position to reside outside the maḍāfa with their husbands.

49. The SCC's judgment records that:

"*On the 28th of October she definitively declared, 'I can't come back and I'm not coming back. I give Bay'ah and now I stay'. She pointedly rejected any call to reconsider her decision. It is apparent that her presence there was considered acceptable by the Islamic State authorities because she was directed to a housing arrangement specified, provided and supervised by the organisation.*

She remained in the women's boarding house for around six months until she was permitted to leave it in the company of her close friend, Mr Georgelas who was undoubtedly still a high level figure within the organisation. Ms Smith was not married at that time, and we therefore accept that her departure in these circumstances was unusual given the customary inflexibility of the organisation in relation to the extent to which unmarried women were permitted male company.

Mr Georgelas could not have located her in this boarding house by accident. We infer that her ability to leave that house as an unmarried woman was permitted by the authorities only because of his undoubted status in the organisation and indicated that it was acceptable to the authorities that she was a suitable candidate for onward travel within the caliphate. This would have been impossible if she was not an established adherent by that time and viewed as such to the satisfaction of the administration and the authorities.

In late March 2016, she confirmed to Mr Kocoglu on social media that she was in Syria for the moment with Mr Georgelas and Mr Collier."

50. While in Syria in 2016 the appellant sought and obtained a divorce from her Tunisian husband, Mr. Mukhrani, against his will. This was followed by a further marriage in Syria to a Mr. Sajid Daslam, aka Abu Mohammad, a Pakistani Briton who was resident there. Not long thereafter she became pregnant by him, and in due course would give birth to a daughter. In the plea in mitigation on the appellant's behalf much emphasis was placed on her contention in interviews with gardaí, and with mental health professionals who also interviewed her in connection with her impending sentencing, that she had been the victim of serious domestic violence at the hands of her husband Sajid. This will be further described in reviewing the relevant reports.

51. The SCC also heard evidence that as the Islamic State controlled area in Syria contracted, post 2015, under external military pressures, principally the Syrian Democratic Forces (SDF) of President Bashar al-Assad, the appellant and her husband and daughter were continually being displaced, eventually ending up in Baghuz, the last bastion of physical territory held by the Islamic State. Baghuz was eventually captured by the SDF in 2019 following a siege. The appellant and her daughter were evacuated from Baghuz by truck, with her husband Sajid staying behind to fight on. He is believed to have died shortly afterwards. The appellant and her daughter ended up in the Al-Hol (aka the Al-Hawl) refugee camp, from which they were eventually released and attempted to make their way towards the Turkish border. After some further travails, including re-apprehension in northern Syria and brief imprisonment, the appellant and her daughter were eventually deported from Syria and repatriated to Ireland.

52. The SCC accepted that membership of an illegal organisation is not established by so-called "*fighting talk*". It was not enough to simply have thoughts or hold opinions that might align a person with the objective of such an organisation. The court accepted that there must also be evidence of overt adherence to the particular organisation concerned and found such evidence in the fact of travel by the appellant to Syria in October 2015 in the circumstances known to her. The SCC found:

> "*Ms Smith took the calculated and determined decision to sunder her matrimonial ties with Tunisia and her wider family ties to Ireland in pursuance of a stated desire to live under Sharia law. Realisation of this ambition did not require her to travel to the part of Syria controlled by the Islamic State organisation. The evidence is that there are several other parts of the world where it is possible to live to some extent or another under that code. Ms Smith seemed to have been particularly attracted by the variant of Islam espoused by Mr Al Baghdadi on behalf of the Islamic State organisation.*
>
> *She also knew that the practice as a spouse by Mr Al Baghdadi and his organisation were far from universally accepted by other Muslims. She had rightly raised the logical doubts with her online correspondence as to the extreme violence that she had seen depicted by the organisation. With the help of these acolytes, she calmly came to a clear and definitive resolution of those doubts in favour of such practices.*

She was therefore particularly well informed about the organisation that ruled where she decided to live in 2015. She knew full well that she was not simply subscribing to a State or organisation that offered life under Sharia law, but to the specific techniques and views of those that would have enforced the law under which she proposed live. She had viewed the professional produced propaganda videos promulgated by the Islamic State organisation which depicted the most extreme and terrifying acts of violence.

There is no room for pleas of naivety or ignorance in these circumstances. Any earlier misapprehensions that she may have been under about the Islamic State organisation, or its objectives and techniques had long since dissipated."

53. Other significant findings were that:

"*She was also practically familiar with likely aspects of life at her intended destination from her prior travels there in 2013. It is also clear from her social media posts that she understood what Bay'ah specifically meant in this context.*

After arriving in Syria, she told both her husband and family that they would have to perform Bay'ah and make Hijrah as a condition of further contact with her as she had no intention of returning from there.

It is also the case that she was aware that not every Muslim shared the view that complying with Mr Al Baghdadi's exultations to migrate to the caliphate was a matter of religious compulsion. A failure to comply with which will result in internal hellfire. She did not have to look further than Mr Mukhrani, a Muslim from birth, for an example of the competing narrative.

Her social media interactions show that she shared a dismissive and scaling contempt with her correspondence for Islamic scholars or clerics who have the temerity to disagree with Mr Al Baghdadi's and the Islamic State organisation's views."

54. Importantly, the prosecution did not rely on specific overt activities of the appellant following her return to Syria, and the SCC's decision to convict did not rely on any such overt activities by her.

55. While the appellant did not give evidence herself, the court had the benefit of the memoranda of her interviews while in Garda custody, and the judgment summarises the main points of the case advanced by the defence, before rejecting them. The SCC said:

"*We summarise the defence case as follows. They characterised the prosecution case as being based on grand statements and endless speculation. Ms Smith was simply one of the many thousands of others who travelled to Syria to reside in and build an Islamic State under one of the forms of Sharia law. If she is guilty of a membership offence, so potentially could many others be.*

She had found Islam whilst depressed and suicidal, but her conversion was influenced by others including Karimah Duffy and Juliet McNichol in the direction of extreme beliefs.

It is said that her travel and actions were influenced by a belief in the caliphate declared in 2014 and a fear of hellfire if she did not comply with the injunctions of the caliph. Similarly, her decision to get married in Syria in 2013 was characterised as being made under pressure from Ms Choudhury. Ms Smyth (sic) was not involved as a confident (sic) in Syria during either of her visits there because such a role was not open to women.

Her internet discussions were characterised as polite, restrained and made in the spirit of discussion and of seeking answers to her reservations and enquiries.

As to her journey to Syria in 2015, further emphasis was laid on the low or incidental value of women in that society and the fact that she remained in the maḍāfa for around six months before leaving with Mr Georgelas. There was nothing peculiar, it is said, in her method of entry into Syria or as to the security precautions taken at that time."

56. The SCC rejected the claim that the appellant had been influenced by Ms. Duffy and Ms. McNichol as claimed. It further rejected the claim that she had been acting out of religious conviction, holding that, "*issues of religion, religious belief and religious compulsion are irrelevant to the resolution of this case. This is because holding a religious belief that a course of conduct must be undertaken, no matter how sincerely that belief is held, affords no relief if that course of conduct creates criminal liability.*"

57. As already stated, the SCC further rejected the contention that her internet discussions were characterised as polite, restrained and made in the spirit of discussion and of seeking answers to her reservations and enquiries. Moreover, it rejected the contention that her travel to Syria was of no significance, holding on the contrary that:

> "*The purpose of her travel to and residence in Syria was the consummation of her burgeoning relationship with the Islamic State organisation and a cross section of its other adherence. It represents overt conduct conclusively cementing her membership of the organisation.*"

58. The judgment of the SCC concluded with the following remarks:

> "*We wish to make two final comments on the defence case and the threads that ran through it.*
>
> *Firstly, there was a complaint that if Ms Smith is guilty of membership, the many thousands of others who travelled to Islamic State territory are perforce guilty of the same offence. This was expressed repeatedly in tones of incredulity.*

A criminal conviction in Ireland requires in the first instance amenability of the convict of the Irish courts. Many of the fellow travellers to the Islamic State are unlikely to have a connection with this country to render them so amenable. Even if it is the case and counsel is correct that the set of potential offenders is large, that is irrelevant to whether Ms Smith has committed a membership offence which is the sole issue that we have to consider in this case.

In her very specific circumstances, we are satisfied that the offence was completed on the evidential basis set out above.

Secondly, the absence of evidence of military type activity was frequently referred to. Such evidence is not required to sustain a membership conviction, either internationally or domestically. As with lawful organisations, there are many varieties and levels to membership of unlawful organisations whereas gardaí were rightly suspicious of Ms Smith in this regard, given the nature of her previous employment, her associates and her online communications. There is no evidence to prove activities of this kind to the criminal standard. This does not mean that she was not a member of Islamic State, she was clearly an adherent who copperfastened her loyalty by travelling to and residing within the jurisdiction of the organisation for so long as it continued to exert control over a physical area.

It simply has the consequence that her offence must fall at the lower end of spectrum of offences involving this organisation and will be dealt with as such.

Applying the general principles set out above, we are satisfied that the prosecution have proved the membership charge beyond reasonable doubt in the sense in which that expression has been explained."

Reports submitted at Sentencing

59. At sentencing the court was furnished with reports from four different psychologists. The first was concerned mainly with the appellant personally, and the second and third such reports focused especially on how a custodial sentence might impact on the relationship between the appellant and her daughter. The fourth report was from the CEO/Director of the International Centre for the Study of Violent Extremism, who is both a psychiatrist and a psychologist, specialising in the psycho-social underpinnings of terrorism. The purpose for which the latter report was put forward was not made entirely clear other than the suggestion, made by the appellant's counsel in the course of his plea in mitigation, that this expert was uniquely placed to report on the case, in addition to the other experts, because "*psychologists, from some people's perspective, may seem to operate in something that might be seen as a bit of a bubble*". As considerable reliance was placed on the contents of all four reports in the plea in mitigation it is necessary to review them in some detail.

<u>The Report of Dr Kevin Lambe.</u>

60. The first report presented to the sentencing court was the report of Dr Kevin Lambe, Consultant Clinical Forensic Psychologist, dated the 8th of July 2022. This was a lengthy and very detailed report running to some 38 A4 pages. It set out, *inter alia*, the appellant's legal circumstances at the time of her referral, the reason for the referral, the sources of information consulted, and outlines the evaluation procedures and the psychological tests employed. The report then goes on to present a summary of the psychologist's interviews with the appellant, and this contains details of a difficult family background and home environment in which the appellant was starved of love and affection and exposed to parental strife, distorted relationships, and drunkenness and violence within the home.

61. The report goes on to describe emerging psychological distress on the part of the appellant in her teenage years. It is reported that "*Lisa was in the midst of a mental health crisis. The intensity of her home life exemplified through the destructive behaviour of her alcoholic father caused her to have a deep well of distress, mixed with suicidal feelings*." The report does not indicate that the appellant sought help at that time or that there was any professional intervention.

62. There is then a section dealing with her enlistment in the Irish army, and another section dealing with her early adult relationships. The appellant seemingly self-reported to Dr Lambe that she was always attracted to "*bad relationships*" where people would treat her badly. She told him, "*I didn't understand what love was, that it involved caring, love, hugs, and kisses. It's weird when someone is nice to me - when I am so cold and hard. Through religion, I've come a long way and I've developed more understanding. Now I feel more secure, content and self-aware.*" The appellant is noted to have had no long-term relationships at any stage in Ireland.

63. The report goes on to deal with the re-emergence of a psychological crisis for the appellant in 2008. On this occasion, it is noted that she attended a psychologist in Newry and received some counselling. She was characterised as being in a state of depression, feeling suicidal, and searching for answers in life.

64. The next section of the report deals with the appellant's introduction to Islam and her subsequent conversion to Islam. It describes her relationship with her initial mentor Ms. Duffy. The psychologist records that the appellant had self-reported that, "*[o]ver time, it became apparent to her that Ms. Duffy took things to the extreme in her religious faith*". She told Dr Lambe that, going back to when they met, Ms. Duffy was reading about conspiracy theories, which she shared with her. Dr Lambe records receiving a history from the appellant that,

> "*[t]he conspiracy theories that Ms. Duffy talked about had to do with the 9/11 attacks and Osama Bin Laden and the Manhattan raids and how there was a plot to take down the Towers. Ms. Duffy used tell her the 9/11 attacks were the result of "an inside job". Lisa had asked Ms. Duffy why 9/11 happened; why a Muslim would do that and why there was so much evil. Ms. Duffy would tell her that the Americans allowed the Muslims to do the attack because they wanted to go to war*

in Iraq – the war on terror. Lisa said she was looking for answers in life. She wanted to be sure she understood the Muslim tradition properly before converting. In her quest for knowledge and understanding, she did not fully appreciate the degree to which her mentor's views were distorted."

65. It bears remarking upon that the appellant's asserted perception that Ms. Duffy's views were distorted does not accord with the SCC's impressions of that witness, or with the court's findings with respect to her testimony. At any rate, this section of the report goes on to note that the appellant had not believed in God for 30 years and that when her belief in God came about so did her belief in the Day of Judgment. The report notes that she asserted that she wanted to be the best Muslim – "*the best I can be, I don't want to go to hellfire.*" The report then goes on to note her falling out with Ms. Duffy, and that in consequence she was asked to leave Ms. Duffy's property. It notes that without the influence of Ms. Duffy the appellant had busied herself memorising the Quran in Arabic, eventually reaching the point where she can now read and write and understand most Arabic. It describes her pilgrimage to Mecca and subsequent travels, her marriage to Ahmed Mukhrani in Syria in 2013, their subsequent return to Tunisia in December 2013 and her subsequent return alone to Ireland due to medical issues.

66. The report deals briefly with the history received from the appellant concerning the establishment of the Caliphate in June 2014 and the fact that her husband did not accept that the Caliphate was true. It records the appellant asserting that she was being told by others that the Caliphate was important and that she had been terrified that she would be asked on the Day of Judgment why she had not responded to God's call.

67. The next section of the report deals in considerable detail with her marriage to Sajjid Aslam. It records that she was the victim of significant domestic violence, coercive control, financial restrictions, and sexual abuse. Further, it notes that she became pregnant by her husband, and that their daughter "*R*" was born of the pregnancy. It records her assertion that she had attempted on a number of occasions to get a divorce, but that on these occasions her husband had intervened with the officials in question who, faced with promises of future good behaviour by the husband, had instead urged attempts at reconciliation rather than granting a divorce. Dr Lambe records receiving a history that after their daughter was born "*Sajjid was angry and jealous that their daughter would not go to him, gravitating towards her instead.*" The appellant reported that Sajid had slapped the child and had thrown her to the ground, but that on other occasions "*he was the best [father] in the world and he would always wash and make sure she had toys*."

68. This section of the report concludes with the description of the family's flight due to the advancing forces of Bashar al-Assad, the departure of women and children in the back of a truck (including the appellant and R) with Sajjid staying behind, and Sajjid's presumed death in December 2018.

69. The next section of Dr Lambe's report records the history received by him concerning the appellant's life in an Internally Displaced Persons Camp in Syria, namely the Al-Hol camp

where she remained from February until mid-April 2019, and her encounters there with an Irish journalist Norma Costello, BBC journalist Anna Foster and a journalist from CNN. The appellant described considerable hardship during her time in the camp. Eventually, she was released when the guards simply opened the gates and let them out. She and her daughter, together with about 60 others, fled in the direction of the Turkish border. However, they were intercepted and placed in a prison in northern Syria for two weeks in poor conditions before they were moved to another prison camp for a further two to three weeks following which they were deported and repatriated.

70. In the next section of the report, Dr Lambe deals with the appellant's motherhood and her concerns for her daughter R, and then deals with the appellant's life now, including how her life is structured around the practice of her Muslim faith.

71. The report goes on to describe the results of psychological testing of the appellant. In describing how she performed on the Personality Assessment Inventory (*PAI Plus*), an assessment of her thinking and feeling as it relates to personality adaptation and disorder, Dr Lambe observed that there were

> "*indications that Lisa endorsed items that set-out to present an unfavorable impression. This result raises the possibility of a mild exaggeration of complaints and problems (Negative Impression Management NIM T score = 70). However, after careful consideration of all the test data, interviews and reports available, I am satisfied that the elevations seen in her profile are more indicative of a 'cry for help', or of a markedly negative evaluation of herself and her life, than of an act of purposeful distortion.*"

72. Dr Lambe concluded, *inter alia*:

> "*9.1.5 Lisa reports a number of difficulties consistent with a significant depressive experience (DEP T=73). This is the depression that has affected her whole life, including the decisons she has made. She is likely to be plagued by thoughts of worthlessness, hopelessness, and personal failure. These thoughts manifested initially in childhood with her parents berating and belittling her, as well as each other. She admits openly to feelings of sadness, a loss of interest in normal activities, and a loss of sense of pleasure in things that were previously enjoyed. She is likely to show a disturbance in sleep pattern, a decrease in level of energy and sexual interest, and a loss of appetite and/or weight. Psychomotor slowing might also be expected.*"

73. He further concluded:

> "*9.1.7 The PAI reports suggests that anxiety and tension are prominent for Lisa (T=73). In addition to her current stressors, there is evidence that disturbing traumatic events (T=67) in the past continue to distress her and produce recurrent episodes of anxiety.*

9.1.8 Lisa's self-concept appears to be poorly established, although self-criticism and adequacy concerns seem characteristic. Her self-perception will tend to vary as a function of the current status of close relationships; apart from a sense of identity established from such relationships, she likely feels uncertain and unfulfilled. Her self-esteem is generally somewhat low and is likely to be particularly sensitive to slights or oversights by other people. Associated with any such shifts in self-esteem are corresponding shifts in identity and attitudes about major life issues.

9.1.9 Lisa's interpersonal style seems best characterised as self-effacing and lacking confidence in social interactions. She is likely to have difficulty in having her needs met in personal relationships and instead will subordinate her own interests to those of others in a manner that may seem self-punitive. Her failure to assert herself may result in mistreatment or exploitation by others, and it does not appear that this interpersonal strategy has been effective in maintaining her most important relationships."

74. Dr Lambe also administered the *Millon Clinical Multiphasic Inventory* - fourth edition, an instrument designed to help clinicians assess personality and psychopathology in adults who are undergoing psychological assessment. The appellant was assessed as being markedly dependent, docile, self-effacing and ineffectual. It was considered that she may tend to be dejected and tense, feel helpless to overcome her fate, assume a passive role in relationships, and evoke nurture and protective attitudes in others. She may be unable to function autonomously and is therefore especially vulnerable to separation anxieties and fears of desertion. Complicating matters are well hidden resentments towards those on whom she must depend because they are often critical and disapproving. The assessment suggested that she tries to be conciliatory, placating, ingratiating and self-sacrificing. She hopes to avoid abandonment by suppressing all traces of independence and self-assertion, subordinating personal desires and submitting to abuse and intimidation. Most notable is her tendency to be invariably pessimistic and to give the gloomiest interpretation of events. Dr Lambe was of the view that:

"*9.2.8 Hesitant, shy, and moody, this troubled woman appears to be experiencing the symptoms and preoccupations of a somatic disorder (e.g., gastrointestinal discomfort, muscular pain, headaches). Highly sensitive to public reproach and humiliation, as well as often feeling mistreated and aggrieved, she may be experiencing considerable bitterness toward others that she cannot express directly for fear of retribution. As a result, her inner turmoil is bottled up and vented indirectly through multiple physical complaints and concerns over undefined and unconfirmed bodily illnesses.*"

75. Dr Lambe felt that her life course since early childhood traumas suggested a requirement for assessment of trauma and accordingly the appellant was administered the *Trauma Symptom Inventory – second edition (TSI-2)*. He reported that:

"Lisa's reported experiences point to flashbacks, nightmares, intrusive or triggered memories, cognitive or behavioural avoidance of reminders of previous traumatic

events, and sympathetic hyperarousal (e.g., sleep disturbance, jumpiness, irritability, hyper-alertness). A High score on this scale, at a level Lisa is showing is indicative of several major traumas in her life."

76. In part 10 of his report Dr Lambe describes a home visit conducted with the appellant and her daughter. He observed an easy mother-daughter relationship and said that:

> *"She appeared to me to be a young woman home from adventure looking to get on with the tasks of motherhood, continue her devotion to God, hopefully get her own house or apartment to live her life, and one day possibly marry."*

77. In the final part of his report Dr Lambe expressed the following opinions concerning the appellant:

> *"11.1 In my opinion, Lisa is a vulnerable person. She has lived life uncertain of who she is and of her identity, lacking an internal core self. She does not have solid internal cues that drive what it is she seeks or is looking for because she does not know what that is. However, she trusts in God now. That she is a Muslim happened by circumstance, by chance, and then because of calling. Islam provided her the answers and reassurances she was looking for over many years through hardships, mental breakdowns, failed relationships and alcohol abuse. In the fullest sense, Islam now provides Lisa a foundation for life, a way to be a good person with a sense of purpose that is dedicated to her God. Her life as a Muslim has brought her clarity about who she is, and it is an ongoing project.*
>
> *11.2 To an extent, everyone must grapple with how to manage the Four Last Things of good, evil, death, and judgment. Judgment in particular is what has concerned Lisa since she made the decision to convert to Islam. The answers were not available to her from her earlier family and catholic religious experiences. Nor could she find comfort in hedonistic pursuits. Her major life decisions since her conversion have concerned the day of judgment and that she would be deemed to have been a good Muslim.*
>
> *11.3 Lisa's personality profile suggests that she is markedly dependent, docile, self-effacing, and ineffectual. She may tend to be dejected and tense, feel helpless to overcome her fate, assume a passive role in relationships, and evoke nurturant and protective attitudes in others. She also has the capacity to draw people in and elicit a caring attitude. These are powerful psychological dynamics which made me think of Sajjid and the conflicts he had in being nurturing and violently abusive to Lisa. Now I see a woman who is presenting with many features of posttraumatic stress disorder which have weakened her. It is as though the abuse and beatings by Sajjid form one additional layer to all the preceding torment which has brought her to a point of fairly continuous anxious misery. Bright moments appear with her daughter and at times of prayer for she can reach out in the knowledge the pain she is experiencing is temporary.*

11.4 She requires a safe space therapeutically to deal with her anxiety, depression and trauma, to examine her long-held feelings of ineptness and helplessness, and to examine how the internalised messages from her childhood still drive her sense of personal futility. Dominance - submission patterns from all aspects of her life will be evident in therapy and require balancing and correcting. She needs help by way of positive reframing to manage the persecutory parts of her personality as they are likely to interfere with her therapy – these parts were not identified by the priest and therapists she went for help from as a young woman before conversion. It will be hard for her let the persecutors go, they are like old friends – because in a way they also have a protective function. Her relationship to past messages and experiences needs reworking in an insight based approach, where her expression and assertion of her needs and desires is facilitated gradually towards greater initiative and autonomy. Therapy is essential for Lisa and she should expect to attend weekly sessions for about two years."

The Report of Dr Nick Wakefield

78. The second report presented to the sentencing court was that of Dr Nick Wakefield, Clinical Psychologist, dated the 7th of July 2022. In preparing his report, Dr Wakefield reviewed the summary of the case provided to him by the appellant's solicitors, interviewed the appellant for a total of three hours over two dates, and reviewed the literature pertaining to the psychological impact of incarceration on mothers and children. He did not personally assess the appellant's daughter but noted that no concerns had been raised by social services with regards to her development or welfare or her relationship with her mother.

79. In his interviews with the appellant he noted her presentation and explored her background, mental health history, traumatic experiences which she had experienced, and her then current circumstances.

80. As to the appellant's psychological functioning, he concluded that the appellant appears to have a history of depression, anxiety complex and acute post-traumatic stress disorder, and suicidal ideation and intention. Her developmental history indicates the presence of insecure attachment through adverse child-rearing experiences, emotionally unavailable and inconsistent mother, and an alcoholic, aggressive father. Insecure attachment affects the development of a fragmented sense of self; emotion regulation abilities; impulsivity and ability to inhibit behaviour; hyper-vigilance for threat; hypo-arousal of the emotion processing centres limiting recognition and understanding of own others emotional states (limiting empathy); limited understanding and defensive avoidance of taking other people's perspectives (theory of mind).

81. In Dr Wakefield's assessment the appellant appears to have internalized a negative sense of self as a result of her early developmental trauma. At a young age she learnt to dissociate from her emotional distress to survive. Both of these mechanisms are attempts to prevent negative interactions with others. However, they prevent her from addressing

her emotional needs, protecting herself, and getting her needs met which negatively affects her relationships and emotional wellbeing.

82. Dr Wakefield considered how a custodial sentence might impact both the appellant and her daughter. He opined that there would be likely to be no immediate impact on Ms. Smith's mental health should she be incarcerated. She had demonstrated great capacity to withstand extremely distressing circumstances for long periods of time through dissociation and more recently taking comfort in her religious beliefs. However, there had also been a pattern of unresolved emotional and psychological distress emerging at a later point as mental health difficulties including depression, anxiety, post-traumatic stress, and suicidal ideation.

83. He noted that the appellant's daughter has already been exposed to a number of Adverse Childhood Events (ACEs) suffering significant losses and disruption since she was born, including being in a violent home, the loss of her father, consistent instability and poverty. Her mother appears to have been the only stable and consistent element in her life. Dr Wakefield notes that the imprisonment of a household member is one of the ten ACEs known to have a significant impact on long-term health and well-being, and that children who are separated from a parent due to prison suffer multiple problems associated with their loss and disruption of the attachment bond.

84. In circumstances where he had been given to understand that any custodial facilities to which the appellant might be committed would be of significant distance from the child's home, Dr Wakefield then considered how might this affect them both. As regards the appellant's daughter, this would result in either limited contact with her mother affecting their attachment and relationship, or regular disruption to her life with long travel and negative impact on schooling and social development, and also potentially mental health impacts. As regards how it would affect the appellant, he opined that it would have a significant effect on the ability of a mother to fulfil many of the important parental tasks, including the appellant's ability to provide for the interpersonal, physical, emotional and spiritual needs of her child.

85. Dr Wakefield made a number of psychological therapy recommendations.

The Report of Ms Anna Motz

86. Ms. Anna Motz, who is a Clinical and Forensic Psychologist, and an Adult Psychoanalytical Psychotherapist, provided a report dated the 9th of July 2022.

87. Her report was specifically addressed to the likely impact of separation of a child and a mother where the two have been closely bonded during life-threatening circumstances.

88. To assist in the preparation of her report, Ms. Motz was provided with a chronology of this case, including specific details relating to the appellant's entry into Syria, two return trips to Ireland and subsequent return, as well as some chronology of her contact with psychiatric services. She interviewed the appellant remotely for two hours, and focused

on the appellant's relationship with her daughter, and her concerns about her development, should the two be separated.

89. Ms. Motz concluded that the appellant presented as an intelligent, articulate and sensitive woman, who was committed to her daughter's welfare, and wanted to offer her a level of emotional availability and protection from harm that she had herself not experienced in her early life. She was devout in her faith and clearly able to distinguish her wish to raise her daughter as a Muslim from any involvement in extremist ideology or groups. She presented as insightful, caring, and realistic about the difficulties her daughter and she would be likely to encounter in relation to separation and also recognised the considerable stress under which her situation had put her family while she was in Syria and then Tunisia. She appreciated the extent to which her family had supported both her daughter and herself, and she also expressed gratitude to her solicitors for arguing for her case. She appeared open to discussing matters related to her experiences of pregnancy, loss, and the birth and development of her daughter, as well as to describing the harrowing trajectory of her escape from ISIS, and her determination to protect her daughter at all costs. Her daughter was a little girl who had just turned five years old and whose main attachment figure had been the appellant, as her father died when she was under one year of age, and he appears to have been a frightening, violent and unpredictable figure who was abusive to her mother and did not seem to have served as a reliable or sensitive source of comfort and protection for her.

90. Ms. Motz opined that given the close relationship of mother and child, and the degree to which they have survived traumatic experiences together, it seemed to her to be in both the appellant and her daughter's best interests that any custodial sentence would take this into consideration. She recommended that if a custodial sentence were to be considered necessary for public protection that it should be for the minimum term possible, and that Lisa's geographical proximity to her daughter would be taken into account, as the two would benefit from frequent and regular contact, should they be separated.

91. She also recommended that the appellant should be offered psychological support, as she had undergone intense and severely traumatic experiences, the aftermaths of which were likely to have a long-lasting impact. This, the expert contended, coupled with the distress of a separation from her daughter, might well increase the risk of her mental state deteriorating to a significant extent.

The Report of Dr Anne Speckhard

92. As previously stated, Dr Speckhard, who is both a psychiatrist and a psychologist, specializing in the psycho-social underpinnings of terrorism, is the CEO and a Director of the International Centre for the Study of Violent Extremism ("ICSVE"). Her services were retained by the appellant solicitors to produce a report, but the extent of her brief is unclear from the report. However, it can be stated that the report considers the appellant's early life and psychosocial history, including her childhood history, her early adulthood, her conversion to Islam. It specifically considers the extent to which she may

have been subject to undue influence/mind control by others, noting the influence on her of John Georgelas, (otherwise "Abu Hassan"), in her life and later that of her abusive husband Sadjid Aslam, (otherwise "Abu Mohammed"). The report records that:

> *"Abu Hassan showed up on the scene right at the next crisis moment, and Lisa then totally turned over her free will and life's guidance system to him, believing he was learned enough about Islam to save her from the mistakes of her previous dissipate lifestyle, could steer her clear of sin and ultimately save her from hellfire. She compliantly followed the instructions of Abu Hassan to leave her life in Ireland behind to come live in a conflict torn land ostensibly ruled by shariah, divorce and then to remarry to an unknown Muslim man in Syria. After marriage, Lisa then let her ISIS husband temporarily guide her decision-making, although she still remained under the persuasive grip of Abu Hassan and his vision of Syria as a possible new Caliphate.*
>
> *Lisa recalls that when she decided to return to Syria on her second trip it was after we were, 'Told, come, come it's the Caliphate. You will die and go to hellfire,' that she paid special attention because she was terrified of hell. 'Most converts get fear when they first convert. I'm still afraid, but I don't want to do anything wrong.' Now, Lisa recalls the lies and propaganda images ISIS was putting out at the time, images she had no help discerning as totally false, given that the major social media companies were still failing to take them down. So strong was her belief in ISIS's lies and propaganda showing it as a rising state that she went to Syria expecting a functioning state. 'I thought there would be some kind of structure. No one mentioned it was so chaotic, before I left. There was the Eid video – welcoming us.'*
>
> *After Abu Hassan was killed in a bombing in Mayadeen, Lisa began to doubt that ISIS was a true religious Caliphate, but she and her family had no choices anymore and were fleeing from city to city. Escape was impossible as Lisa lacked funds to pay a smuggler and was a victim of domestic violence and would be severely punished by ISIS if she attempted to escape and was caught.*
>
> *At that point Abu Mohammed completely controlled Lisa with his violence and she had a young child to protect as well."*

93. Dr Speckhard assessed the appellant's honesty in the interview processes and concluded that she appeared truthful and highly cooperative and desirous of warning others that ISIS was not following or representative of Islam. She went on to consider whether the appellant was currently radicalised. Concluding that she was not, she reported *inter alia*:

> *"When I asked Lisa if she believed in any of the concepts that ISIS holds dear like jihad, hijrah, martyrdom by suicide terrorism, etc. she did not currently believe in any of these. Most persons who are dedicated to militant jihadists groups would never deny their belief in these concepts although they may try to defend them or minimize them as self-defense.*

Lisa totally rejects them. Likewise she renounced the ISIS practice of locking women in maḍāfas and not allowing people to leave their Caliphate and states that ISIS itself was not Islamic at all. While it's very clear she voluntarily left to Syria to live under the Islamic State, it's clear to me that her idea of an Islamic State was a purely religious ideal and that she does not now support the ISIS terrorist group, it's tactics or its un-Islamic, corrupt and brutal ways."

94. Dr Speckhard further considered the future dangerousness insofar as the appellant was concerned. She has reported that the appellant's previous confusion about her duties under Islam and her foolishness in making crucial decisions under the influence of an ISIS recruiter are now totally behind her. She is very clear that she renounces ISIS, that she does not see their practices as representing Islam and that she wants nothing to do with militant jihadist thinking and behaviours. She is still a dedicated Muslim and still wants to live a devout life to avoid future hellfire, but she has learned a very important lesson about following mentors and going to live outside of her country among strangers she now understands are not likely to be trustworthy or have her best interests in mind.

95. Dr Speckhard added:

"Lisa still follows Islam and covers her hair as many Muslims do, but she adheres to an Islamic interpretation that is peaceful and totally respectful of other religions. She is simple in her practice and open to her fellow countrymen. 'I read my Quran, say my prayers five times a day. I read some Islamic books'."

96. Further:

"Thinking back to before she fell into the clutches of Abu Hassan, Lisa wistfully recalls, 'I used to be a really good-hearted person. Maybe God guided me.' Now Lisa states, 'I just want to be a good person, worship God. I know that God is real.' Although now she struggles with trust and could use some gentle guidance to completely ensure she follows her faith peacefully without anyone having the power to confuse her again.

As far as I'm aware, Lisa has obediently followed all court orders and served her time on house arrest peacefully giving clear indication that she would continue to comply if further home arrest was deemed appropriate. She is a very devout, peace loving and submissive person and appears eager to reenter Irish society."

97. On the issue of possible incarceration of the appellant, and the needs of her child, Dr Speckhard reported that:

"In my view it would be a very traumatic incident for [the appellant's daughter] if her mother was taken from her. She has already lost her father, grown up under bombardments, escaped one prison camp to come home to house arrest for her mother. She needs her mother's love and care. Lisa states that she does [her

daughter's] homework with her and worries that her child will fall behind in school and be extremely distressed if Lisa is separated from her."

98. We should further mention that Dr Speckhard also refers in her report, under the heading "*Time Served*", to the history received by her from the appellant concerning time spent by the appellant in the Al-Hol and Ein Issa camps, amongst other locations, where her liberty was seemingly restricted. Dr Speckhard's report states in that regard:

> *"Lisa was held in a very dangerous and hostile prison camp from the time she escaped ISIS and surrendered to the SDF till the shelling of Ein Issa by the Turkish backed rebels when she escaped ultimately into Turkey. She served approximately two years in the SDF prison camps of al Hol and Ein Issa under dire circumstances and threat from the other ISIS women. The time served in these camps is much worse than any EU prison could ever be. She then was held in a Turkish prison for two weeks. Inside ISIS she was imprisoned in an ISIS maḍāfa for 5.5 months. She has now been on house arrest in Ireland for another two years. Clearly she's served considerable time as a prisoner already for her mistaken travels to go and live under ISIS control."*

99. In her report, Dr Speckhard, in commenting on her impression of the appellant's forthrightness and honesty, alluded to the appellant's participation in a project called "*Breaking the Counternarrative*". It is important to mention this having regard to ground of appeal no. (ix), to be discussed later in this judgment. The report states:

> *"Lisa appeared straightforward and honest. Her willingness, even when in danger in the Ayn Issa camp, to participate in the breaking the counternarrative project, and to join our fight against militant jihadist groups, who routinely recruited over the internet, made her sincerity and truthfulness in the interview appear to us even more genuine. Lisa was afraid of the die-hard ISIS women who could find out what she did and punish her. ISIS women had already thrown a heavy stone into her tent, missing Ruqayyah by centimetres. She had then been moved to Ayn Issa to protect her from further attacks, but the atmosphere was still murderous and violent. She appeared honest and straightforward. She knew there would be serious consequences to both herself and her young daughter participating."*

100. Dr Speckhard's report concludes with this summary:

> *"Summary*
>
> *After carefully reviewing this case, I would view Lisa Smith as having extreme vulnerabilities at the time of her religious conversion, falling under undue influence and mind control from individuals who ultimately paved her path into travel to Syria. These vulnerabilities include growing up in an alcoholic and violent family where it is difficult to develop a strong positive identity, secure attachment style or learn to dissent peacefully, to having substance abuse issues herself and suffering from sexual harassment and attempted rape in her workplace. Lisa sought*

traditional help from psychiatry and was pointed by her psychiatrist to religion as a potential solution to her problems. Lisa then converted to Islam at a time when a terrorist group was claiming to represent the true Islam and she willing handed over control of her life to a series of Islamic mentors all who failed her terribly.

It appears just to me to be lenient with her given her history of psychiatric problems, recent conversion to Islam, falling under undue influence and being a single parent and mother of a small child whose father is dead and who still needs her. I have confidence that Lisa will continue to rehabilitate, reintegrate fully in Ireland and thrive. With help from her Irish neighbors and hopefully the court, I fully expect she will become an ISIS returnee success story."

The Plea in Mitigation

101. In the plea in mitigation great emphasis was placed by counsel on the four reports that had been placed before the court. The hope was expressed that they would assist and enlighten the court below in engaging with the second part of the dual proportionality requirement with which a sentencing court must be concerned, namely the requirement to impose a sentence which is not just proportionate to the offence, but rather to the offence as committed by the offender in question. The sentencing court was taken in great detail through each of the reports and it was urged by defence counsel upon the members of the sentencing court that "*the fact, in my respectful submission, that such four eminent experts have examined this case and reached such startlingly similar conclusions, in my respectful submission, can give the court confidence that the findings they are making are rooted in sound psychological assessment*."

102. Counsel on behalf of the defence submitted that a common theme in all of the reports was the underlying very real mental health issues that his client was labouring under. She was not a robust person when she converted to Islam and was interacting with individuals on the internet. She had neither a depth of knowledge nor of life experience. She was, in his submission, a very damaged person, a very vulnerable person who had perceived what she believed to be an attractive proposal and had responded to it in the way that she did, that she had done so with very limited resources and significant burdens that others in her peer group would not have had. He emphasised that in convicting her the SCC had not found her to have been active militarily, or to be otherwise actively engaged in promoting ISIS. Rather, she had been a passive adherent who had copper-fastened her loyalty by travelling to and residing within the jurisdiction of that organisation for so long as it continued to exert control over a physical area. He stressed that the trial court had already opined in its judgment of conviction that this meant that "*her offence must fall at the lower end of the spectrum of offences involving this organisation and will be dealt with as such*".

103. Counsel further emphasised that his client had been cooperative with the authorities, and he submitted that given the nature of the case that it was a far easier prosecution than it otherwise would have been because of that cooperation.

104. He also urged the sentencing court to be somewhat understanding of the fact that his client had not pleaded guilty and had gone to trial. He characterised the issues in the case as having been "*very, very novel*", and in the circumstances asked the court to regard the loss of mitigation for going to trial as being minimal.

105. Counsel then addressed the issue as to how the sentencing court might structure a sentence. He submitted that the court should impose a suspended sentence but in the alternate he submitted that if there had to be a custodial element that the court should regard his client as having in effect served that because of the time that she had spent in the Ein Issa and Al-Hol camps. He urged upon the sentencing court that there was a strong causal connection between the behaviour upon which the court had anchored its conviction and her presence in the displaced persons camps. She had remained in Islamic State territory while that territory shrank in size before ultimately surrendering to the Syrian forces and being placed in a camp. Counsel submitted that the reason she had been placed in a camp was, "*intimately, not only connected, I would say, welded at the hip on the very causes which led her to be charged and ultimately convicted in this court. So, in my submission, there's a very strong degree of overlap.*"

106. Counsel alluded to a case in which a court in Germany had taken into account time spent by a fraudster in particularly horrific conditions in a Brazilian jail, stating that the German court had given credit for the offender time spent there on the basis of a ratio of 1: 2.5. The case in question was *The People v. Paul Lange*, a 2017 decision of the District Court of Dresden Large Criminal Division, and a copy of the judgment (which has also been provided to this Court, having been included in the agreed Book of Authorities for this appeal) was handed in.

The sentencing court's decision and reasons

107. The decision of the sentencing court, and the statement of its reasons, was delivered by Hunt J. on the 22nd of July 2022.

108. In sentencing the appellant, the sentencing court commenced by outlining that sentencing is a two stage process, (1) to establish the range of penalties available for the type of offence, the gravity of the offence and where on the range of penalties it would lie and the level of punishment to be imposed, and (2) that the sentencing court must then consider the particular circumstances of the convicted person and within that ambit consider any mitigating factors that apply to the notional sentence previously identified. The court below then identified that the statutory offence under which the appellant had been convicted carried a maximum custodial sentence of 8 years.

109. The sentencing court then identified the offence in this case as situated in the lower part of the spectrum of such offences stating:

> *"[…] there is nothing beyond justifiable suspicion about the precise nature of Ms Smith's activities during the time that she allied herself to the Islamic State organisation in Syria. However, this Court is bound to act on evidence and not to*

act on unproven speculation and to resolve any reasonable doubts in this regard in her favour."

110. The court viewed that the taking of an allegiance in a "*considered and determined manner*" by a former Irish Defence Force member with a foreign terrorist organisation was a serious issue, stating:

"There is (sic) undoubtedly indications in the evidence that Ms Smith followed rather than led in this regard, but there is also no doubt that she knew precisely the nature of the organisation in question. She associated with influential and high-ranking members before and during her time in Syria and had considered and decisively rejected all alternative interpretations and approaches towards both her religion and her chosen way of life. In the case of an offence carrying an eight-year sentence, if it is divided into a tripartite scale of lower end, medium and upper end offences, this would result in a potential headline sentence for a low-end offence of up to two years and eight months. Having regard to the prolonged and intentional association with a destructive and sinister organisation, we are satisfied that the offence in this case belongs at the upper end of the lower third of the scale. We have therefore identified a headline sentence of two years and six months' imprisonment before consideration of any mitigating factors."

111. The sentencing court then took account of the mitigating and personal circumstances of the appellant, and held that she was a person of previously good character who not only had no previous convictions but who had made "*very positive contributions to society during her military service.*" The court was also of the view that, notwithstanding that there were foreseeable consequences to her attaching herself to and remaining with the Islamic State organisation during its existence, she had experienced "*very difficult and hard times in the camps in Syria*" before her repatriation in December 2019. The court noted that there was independent corroboration that she had suffered domestic violence at the hands of her husband during her marriage in Syria.

112. The sentencing court did not view the appellant as a source of present or future danger and noted that since her return from Syria she had been of good behaviour and was the mother and carer of a young child. However, the court did note that the appellant had fully contested the case where "*various witnesses were strongly challenged as to their credibility and methodology*" and while that was an entitlement and not an aggravating factor, it did "*result in a significant loss of mitigation potential as a result*."

113. The court below accepted that the appellant had facilitated the prosecution case with her admissions as to some facts during interviews and that the case was novel in terms of the content of the trial. However, it did not believe "*that the factual issue of membership was at all complicated.*" The court noted that although the appellant had been acquitted of the financing charge, this had occupied a relatively small portion of the trial.

114. In considering the reports relating to the appellant's personality and background the sentencing court was not of the view that they added significantly to what had been

gleaned during the trial. Although the appellant may have been easily led by circumstances and other people into difficult situations, in each case she subsequently "*displayed characteristics of resilience and determination*" as was evident in "*her army career, religion, her affiliations with people such as Mr Georgelas, her rejection of her family and Tunisian husband, her travelling to Syria and remaining there until the bitter end.*"

115. The sentencing court noted the submissions of defence counsel that along with the bail terms imposed following repatriation, the appellant had spent a considerable and arduous time in the camps in Syria, which could be viewed as equivalent to incarceration and should be taken into account during sentencing. However, when sentencing the court below did not feel compelled to follow the approach advocated by defence counsel, in which German courts in similar cases had adopted a system where mathematical ratios were assigned to such time periods. The court below instead favoured the traditional approach to sentencing in this jurisdiction and combined the experiences in these camps with other mitigating factors. Having determined what weight in mitigation should be assigned to the combined factors in the case, the sentencing court held that the custodial threshold had been passed and that the sentence should be no longer than that "*necessary to underline the gravity of the offending*" and to "*deter others from offering concrete and support to similar dangerous organisations*."

116. The court held that notwithstanding the absence of a plea of guilty, acceptance of the court's verdict or any expression of remorse, that a substantial discount of 50% from the sentence was "*more than a fair allowance for the combined matters of mitigating factors that existed.*" The court then observed that this discount exceeded what might be available to a person who had pleaded guilty and who had expressed genuine remorse, neither of which the appellant had done, but that she was receiving this very substantial consideration in view of the matters put forward by her counsel. Nevertheless, Hunt J. continued, there was "*insufficient mitigation*" to support a fully suspended sentence based on the factors and circumstances presented to the court.

117. The court imposed a final sentence of 15 months' imprisonment, backdated to the 21st of June 2022.

Grounds of Appeal

118. The appellant appeals the severity of her sentence on the following grounds:

> *"The Court erred in imposing a sentence of 15 months backdated to 21st June 2022 which was excessive in all the circumstances and in particular,*
>
> *(i) concluded that the custody threshold was met in this case notwithstanding the significant mitigating factors and personal circumstances of the appellant who was a person with an unblemished character and was without prior or subsequent convictions – the corollary of which is that the Court erred in not suspending the entirety of the appellant's sentence;*

(ii) identified the appropriate sentence as being in the upper end of lower third of the scale;

(iii) imposed a headline sentence of 2 years and 6 months before mitigation;

(iv) failed to take into consideration the nine months the appellant spent in effective custody in Al-Hol [aka Al-Hawl] and Ein Issa Internally Displaced Persons camps, which custody was a direct result of the appellant having gone to and having remained in Islamic State, which in turn was the very basis upon which the appellant was convicted of this offence;

(Commentary in square brackets by the Court)

(v) by disregarding persuasive authority in the German case of Paul Lange, in which the Court of Dresden held that time spent in poor conditions in a Brazilian prison should be taken into consideration by a German Court in imposing sentence and further, should be calculated on a ratio of 2.5:1; which under this interpretation the appellant had already served the equivalent of 25 months in custody;

(vi) by failing to take into consideration the poor conditions in Al-Hol and Ein Issa Internally Displaced Persons camps;

(vii) by failing to take into consideration the thirty-one months the appellant has spent under strict bail conditions and in particular the daily requirement to sign on in Dundalk Garda Station and a strict overnight thirteen-hour curfew;

(viii) by failing to adequately take into consideration any of the four psychological reports furnished in evidence by the appellant's legal representatives;

(ix) by failing to give the appellant any or any adequate credit for her willingness, even when in danger in the Ain Issa internally Displaced Person's camp, to participate in the breaking the counternarrative project and join the fight against militant jihadist groups."

Submissions

Submissions on behalf of the appellant

119. Counsel for the appellant submitted that the fixing of a penalty is a forensic exercise that typically involves assessment of the gravity of the offence with particular emphasis on the accused's level of participation in the terrorist organisation. It was submitted that a court must sentence on evidence and not on suspicions, and complaints were made about certain statements of the sentencing court during sentencing, including three references to what the court characterised as "*justifiable suspicions*" about the appellant's activities in Raqqa. Counsel submitted that the sentencing court, in alluding in sentencing to a basis for suspicion, albeit one which lacked proof to the criminal standard, approached the matter in a manner that was inappropriate and unfair. It was also complained that repeated observations made by the sentencing court to the effect that the penalties for

the offence were too low were unhelpful. It was submitted that such observations could give rise to a perception that the sentencing court's thinking in fixing a headline sentence in this case may have been inappropriately influenced, perhaps at a subliminal level, by its belief (i) that a well-founded basis for suspicion existed, and (ii) that the penalty range for such offences was inadequate.

120. It was emphasised that the appellant's case is that her role as a member of the organisation in question was wholly passive. The evidence in the case was that while in Syria she spent the overwhelming amount of her time looking after her household. There was no evidence that "*she was a prevalent person in Raqqa*" (*sic*, prominent person?) or even mixed with other westerners. It was submitted that the court had therefore failed to engage with the actual evidence in the case.

121. The appellant draws this Court's attention to the following observation by the SCC in delivering its verdict on the conviction aspect of the case. The trial court said:

> *"We wish two make two final comments on the defence case and the threads that ran through it. Firstly, there was a complaint that if Ms Smith is guilty of membership, the many thousands of others who travelled to Islamic State territory are perforce guilty of the same offence. This was expressed repeatedly in tones of incredulity. A criminal conviction in Ireland requires in the first instance amenability of the convict to the Irish courts. Many of the fellow travellers to the Islamic State are unlike to have a connection with this country to render them so amenable. Even if it is the case that the set of potential offenders is large, that is irrelevant to whether Ms Smith has committed a membership offence, which is the sole issue that we have to consider in this case".*

122. In written submissions on behalf of the appellant, issue was taken with the suggestion that the subset is limited to many thousands. The contention was that it is millions. That being so, and given the passive role of the appellant, it was submitted that the sentencing court was correct in finding that the appropriate sentence should be one of the lower end of culpability. However, it was submitted that the headline sentence actually nominated was not at the lower end of culpability but was higher up the scale. It was submitted that evidence was required to elevate the appellant's culpability to that higher point on the scale. The problem, says counsel for the appellant, is that there was no evidence that the appellant did anything while living in Raqqa other than be a dutiful housewife.

123. The written submissions further complained that there was insufficient engagement on the part of the sentencing court with the unchallenged evidence concerning the beatings and domestic violence to which the appellant was subjected during her marriage. While the sentencing court acknowledged the existence of evidence in that regard, the submissions stated "*it is tempting to conclude that the court did not believe Lisa Smith or at least entertained some doubt about her claims.*"

124. In pressing the claim that there was insufficient engagement by the sentencing court with the evidence when determining the appropriate headline sentence, counsel for the

appellant in his written submissions identified a number of points relied upon by the court (reproduced below in italics), and offered observations:

1. *Lisa Smith took up allegiance to a foreign terrorist organisation in a considered and determined manner.*

   Observation:

   "Lisa Smith lived in Raqqa. She was a housewife an abused housewife. There was no evidence that while she was in Raqqa she was vocal in her support."

2. *Lisa Smith persisted with that allegiance through the decline and fall of that grouping.*

   Observation:

   "Lisa Smith begged her husband for a divorce. He refused. She was not entitled to travel alone. The actual evidence was that Lisa Smith was totally disillusioned by the Islamic State, that it had not measured up to her expectations, and that she deeply regretted coming to Syria. The Court dismissed these sentiments as 'buyer's remorse'. Even if it was that, how can that be reconciled with the finding that she was persisting in her allegiance? A persistent allegiance is inconsistent with regret."

3. *Lisa Smith was a follower and not a leader.*

   Observation:
   "Agreed."

4. *Lisa Smith knew precisely the nature of the organisation in question.*

   Observation:

   "This finding is based on a small number of social media exchanges, ones in which Lisa Smith had the temerity – consistently – to question the moral basis for the actions of ISIS. She was talked down to by men who purported to know a lot more about Islam than she did. Her sentiments as expressed when interviewed in the detention camp are wholly at odds with that finding. These findings were video-recorded and uploaded onto the Internet."

5. *Lisa Smith associated with influential and high-ranking members before and during her time in Syria.*

   Observation:

   "The only person whom Lisa Smith associated with who was established to be a member of ISIS was Abu Hassan (described by the prosecution as John Georgelas). The evidence was that he did not join ISIS until the second half of 2015. On her release from the maḍāfa, where she was held captive for five months, she lived a short time with Abu Hassan's family near Raqqa. She told An Garda Siochána in interview that she had assumed that she would spend time in his company

discussing scriptures. Instead, she was forced to live with his extended family with whom she did not get on. Culpability does not arise out of being in the company of an influential figure, it arises only if the occasion is being used to in some way advance the cause of the unlawful organisation."

6. *Lisa Smith considered and decisively rejected all alternative interpretations and approaches towards both her religion and her chosen way of life.*

   Observation:

   "See the evidence of Dr Hugh Kennedy, a leading world authority who said that a sizeable minority were taken in by Al-Baghdadi. Millions of Muslims were, hundreds of thousands actually left their homes and travelled there. Lisa Smith is in good company."

125. Submissions have also been advanced in support of the argument that the appellant ought to have received credit for the time that she had spent in the displaced persons camps and while under what is characterised as "*house arrest*", i.e. when her liberty was *de facto* restricted for various reasons. In that regard we were asked to note:

- *"The appellant fully accepts the finding of the court that the time spent in the camps was a consequence of Lisa Smith's choice to attach herself to the Islamic State and of remaining within its territory until it collapsed.*
- *When a person is actually convicted of a criminal offence, it is a consequence that they may spend time in custody.*
- *The necessary nexus between Lisa Smith's incarceration in the detention camps and the offence for which she has been convicted is made out. So much so, that one can literally transpose one over the other.*
- *However, it is not accepted that the conditions to which Lisa Smith was subjected in the camps were foreseeable. People were placed in the camps without any trial taking place. There were 60,000 people in the camps, half of them women and children. Many have been interned there for years. People were regularly murdered. Violence was never very far from the surface. People lived in constant fear. None of this was foreseeable. More importantly none of this is acceptable."*

126. Counsel for the appellant complains about the sentencing court's disinclination to follow the approach of the District Court of Dresden in the Lange case. We are asked in this context to consider this Court's decision in *The People (Director of Public Prosecutions) v. A.M.* [2021] IECA 322, a decision of which the parties were unaware when the matter was before the SCC and which was not drawn to the attention of the sentencing court.

127. The *A.M.* case was an undue leniency review in a child pornography case, involving a respondent who had returned to Ireland to face trial having initially absconded to the UK, and from there to the Philippines, in an effort to avoid being brought to justice. Before

returning to this jurisdiction the respondent had spent time in custody in the Philippines on suspicion of having committed an immigration offence. The suspected immigration offence was indirectly related to the Irish offences for which he was wanted in that he had travelled to the Philippines on an Irish passport which, although valid, had been procured through a deception (i.e., he had applied for a new passport, maintaining that his existing passport was lost, when in fact it had been surrendered by him to Gardaí). This Court, having made a finding of undue leniency, had been prepared in re-sentencing the respondent to take some account of the time spent by him in custody in the Philippines on the basis that it was "*an adversity suffered by the respondent of which account must be taken in considering the overall proportionality of the proposed sentences.*"

128. This Court is asked to note that the principles informing the *A.M.* judgment were, in counsel for the appellant's submission, equitable in nature. Further, it is said the connection between the appellant's loss of liberty and the offence is total. Further, international extradition treaties routinely mandate that any time served on remand in custody in the requested country must be credited against any sentence imposed in the requesting country in the event that the person extradited is convicted of the offences charged. This is a legal right as opposed to an equitable one. Finally, the situation in the present case is wholly analogous to an extradition situation in respect of both instances of loss of liberty, and the appellant is therefore in a much stronger position than was the respondent in *A.M.* It was submitted that the appellant should, at a minimum, get full credit for her loss of liberty.

129. There is a further complaint that the SCC's approach to taking account of the appellant's time in the displaced persons camps in Syria, and of the further restrictions to her liberty while on bail in this jurisdiction awaiting trial, was erroneous. That approach is encapsulated in the following quotation from the sentencing judgment:

> *"We accept that life in Syria in the various camps was arduous and have considered the argument put forward by Mr O'Higgins that the accused has in effect already been subject to a period equivalent to incarceration by reason of these experiences and by reason of the bail terms imposed on her after her repatriation. We also considered the German approach of assigning mathematical ratios to such time periods and we do not consider that this approach is compelling. We have instead adopted the traditional approach to sentencing in this jurisdiction by adding these experiences as a mitigating factor to the other such factors which are present in the case and identified above."*

130. The appellant contends that global figure for mitigation was not appropriate in this case. The appellant was contending for very specific periods in which she experienced loss of liberty and which he argued should be credited against any custodial sentence imposed. It was submitted by way of an analogy that if a person was remanded in custody for a year prior to trial, and a sentencing judge simply included that in a list of points to be reflected in a discount for general mitigation "*there could be no doubt that this was an error in principle*".

131. The appellant contends that it is unsatisfactory that the court did not break down the different levels of mitigation and that that was an error in principle. Counsel for the appellant submits that the mitigating factors in the case, quite apart from any allowance for loss of liberty, should have entitled the appellant to a discount of 12 months. In circumstances where the overall discount of 15 months that implies that a mere 3 months was allowed for the loss of liberty factor. This is characterised as being a grievous error and "*way off what would be required*."

132. In further support of the appellant's argument that she received insufficient allowance for the loss of liberty factor, we were referred to *R. v. Summers* [2014] 1 S.C.R. 575, a decision of the Supreme Court of Canada, a case in which that court was called upon to interpret certain amendments to the Canadian Criminal Code effected by the Truth in Sentencing Act 2009. In the introduction to the court's judgment the background to the case is set out in paras. 1 to 6 thereof. These bear reproduction:

> *"[1] When an accused person is not granted bail, and must be remanded in jail awaiting trial, the Criminal Code, R.S.C. 1985, c. C-46, allows time served to be credited towards a resulting sentence of imprisonment. A day in jail should count as a day in jail.*
>
> ***[2] However, crediting a single day for every day spent in a remand centre is often insufficient to account for the full impact of that detention, both quantitatively and qualitatively. Time in a remand centre does not count for the purposes of eligibility for parole, earned remission or statutory release, and this can result in a longer term of actual incarceration for offenders who were denied bail. Moreover, conditions in remand centres tend to be particularly harsh; they are often overcrowded and dangerous, and do not provide rehabilitative programs****.*
>
> *[3] As a result, for many years courts frequently granted 'enhanced' credit: 2 days for each day spent in pre-sentence custody. This practice was endorsed by this Court in R. v. Wust, 2000 SCC 18, [2000] 1 S.C.R. 455. When conditions were exceptionally harsh, judges granted credit at a rate of 3 to 1 or more.*
>
> *[4] The Truth in Sentencing Act, S.C. 2009, c. 29 (TISA), passed in 2009, amended the Criminal Code to cap pre-sentence credit at a maximum of 1.5 days for every day in custody. The purpose was to remove any incentive for an accused to drag out time in remand custody, and to provide transparency so that the public would know what the fit sentence was, how much credit had been given, and why.*
>
> *[5] In this case, the Court is called upon to interpret these amendments. There is no dispute that Parliament imposed a cap on enhanced credit at a rate of 1.5 to 1. However, there are conflicting lower court decisions on when 'enhanced' credit at a rate higher than 1 to 1 is available.*

[6] The statute does not definitively address the issue, providing simply that enhanced credit is available when 'the circumstances justify it' (s. 719(3.1)). The legislative history is contradictory and inconclusive. We must interpret the provisions to determine what "circumstances" justify enhanced credit of up to a rate of 1.5 to 1. The appellant, the Attorney General of Ontario, argues that the loss of eligibility for parole and statutory release cannot be a 'circumstance' justifying enhanced credit under the new s. 719(3.1) of the Criminal Code. The Ontario Court of Appeal in this case and the Nova Scotia Court of Appeal in the companion case, R. v. Carvery, 2012 NSCA 107, 321 N.S.R. (2d) 321, came to the opposite conclusion, and held that the loss of eligibility for parole and statutory release is a 'circumstance' that can justify enhanced credit."

The appellant in the present case places reliance on the obiter statements in para. 2 of the introduction just quoted (in bold)

133. Reliance was also placed on *R. v. Keown* [2010] NZCA 492 and *R. v. Tamou* [2008] NZCA 88, decisions of the New Zealand Court of Appeal in which that court, while refusing to specify any standard reduction to be applied at sentencing for the restriction of an offender's liberty suffered while on bail subject to stringent conditions pending trial, held that a sentencing court should weigh in each case the degree of restriction on liberty imposed by bail conditions compared with the restriction on liberty entailed due to imprisonment. We were also asked to consider the cases of *R. v. Shramka* [2022] NZCA 299, and *Paora v. R.* [2021] NZCA 559, in both of which allowances were granted to the offender for time spent on bail subject to electronic monitoring. However, the appellant's written submissions concede that there is a statutory basis for granting such allowance in New Zealand, and we consider that that makes those authorities of limited relevance. We might mention in passing that considerable reliance is also placed in the appellant's written submissions on UK statute law, specifically ss. 240 and 325 of the Criminal Justice Act 2003, with respect to the granting of allowance for being subject of bail. Once again, we feel obliged to remark that in the absence of comparable statutory provisions in this jurisdiction we regard this as being of limited assistance.

134. It was further submitted that in Australia, case law suggests that a judge sentencing should have some regard to the curtailment of liberty experienced on account of bail conditions where it has been significant, and in this regard we were referred to *R. v. Silver & Others* [2006] VSC 154, [116] and *Pappin v. R.* [2005] NTCCA 2, [18] (Martin CJ).

135. With respect to the amount of discount afforded for mitigation generally the court was also asked to have regard to the remarks of Hardiman J. in *The People (Director of Public Prosecutions) v. Doherty* (unreported, Court of Criminal Appeal, 29th of April 2003, cited in *The People (Director of Public Prosecutions) v. Maguire* [2015] IECA 350) who stated that in such a person's case "*it is the fact of the sentence rather than its duration which is the principal effect*."

136. In regard to the complaint that the sentencing court failed to have adequate regard to the expert reports submitted by the defence at sentencing, the appellant's written submissions characterise the sentencing court's finding that those reports did not add significantly to matters gleaned at the trial as "*baffling*". It is further complained that the sentencing court failed to take account of the appellant's involvement in the counterterrorism project known as "*Breaking the Counternarrative*", as outlined by Dr Speckhard and this is characterised as being a grave omission.

Submissions on behalf of the Respondent.

137. The respondent submitted that there was no error in the sentence actually imposed nor in the fact that the court found that the custody threshold had been met.

138. The respondent placed reliance on *The People (Director of Public Prosecutions) v. M.S.* [2000] 2 I.R. 592, submitting that the identifying of 2 years and 6 months was correct in circumstances where deterrence was an important element in determining the appropriate sentence particularly in a case where a former member of the Defence Forces had travelled to a foreign country in an act of allegiance to a terrorist organisation. The sentence fixed by the SCC was said to be well within the parameters of the appropriate range available to that court which was obliged to mark the gravity of the offending.

139. Further, reliance was placed by the respondent on *The People (Director of Public Prosecutions) v. Jafari* [2021] IECA 35 and *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356 in submitting that sentencing is not an exact science and that sentencing judges are to be afforded a wide range of discretion within the parameters of the sentencing ranges set by legislation in this jurisdiction, whilst taking into consideration the circumstances surrounding the offence and the offender. It was submitted that the SCC correctly identified a headline sentence figure which reflected the gravity of the offence, and then went on to specify the relevant mitigating factors in respect of which allowance would then be made.

140. The respondent submitted that the express referencing (twice) by the SCC of the 9 months spent by the appellant in the Al-Hol and Ayn Issa international displaced person's camps prior to the imposition of sentence demonstrates that the court below took into consideration her incarceration in these camps when applying mitigation. However, the appellant was not entitled to a like for like allowance. While it may have been a hardship to be in the camps in question, the camps were not prisons and the appellant was not committed there by any judicial authority in consequence of a finding against her that she had breached the law.

141. In response to the appellant's reliance on the decision of A.M. and the passages quoted, the respondent submits that those passages state "*the preferred approach*" of the Court in that case was to "*treat the incarceration […] as an adversity suffered […] of which account must be taken in considering the overall proportionality of the proposed sentences*" which is what the SCC did.

142. It was further submitted that there is no established principle in this jurisdiction of conditional bail being equated, on a like for like basis, with a period in custody.

143. Counsel for the respondent also places reliance on the decision of this Court in *The People (Director of Public Prosecutions) v Ouachek* [2015] IECA 221 in response to the appellant's submission that the SCC erred in principle in not breaking down the global figure it was allowing for different aspects of mitigation. The Court in that case held that:

> *"35. It is clear from established jurisprudence that a sentencing judge is not required in a sentence ruling to slavishly refer to and describe in detail every piece of evidence relied upon as a mitigation factor. Clearly, the greater the weight that can be attached to a piece of evidence the greater the obligation to refer to it specifically. Equally, if the potential mitigating effect of a piece of evidence is adjudged to be slight or minimal a judge ought not to be obliged to specifically refer to it, although he or she must take it into account. It is not at all uncommon in sentence rulings for judges to state on a roll up basis that they are taking into account all of the potentially mitigating factors urged upon the court, and then to refer only to those to which significant weight manifestly attaches, and there is nothing wrong with that. A judge who proceeds in that way commits no error of principle."*

144. With regard to the complaint that the sentencing court failed to attach adequate weight to the contents of the expert reports, the respondent submits that the SCC addressed the appellant's personality, background and vulnerabilities in sentencing, having considered the psychological reports in the light of knowledge they had already attained from the trial. Counsel further submitted that in circumstances where the appellant could not avail of the substantial mitigation that would have attached to a guilty plea, and received nonetheless a 50% discount, she can have no basis for legitimate complaint. We were referred to *The People (Attorney General) v. Earls* [1969] I.R. 414 and *The People (Director of Public Prosecutions) v. O'Halloran* [1999] 2 JIC 1504 in support of the proposition that absent an error in principle, an appeal court should not interfere with a sentence merely because it might have imposed a different one had it been dealing with the matter at first instance.

The Court of Appeal's Analysis and Decision

145. As we understand the position to be, this case represents the first prosecution and conviction before the Irish Courts for an offence of membership of a terrorist group, which is an unlawful organisation, outside of the State, contrary to ss. 6(1)(b)(i) and 7(2) of the Act of 2005; an offence which if committed in the State would constitute an offence under s. 21 of the Act of 1939 as amended by s. 5 of the Act of 2005.

146. Understandably for this reason, there are no previous sentencing decisions in respect of such an offence to potentially assist us. Nevertheless, because of the linkage with offences contrary to s. 21 of the Act of 1939 some potential assistance may be gleaned from a consideration of how our courts have approached the sentencing of offenders who have committed such offences.

147. The difficulty in that regard is that there is currently no readily accessible database or collection of sentencing judgments of the Special Criminal Court, and so it is difficult to make a data-based assessment of trends in sentencing practice for an offence such as that of membership of an unlawful organisation which is not prosecuted in any other court. While the SCC's sentencing judgments are sometimes reserved, and are delivered in public in the normal way, there is no system in place for their collation and wider promulgation. This is so notwithstanding the absence of any restriction on their publication. Uniquely amongst the courts, to-date no judgments of the SCC have been published on the Courts Service website, nor do they appear to have found their way into the Irish Reports or the Irish Law Reports Monthly.

148. More commonly, the SCC's sentencing remarks are ex tempore. The sentencing judgment having been delivered in public, there may be reports of those ex-tempore remarks in the press or broadcast media, but a record of the SCC's *ex tempore* judgments is rarely published in any formal way. Inevitably, there are concerns as to the possibility that such reports might sometimes contain inaccuracies, although it has to be said that in general media reporting of court cases in Ireland is very good and most reports are in fact reasonably accurate. But even if they were to be regarded as being reliable for the most part, we consider that media reports rarely contain sufficient detail as to the court's reasoning to be of assistance. While invariably in recent years there will have been a digital audio recording of the sentencing court's remarks, a transcript is not generally made up unless there is an appeal. Accordingly, while there may be anecdotal awareness amongst regular practitioners before the SCC of its sentencing practices in the case of s. 21 membership offences, hard data is hard to come by. In some instances, the SCC may have made available to interested parties a note reflecting its sentencing remarks, or a contemporaneous note may have been taken by someone present, and these may be in limited circulation, and similarly with respect to any transcript of sentencing remarks that may have been made up for the purposes of an appeal, whether it was ultimately proceeded with or not. Such notes or transcripts do not constitute a formal record, but in circumstances where their accuracy is capable of being verified by comparison with the digital audio recording record they represent source material which, if approached with appropriate caution, is valuable nonetheless for the data it contains.

149. In the course of its researches for the purposes of this judgment, the Court of Appeal has successfully secured transcripts, or notes, of the SCC's sentencing remarks in twenty cases where persons were sentenced for s. 21 offences, and these will be reviewed presently. The survey does not purport to be comprehensive, but there is in our view a sufficient sample to enable us to discern any major trends in sentencings at first instance for this offence. Those cases were (1) *The People (Director of Public Prosecutions) v. Robert O'Leary* (SCC, *ex tempore*, 16th of October 2020); (2) *The People (Director of Public Prosecutions) v. James Joseph Cassidy* (SCC, *ex tempore*, 29th of April 2019); (3) *The People (Director of Public Prosecutions) v. Damien Metcalfe* (SCC, *ex tempore*, 27th of May 2019); (4) *The People (Director of Public Prosecutions) v. Julian Flohr* (SCC, *ex tempore*, 18th of February 2019); (5) *The People (Director of Public Prosecutions) v. Darren Gleeson* (SCC, *ex tempore*, 07th of December 2017); (6) *The People (Director of*

Public Prosecutions) v. Seamus McGrane (SCC, *ex-tempore*, 07th of December 2017); (7) *The People (Director of Public Prosecutions) v. D. O'C* (SCC, *ex tempore*, 07th of December 2017); (8) *The People (Director of Public Prosecutions) v. Martin McHale* (SCC, *ex-tempore*, 16th of March 2017); (9) *The People (Director of Public Prosecutions) v. Noonan and McMahon* (SCC, *ex tempore*, 31st of October 2014); (10) *The People (Director of Public Prosecutions) v. Nathan Kinsella* (SCC, *ex tempore*, 10th of April 2014); (11) *The People (Director of Public Prosecutions) v. Clarke and Palmer* (SCC, *ex tempore*, 31th of January 2013); (12) *The People (Director of Public Prosecutions) v. John Daly* (SCC, *ex tempore*, 14th of June 2013); (13) *The People (Director of Public Prosecutions) v. Barry O'Brien* (SCC, *ex tempore*, 25th of July 2012); (14) *The People (Director of Public Prosecutions) v. Robert Nolan* (SCC, *ex tempore*, 11th of December 2012); (15) *The People (Director of Public Prosecutions) v. Sean Farrell* (SCC, *ex tempore*, 23rd of May 2012); (16) *The People (Director of Public Prosecutions) v. David Dodrill* (SCC, *ex tempore*, 24th of April 2012); (17) *The People (Director of Public Prosecutions) v. Barry O'Brien* (SCC, *ex tempore*, 23rd of February 2011); (18) *The People (Director of Public Prosecutions) v. Dalton McKevitt and Niall Farrell* (SCC, *ex tempore*, 02nd of December 2011); (19) *The People (Director of Public Prosecutions) v. Barry Fitzpatrick* (SCC, *ex tempore*, 25th of February 2011); (20) *The People (Director of Public Prosecutions) v. Jim (James) Murphy, Gerard McGarrigle and Desmond Donnelly* (SCC, *ex tempore*, 15th of December 2010).

150. The position in terms of the availability of data is in theory somewhat better at appellate level. Since its establishment in 2014 it has been the practice of this Court to publish every single one of its judgments on sentencing, whether delivered *ex tempore* or following reservation, on the Courts Service website, and these are readily accessible. However, there have been sentence appeals / undue leniency reviews in relatively few s. 21 membership cases. The few that have been brought included *The People (Director of Public Prosecutions) v. Ryan Glennon* [2018] IECA 329; *The People (Director of Public Prosecutions) v. Sean Hannaway, David Nooney and Edward O'Brien* [2020] IECA 39; and *The People (Director of Public Prosecutions) v. Conor Metcalfe* [2021] IECA 221.

151. There has also been little in the way of scholarly commentary on sentencing for membership of an unlawful organisation. It is not dealt with at all in the current edition of the leading treatise on Irish sentencing law, i.e., Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016). Neither is it dealt with in Eoin O'Connor, *National Security Law in Ireland*, (Bloomsbury Professional 2019), but in fairness the focus of that work is on substantive criminal law, evidence and procedure in the national security context rather than on sentencing. Sentencing for s. 21 offences is, however, treated of in Alice Harrison, *The Special Criminal Court, Practice and Procedure* (Bloomsbury Professional 2019) - see in that regard see paras. 6.63 to 6.66 inclusive of the latter work. At para.6. 63, Ms. Harrison states that "*[e]xperience suggests that, following a conviction for membership where the trial was fully contested by the accused, the special criminal court has tended to hand down sentences of between three and six years*", and in support of that the sentences handed down in the cases of cases of *The People (Director of Public Prosecutions) v. Maguire* [2018] IECA 107; *The People (Director of Public*

Prosecutions) v. Connolly [2018] 3 I.R. 753; *The People (Director of Public Prosecutions) v. Weldon* [2018] IECA 197; *The People (Director of Public Prosecutions) v. Nolan* [2015] IECA 165 and the case of *The People (Director of Public Prosecutions) v. Binéad & Donohue* [2007] 1 I.R. 374, are cited as examples. However, in the case of the judgments bearing Court of Appeal neutral citation references and *DPP v. Connolly*, these all relate to judgments dealing with conviction appeals. Sentence appeals in these cases do not appear to have been proceeded with. It seems safe to assume therefore that the sentence indications contained in the footnote are referable to sentences imposed by the SCC at first instance.

152. There is also a brief discussion of sentencing policy in membership cases in what is now quite an old work, namely Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester University Press 1989). The authors comment:

> *"It appears that in a few cases during the mid-1970s the Court of Criminal Appeal was prepared to impose suspended sentences in the case of persons convicted of politically motivated offences where the defendants were prepared publicly to forswear membership of an illegal organisation. For example, O'Higgins C.J. is reported as having said in the Court of Criminal Appeal in The People (Attorney General) v. Murphy [footnoted reference to The Irish Times, 13 December 1974] that the court looked 'with approval on anyone no matter how involved are concerned they may have been in the past, who has the courage to stand up and stand apart, and to realise that mistakes have been made'. But this view fell out of favour with the Court of Criminal Appeal in The People (Director Of Public Prosecutions) v. Potts and O'Hare [footnoted reference to The Irish Times, 21 June 1977], where the court refused to take such considerations into account saying that such pleas for clemency should more properly be addressed to the executive branch of government."*

153. In the United Kingdom there is no exact analogue for s. 21 of the Act of 1939, or indeed for an offence of membership, outside the state, of a terrorist group which is an unlawful organisation contrary to ss. 6(1)(b)(i) and 7(2) of the Act of 2005 and which if committed in the State would constitute an offence under s. 21 of the Act of 1939. Section 11 of the Terrorism Act 2011 which criminalises membership of proscribed organisations seems to represent the closest approximate analogue. Guidance with respect to sentencing for s. 11 offences has been published by the Sentencing Council (for England and Wales). It provides that in determining an offender's culpability a sentencing court should consider which of the following three categories and offender falls into:

    A. Prominent member of the organisation;
    B. Active (but not prominent) a member of the organisation;
    C. All other cases.

154. The approach to harm done in the Sentencing Council's said guidance is that where the offence is charged there is no variation in the level of harm caused. Membership of any

organisation which is concerned in terrorism either through the commission, participation, preparation, promotion or encouragement of terrorism is inherently harmful.

155. We do not consider it would assist us to have any regard to the range of sentences recommended in the neighbouring jurisdiction for offences falling into the aforementioned categories A, B or C respectively, or to the starting points recommended in the sentencing Council's guidance.

156. However, we do think that the factors respectively listed in the Sentencing Council's guidance as being potentially aggravating factors and as being potentially mitigating factors are informative. In saying that, we are not to be taken as uncritically adopt their lists or treating them as being exhaustive, not least because certain factors are to be treated as aggravating in that jurisdiction by statute, and the statutes in question obviously do not apply in this jurisdiction. In some instances, we may have analogous legislation, e.g. s. 11 of the Criminal Justice Act 1984 which makes offending whilst on bail an aggravating factor. For the most part, the factors listed mirror factors that would also be considered relevant in this jurisdiction. Amongst the factors that are identified as potentially aggravating are having relevant previous convictions; the fact (if it is the case) that an offence has been committed whilst on bail; the length of time over which offending was committed; any failure to respond to warnings; any failure to comply with court orders, committing the offence whilst on licence under post release supervision, or; committing the offence whilst in prison. The guideline specifically relating to s. 11 offences is also required to be read in conjunction with the Sentencing Council's "*General guideline: overarching principles*" in sentencing, and that in turn lists many generic aggravating factors to be also taken into account. It is not considered necessary or appropriate to review those.

157. Turning to the mitigation side, the Sentencing Council's guidance on s. 11 offending lists factors to be taken into account as reducing seriousness or reflecting personal mitigation. The list in that respect includes having no previous convictions or no relevant/recent convictions; being of good character and/or having exhibited exemplary conduct; being involved through coercion, intimidation or exploitation; providing clear evidence of the change of mindset prior to arrest; having diminished responsibility due to a mental disorder or a learning disability; age and/or lack of maturity where it affects the responsibility of the offender, and; being a sole or primary carer for dependent relatives. Once again, it is the case that the offence specific guidance must be read in conjunction with the general guideline on overarching principles, and there is a long list of generic mitigating factors that might require to be taken into account. Once again, as they are generic is not considered necessary to review them.

158. The position in England and Wales is that a plea of guilty is considered separately as it is expressly provided for in s. 73 of the Sentencing Code and there is a separate Reduction in Sentence for a Guilty Plea guideline.

159. Returning then to the law in this jurisdiction, s. 21(1) of the Act of 1939, as amended, criminalises membership of an unlawful organisation. The characteristics of what may

constitute an unlawful organisation are set out in s. 18 of the Act of 1939, and s. 19 of the Act of 1939 makes provision for the government to declare that an organisation is an unlawful organisation, and that it ought, in the public interest, to be suppressed. Where a suppression order has been made it is conclusive evidence for all purposes, other than for an application for a declaration of legality, that the organisation to which it relates is an unlawful organisation within the meaning of s. 18 of the Act of 1939. A person found guilty of an offence of membership of an unlawful organisation contrary to s. 21 of the Act of 1939 is liable, on summary conviction, to a fine not exceeding €4,000 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months, or both. A person convicted of the offence on indictment is liable to a fine or imprisonment for a term not exceeding 8 years, or both.

160. While it is a different offence to an offence of membership of an unlawful organisation contrary to s. 21 of the Act of 1939 as amended by s. 5 of the Act of 2005, the offence under ss. 6(1)(b)(i) and 7(2) of the Act of 2005 is closely related to it. Section 7(2) of the Act of 2005 provides that:

> *"A person guilty of an offence under section 6(1)(b) is liable on conviction to the penalty to which he or she would have been liable had the act that constitutes the offence been done in the State."*

161. Accordingly, a very similar approach to the sentencing of offences under s. 6(1)(b)(i) of the Act of 2005 to that taken in respect of the sentencing of offences arising under section 21 of the Act of 1939, as amended, would seem appropriate. It is convenient therefore, at this stage, to consider such data as is available concerning sentencing practices for s. 21 offences at first instance and on appeal.

(1) The People (DPP) v Robert O'Leary

162. The defendant was convicted following a trial on a count of membership of an unlawful organisation contrary to s. 21 of the Act of 1939, as amended. At trial, there was statutory belief evidence which was corroborated by evidence which pointed to the acquisition by the defendant of a vehicle approximately one week before that vehicle played a pivotal role in the planting by the IRA of an under-vehicle IED designed to kill or seriously injure a PSNI officer. The sentencing court noted that the role a person is prepared to play in the activities of an unlawful organisation is a logical indication of his level of membership. The sentencing court was satisfied on the basis of limited evidence that the defendant's role was one merely of sourcing and supplying the vehicle in furtherance of an unlawful object by the IRA, and noted that any member who agrees to procure a vehicle on behalf of an unlawful organisation must be taken to know that it may be required for all activities within the recognised field of that organisation. The sentencing court nominated a headline sentence of 4 years and 6 months' imprisonment, which sentence fell just above the centre of the middle range of offences. From this, the sentencing court deducted 1 year to account for limited mitigating factors, principally the absence of previous convictions and the particularly onerous impact upon the defendant's partner. No part of the net custodial sentence was suspended. (It should be noted that

Mr. O'Leary's conviction was later quashed by this Court on consent on the 11th of January 2022 – see Court of Appeal Record No. 212/2020. There is no written judgment.)

(2) The People (DPP) v James Joseph Cassidy

163. The defendant was convicted following a trial on a count of membership of an unlawful organisation contrary to s. 21 of the Act of 1939, as amended. At trial, statutory belief evidence was corroborated by evidence which consisted of the finding of a booster tube in a property adjacent to the defendant's home to which the defendant had primary and immediate access; files on a USB key found within the defendant's home that indicated internet searches relating to the extraction of ammonium nitrate from fertiliser; a number of sequential new mobile phones in inscribed boxes and the circumstances in which, and the person from whom, these phones had been observed to have been procured by the defendant, and; inferences drawn from his responses or non-responses to questions concerning these matters at subsequent interview. The sentencing court did not regard the defendant to be a member active at the highest level of the organisation and considered the various activities of the defendant as preparatory to the commission of some criminal offence. The sentencing court assessed the gravity of the offence as lying somewhat above the centre of the middle range of offences, nominating a headline sentence of 4 years and 6 months' imprisonment. This sentence was subsequently reduced by 6 months to account principally for the absence of previous convictions as mitigation. No part of the net custodial sentence was suspended.

(3) The People (DPP) v Damien Metcalfe

164. The defendant was convicted following a trial on a count of membership of an unlawful organisation contrary to s. 21 of the Act of 1939, as amended. At trial, statutory belief evidence was corroborated by evidence which pointed to *inter alia* the defendant playing a supporting logistical role in relation to IRA inquiries that were being conducted at a property in Carpenterstown, Dublin, his primary purpose being the transportation of persons to and from the inquiry for the purpose of their being interviewed by an IRA team that had travelled from Northern Ireland to Dublin to conduct this process. The trial court also drew inferences from his failure to answer questions concerning these matters at interview. The sentencing court regarded this evidence as indicative that the defendant was willing and was trusted to assist and support in the function of an IRA inquiry into matters of profound concern to that organisation, and the evidence was generally supportive that he was a member at the relevant date. The sentencing court placed the defendant's offending at the lower end of the mid-range, and nominated a headline sentence of 3 years' imprisonment. From this, a deduction of 15% (6 months) was made, to account for limited mitigating factors, primarily: the defendant's family circumstances, a good employment record, and appropriate behaviour in his interactions with gardaí. No part of the net custodial sentence was suspended.

(4) The People (DPP) v Julian Flohr

165. The defendant was convicted following a trial on a count of membership of an unlawful organisation contrary to s. 21 of the Act of 1939, as amended. Statutory belief evidence was corroborated by independent evidence which consisted of a discovery by gardaí of an explosive device in a vehicle in which the defendant was a passenger. The sentencing court was satisfied that the defendant had intentionally engaged in the facilitation and assistance of moving a training mortar from place to place in furtherance of the aims of the IRA. The concealment of the mortar, in a child's backpack, pointed to the provision of significant practical assistance by way of the defendant's membership. There was no evidence that the defendant's membership went any further than that which was disclosed by gardaí. Nevertheless, that the defendant was involved in the transportation of the mortar pointed to the IRA reposing significant trust in the defendant who the sentencing court regarded as having acted on a knowledgeable and voluntary basis. A headline sentence of 3 years and 4 months' imprisonment, lying within the lower half of the mid-range, was nominated. From this, a discount of 15% (6 months) was made to account for inter alia family circumstances; previous employment; positive civic application in relation to other matters, and; genuine and personal social references. No part of the net custodial sentence was suspended by the sentencing court.

(5) The People (DPP) v Darren Gleeson

166. The defendant pleaded guilty to a count of membership of an unlawful organisation contrary to s. 21 of the Act of 1939, as amended. The defendant, operating under a pseudonym, served as an intermediary, receiving two (inert) grenades on behalf of another individual connected with the IRA, which grenades were delivered as part of a controlled arrangement made by the gardaí in their investigation into IRA activities in the Dublin area. The defendant was 35 years of age, and had a significant number of previous convictions. None of these previous convictions were similar in nature to membership of an unlawful organisation. Garda evidence at the sentencing hearing pointed to the defendant as a member at the lower level of the organisation. Nonetheless, the sentencing court was satisfied that the defendant was a person in whom sufficient trust was vested insofar as he was enabled to arrange the importation of explosive devices on behalf of the IRA. The sentencing court regarded the offending as lying in the upper part of the midrange, nominating 5 and a half years' imprisonment as the headline sentence. The guilty plea, described as "*reasonable*", was taken into account as a mitigating factor, and the sentencing court deducted 2 years from the headline, leaving a net custodial sentence of 3 and a half years to be served, of which custodial sentence no part was suspended on account of the absence of an undertaking that the defendant would dissociate from the IRA.

(6) The People (DPP) v Seamus McGrane

167. The defendant was convicted following a trial on *inter alia* a count of membership of unlawful organisation contrary to s. 21 of the Act of 1939, as amended. The prosecution had adduced evidence to the effect that the defendant was involved in directing an unlawful organisation: issuing directions in respect of activities regarding the

experimentation and development of explosive devices; directing IRA strategy, and; directing the training up of persons in respect of an unlawful organisation. The defendant had two previous convictions: membership of an unlawful organisation, and training persons in the use of firearms. The sentencing court nominated a headline sentence of 8 years' imprisonment. In mitigation, the sentencing court took into account the efficient and expeditious manner in which the trial of the defendant was conducted which was attributable to admissions and the calling by agreement of witnesses. The sentencing court deducted 1 and a half years from the headline sentence, leaving a net custodial sentence of 6 years and 6 months to be served.

(7) The People (DPP) v D. O'C.

168. The defendant pleaded guilty to a count of membership of an unlawful organisation contrary to s. 21 of the Act of 1939, as amended. The "*overwhelming*" evidence against the defendant (the SCC's characterisation) consisted *inter alia* of observations by gardaí of various meetings between the defendant and a person previously convicted before the Special Criminal Court and suspected by the gardaí as having a significant role within the real IRA; reference to a bomb "*on the line*" which the gardaí were satisfied referred to the Dublin-Belfast train line, and the provision by the defendant of a time power unit, and; discussions regarding the manufacture of certain powders, sample of which was found in a search conducted by gardaí. The sentencing court regarded the defendant's use of his intellect and educational skills as an aggravating factor. Also aggravating was further evidence which pointed to the planned use of an explosive device at the time of a visit by a member of British royalty, who was designated as a military target by the organisation. The sentencing court nominated a headline sentence of 7 years' imprisonment, situated in the upper range of offences. Taking into account mitigating factors (*inter alia* the guilty plea, no previous convictions, expression of remorse, and testimonials), the sentencing court deducted 1 year and 6 months, leaving a net custodial sentence of 5 years and 6 months to be served.

(8) The People (DPP) v Martin McHale

169. The defendant was convicted following a trial on a count of membership of an unlawful organisation contrary to s. 21 of the Act of 1939, as amended. The defendant was a trusted transporter of fertiliser, and on the date of the offence was transporting half a metric tonne of the substance which could be used as a component in the manufacture of explosive devices. Statutory belief evidence was adduced, as was evidence regarding interviews with gardaí, inferences drawn pursuant to s. 2 of the Offences Against the State (Amendment) Act 1998, and the activities of the accused at the relevant time. The sentencing court nominated a headline sentence of 5 and a half years' imprisonment, lying in the upper end of the midrange of offences. Mitigating factors included the absence of relevant previous convictions, the defendant's settled family circumstances and limited education, and the manner in which he approached his trial. The sentencing court deducted a year to account for these factors, leaving a net custodial sentence of 4 and a half years to be served. No part of the net custodial sentence was suspended.

(9) The People (DPP) v Noonan and McMahon

170. Both co-accused in this matter pleaded guilty to membership of an unlawful organisation, namely the IRA. They were considered equally involved and no distinction was made between them on that account. They both also had a number of previous convictions including convictions for violence. Their pleas were entered at a late stage but were nonetheless regarded as valuable. In mitigation, each had given undertakings under oath to disassociate.

171. The accused Mr. Noonan was 36 years of age. He had some difficulties in his personal life in respect of which he had sought some assistance, particularly centering upon his use of alcohol. He was a single man with four children from previous relationships and was unemployed but had a history of some employment. The accused Mr. McMahon was 32 years old. He was a married man with four children. He was unemployed but had previously worked as a chef.

172. The court regarded both accused as being at a reasonably low level in the IRA but nonetheless actively involved (at the time of arrest they had been found in proximity to what the court referred to as "*very serious weaponry*", although they were not charged with weapons offences).

173. The court set a headline sentence in each case of 6 years' imprisonment. The court discounted from that for 2 years to reflect mitigation leaving a net sentence of 4 years' imprisonment. It then suspended a year and a half of that to incentivise rehabilitation.

(10) The People (DPP) v Nathan Kinsella

174. This accused was also sentenced following a plea of guilty to membership of an unlawful organisation. The case against him was based all upon the opinion of a chief superintendent, to be supported by evidence that he had attended a paramilitary-type funeral at which shots were fired and that highly incriminating documents were found concealed in his house. The accused was aged 35, in a relationship, with six children. He had no previous convictions of consequence. The offence was placed at the lower end of the middle range of seriousness. The court set a headline sentence of 4 years before mitigation. It was discounted to 3 years to reflect mitigation and the final year of that post-mitigation sentence was suspended.

(11) The People (DPP) v Clarke and Palmer

175. These two accused were convicted of membership of an unlawful organisation following a contested trial. The charges arose out of a successful Garda operation in which gardaí had stopped two cars containing ten males, the two co-accused among their number, and a lot of paramilitary-type paraphernalia.

176. The accused Mr. Palmer was 57 years old. His conviction history included two relevant previous convictions which the sentencing court took into account: possession of firearms for which Mr. Palmer had received a 5-year custodial sentence, and; possession of

firearms with intent to endanger life for which he had received a 7-year custodial sentence. There had been evidence that Mr Palmer had been receiving drug treatment assistance. He was married but separated and had seven children. He was unemployed but had previously served in the Irish army for three years, following which he had a construction business which collapsed. There was evidence of voluntary community work.

177. The accused Mr. Clarke was 43 years old. He had two previous convictions, one of which was relevant, namely a previous conviction for membership for which he had received 4 years' imprisonment. He had experienced difficulties in spending time in solitary confinement in prison, and had been treated at the Central Mental Hospital. He was a married man with four children and had been in employment until 2007.

178. Each had given undertakings under oath to disassociate. The court decided to treat each of them equally for pre-mitigation purposes notwithstanding Mr. Palmer's more serious record. However, the court felt it balanced out because Mr. Palmer's last conviction had been 21 years previous. The court sentenced each of them to what was effectively a headline sentence 6 ½ years' imprisonment. In the case of Mr. Palmer, they suspended the final year of that sentence, whereas in the case of Mr. Clarke they suspended 3 years of that sentence.

(12) The People (DPP) v John Daly

179. This accused was convicted of membership of an unlawful organisation following a contested trial. The evidence against him at consisted of a Chief Superintendent's opinion, certain supporting circumstantial evidence and inferences drawn from his failure to answer certain questions. The circumstantial evidence relied upon was that he was travelling in a stolen car which was stopped, and he was found to be wearing a disguise. He had been partially cooperative with the investigation.

180. The accused was aged 49 years at the date of his sentencing, and was married with three children, one of whom was still in education. He was a taxi driver and also had an interest in a grocery shop. He had two previous convictions, being a conviction for a public order offence and a relevant conviction, namely a conviction in Antwerp in Belgium for unlawful possession of firearms in 1991 for which, having spent 146 days remanded in custody, he had received a suspended sentence of one year.

181. The SCC nominated a headline sentence of 5 years' imprisonment and reduced that by one year to take account of mitigation, namely his partial cooperation.

(13) The People (DPP) v Barry O'Brien

182. This accused was charged with membership of an unlawful organisation and other more serious charges. He pleaded guilty to the membership charge. The court's sentencing remarks do not outline the circumstances of his membership. However, he is noted to have been 40-year-old family man with five children. His wife suffered from epilepsy which was under control. She was the carer of the accused's mother until he went into

custody. Although not recently employed he was trained as a chef and had work available to him. He had given an undertaking on oath to dissociate. He had one previous conviction in 1999 for an assault causing harm for which, in circumstances where he was willing to pay the victim some compensation, he received 4 months' imprisonment. The court fixed a headline sentence of 5 years but suspended the final 3 years of that to reflect mitigation.

(14) The People (DPP) v Robert Nolan

183. This accused was convicted of membership of an unlawful organisation following a contested trial. He was convicted on the basis of a Chief Superintendent's opinion supported by certain circumstantial evidence and adverse inferences based on his failure to answer certain questions. He was a passenger in a car that was stopped in Limerick. The driver of the car was convicted member of the IRA. There was a firearm in the car but no evidence indicating knowledge on the accused's part of the presence of that firearm. The accused had co-operated on arrest and had complied with stringent bail conditions.

184. The sentencing court expressed the view that the offence was at the low end of the scale. The accused was 45 years old and had an alcohol addiction. He was a married man with two children and had worked as a roofer. He had a good employment history. He had one previous conviction for larceny of a beer keg for which he had received a fine, which previous conviction the sentencing court disregarded. There was evidence that the accused had another previous conviction for a public order offence but there was reason to believe that it had been quashed on appeal. No headline sentence was indicated but a post mitigation sentence of 3 ½ years' imprisonment was imposed.

(15) The People (DPP) v Sean Farrell

185. The accused was convicted of membership of an unlawful organisation following a contested trial. The sentencing remarks do not indicate the circumstances of the offence other than that he had come to Garda notice in the context of a successful operation in which firearms had been recovered. However, the court emphasised that there was no evidence at all connecting the accused to the firearms. The court was approaching the matter on the basis that all they had was evidence of membership but not of any activity in the context of membership.

186. The accused was 27 years of age. He had a good employment record. He had worked as a cabinetmaker and as an outreach worker and the court had before it a number of testimonials concerning positive contributions which the accused had made to his community, particularly in the sporting context. He had a number of previous convictions, the most serious of which was a conviction for possession of a firearm with intent in 2009. He had participated in a robbery while dressed in Garda uniform and carrying firearms. Although the circumstances of that offence were serious, he had received a suspended sentence.

187. No headline sentence was nominated in respect of the membership offence. However, the court imposed a post mitigation sentence of 5 years' imprisonment on the accused, backdating it to when he went into custody.

(16) The People (DPP) v David Dodrill

188. This accused pleaded guilty to a single charge of membership of an unlawful organisation, namely the Real IRA. The court heard evidence of the accused's involvement in criminal racketeering and intimidation in the course of his activities as a member of the said organisation. The court assessed his role as being at the highest end for such a crime before consideration of mitigating circumstances. It took into account his plea of guilty, his work history; his role as a father, and; his role within and without his family including work done by him for elderly people. He had no material previous convictions. The court sentenced him to 6 years' imprisonment. It considered that it was not suitable case in which to suspend any portion of the sentence.

(17) The People (DPP) v Barry O'Brien

189. This accused was convicted of membership of an unlawful organisation following a contested trial. Unusually, the offence dated back to April 2004 and the maximum potential penalty for such an offence was 7 years rather than 8 years' imprisonment. The reason for the delay in trying him was that the accused had instituted judicial review proceedings. The sentencing court's remarks do not give any indication as to the circumstances of the accused's membership beyond the fact of such membership. The accused was 39 years of age and was married with a number of children. His wife suffered from ill-health. He had three previous convictions. These comprised a s. 2 assault and a s. 3 assault causing harm both dating from 1999 and for which he had received a sentence of 4 months' imprisonment. The third matter was a conviction for handling stolen property in 2012 for which he received a fine. The court accepted that as the accused had been on bail for almost 7 years, he had spent a considerable time with his liberty restricted. It was considered appropriate to take that into account. The Court nominated a sentence of 4 years' imprisonment but sentenced the accused to 3 years and 9 months' imprisonment, an allowance of 3 months being made for what was characterised as "*the delay*".

(18) The People (DPP) v McKevitt and Farrell

190. These accused were both convicted of membership of an unlawful organisation, amongst other more serious charges, having pleaded not guilty on arraignment. The accused Mr. McKevitt was 36 years of age. He had a partner with whom he had two children. The accused Mr. Farrell was 35 years of age. The portion of the SCC's sentencing remarks dealing with the membership charges noted the maximum potential sentence was 8 years' imprisonment, and alluded to the fact that both accused had previous convictions before the SCC in 2002 for possession of firearms for which each of them had received a sentence of 3 ½ years' imprisonment. The court indicated that taking that into consideration the offence of membership in their respective cases merited 6 years'

imprisonment. However, the court felt that, although they had not pleaded guilty, allowance should be made for the fact that no contest had been offered at their trials and that had allowed the court to very quickly come a conclusion, beyond reasonable doubt, as to the guilt of both accused. To take account of that, the court was prepared to reduce the indicative sentence of 6 years' imprisonment to one of 5 years.

(19) The People (DPP) v Barry Fitzpatrick

191. This accused was convicted of membership of an unlawful organisation following a contested trial. The evidence against him consisted of the opinion evidence of a Chief Superintendent supported by circumstantial evidence comprising being in proximity to a finding of firearms (albeit that they were not capable of firing other than plastic) at the time of his arrest, and inferences drawn from his refusal to answer a number of material questions concerning his movements. There was no evidence as to the status of the accused within the organisation in question. He had some previous convictions comprising road traffic matters, an assault on a Garda and breach of the peace, the obstruction of a Garda in the course of his duty, and; conspiracy to effect the escape of prisoners when a member of the Defence Forces and working as a military policeman. He had received non-custodial penalties for all but the latter, for which he received 6 months' imprisonment. The SCC sentencing remarks noted that he had caused the gardaí no difficulties. He had represented himself at trial and the court had been impressed with this attitude throughout the trial. Further, a very large factor in the case was his age, 68 years. The court indicated that the appropriate sentence, but for the age factor, was 4 years' imprisonment. Because of the age of the accused the court was disposed to reduce that by a further one year, leaving a net sentence of 3 years' imprisonment.

(20) The People (DPP) v Murphy, McGarrigle & Donnelly

192. These three accused were all convicted of membership of an unlawful organisation following a contested trial. The SCC heard evidence as to the background. The accused were all arrested in the context of a Garda operation aimed at foiling an intended tiger kidnapping. They were arrested en route to what was suspected to be the planned commission of such an offence. However, there was no evidence of the commission of any actual offence other than membership. They were not charged with attempted kidnapping or with any other offences.

193. The accused Mr. Murphy was aged 63 years. He was said to be a family man with health problems. He had no relevant previous convictions, but had convictions in Northern Ireland for assault on members of the police, for an aggravated assault on a child and for being in breach of bail.

194. The accused Mr. McGarrigle was aged 46 years and was married with two children. He was a scaffolder by occupation, but also worked as a doorman. He had 37 previous convictions in Northern Ireland. The majority were unrelated to terrorist offences, but the list did include including convictions for attempted murder of a member of the security services, and possession of firearms in that context. He received 14 years' imprisonment

for the attempted murder and a concurrent sentence of 12 years' imprisonment or firearms offences.

195. The accused Mr. Donnelly was aged 58 years, and was single but in a relationship. He had 60 previous convictions in Northern Ireland but they were unrelated to terrorist type offences. He was the sole carer of his elder sister, and his own health was poor. The court was disposed to treat him as a first-time offender in this jurisdiction.

196. The SCC's sentencing remarks do not nominate a headline sentence in any of the cases. The court sentenced both Mr. Murphy and Mr. Donnelly to 3 years and 9 months' imprisonment, stating it was taking into account their respective ages. It was not prepared to distinguish between the two in terms of their culpability and other circumstances. Mr. McGarrigle's case, in contrast, was considered to be distinguishable from the cases of his co-accused. He was sentenced to 5 years' imprisonment, and his case was distinguished from those of Mr. Murphy and Mr. Donnelly on the basis that he was a younger man than them and on the basis of his history, namely his relevant previous convictions in Northern Ireland.

Review of the Appellate Sentencing Judgements Previously Identified.

197. As previously identified at para. 149 of this judgment there are a small number of published judgments of this Court in sentencing appeals/undue leniency reviews concerning s. 21 membership cases. It is appropriate to also review these.

The People (Director of Public Prosecutions) v Ryan Glennon

198. In this case the appellant had been convicted of a s. 21 offence following a contested trial before the SCC and had been sentenced to 6 years' imprisonment, the court having expressed the view that there were aggravating circumstances in the case. He appealed to this Court against the severity of his sentence. The background was that during a search of two premises a quantity of explosives; rockets; component parts for explosive devices and a water tub containing four rockets; the quantity of Semtex; detonators, and; other material associated with explosives. Also found was a home-made booster tube, and a quantity of ground ammonium nitrate. The appellant's fingerprints and his DNA signature had been found in a number of the items. This was offered as supporting evidence to corroborate a Chief Superintendent's opinion that he was a member of the IRA. The nature of the aggravating circumstances alluded to by the SCC was not specified, but implicitly it was a reference to the nature of the materials found during the searches which suggested that the appellant's involvement as a member had not just been passive but rather that he had been significantly active.

199. The appellant was aged 25 years at the date of sentencing, was in a relationship, and had a 3-year-old daughter. He had a consistent work record, mostly as a labourer on the Dublin docks. The sentencing court had received a testimonial from his employer attesting that he was a good employee. He had just one previous conviction for a minor road traffic matter.

200. The Court of Appeal found no error of principle in how the SCC had approached sentencing and dismissed the appeal.

The People (Director of Public Prosecutions) v Sean Hannaway, David Nooney and Edward O'Brien

201. In this case the appellants were convicted of a s. 21 offence following a 50-day trial before the SCC. There were two co-accused who were also convicted of the different offence of providing assistance to an unlawful organization. The background to the matter was that gardaí had through covert electronic surveillance of a rented dwelling and other means found the accused to be engaged in what was believed to be the holding of an IRA court-martial or inquiry at the premises in question. Again, the evidence relied upon in all cases was a Chief Superintendent's opinion, supported by evidence gained during the Garda investigation and surveillance, and, in the case of Mr. Nooney and Mr. O'Brien only, inferences drawn from their respective failures to answer material questions in circumstances where s. 2 of the Offences against the State (Amendment) Act 1998 had been invoked.

202. The SCC sentenced Mr Hannaway to 5 years and 6 months' imprisonment, Mr. Nooney to 3 years and 9 months' imprisonment, and Mr. O'Brien to 1 year and 4 months' imprisonment. Mr. Hannaway appealed the severity of his sentence to this court and the DPP sought a review of the sentences imposed in respect of Mr. Nooney and Mr. O'Brien on the ground that they were unduly lenient.

203. Mr. Hannaway's appeal was based essentially on the contention that there had been an unjustified differentiation between the accused, which argument the Court of Appeal rejected, giving its detailed reasons in its judgment. Of interest are the following remarks at paras. 24 and 25 of the judgment:

> *"The differentiation between each accused was in part explained, and is in part to be inferred, from the judgment of the court below, and it was quite nuanced. The court looked at the activity that was underway in which all three had participated, albeit at slightly differing levels of culpability. They were satisfied that this was the conduct of an IRA inquiry requiring the attendance of persons for the purpose of interrogation and the conduct of inquiries of the sort revealed on the audio recordings. As counsel for the DPP pointed out to us in the course of her oral submissions it was clear that there was a high level of planning and prior organization and that all of those involved were acting in concert. The court was entitled to regard this as criminal conduct that justified placing the offenses in the high range. This was not just passive assistance or support for an illegal organization, or passive membership of such an organization. All of the participants were actively engaged in the furtherance of the activities of an illegal organization, either as a member (in one instance) or persons providing assistance/support. Each of the accused has complained that the court below effectively "tarred them all with the same brush" (this court's characterization) in that it attributed activities identified as having been performed by specific individuals to all of the accused. An*

example in that regard is that the renting of the property, which was clearly identified as having been the work of David Nooney. Despite this the fact that a property had been rented for the purpose of conducting an IRA inquiry was treated as an aggravating factor in all cases.

25. We do not consider that this criticism stands up to critical analysis. The court below was perfectly entitled to take an overview of the nature of the illegal activity that was being conducted. It did not treat all accused in the same way, either with respect to the assessment of gravity or with respect to discounting for mitigation."

204. The DPP's undue leniency applications involving Mr. Noonan and Mr. O'Brien, which had relied on alleged excessive discounting for mitigating circumstances, were also dismissed.

The People (Director of Public Prosecutions) v Conor Metcalfe

205. Finally, this again was a sentence appeal by an appellant who had been convicted of a s. 21 offence following a contested trial in the SCC. He had been sentenced to 4 ½ years' imprisonment. The evidence against him consisted of a Chief Superintendent's opinion, corroborated by adverse inferences which the court was invited to draw arising from his failure to answer material questions. The questions had concerned his involvement in the movements of a stolen van, which was later intercepted and found to contain firearms and ammunition, his association with a number of convicted members of the IRA, and the fact that a document bearing the fingerprints of the accused was found in the residence of a convicted member of the IRA in the course of a search.

206. The central issue on appeal was the suggestion that the SCC had erred in their assessment of the gravity of the case. This was rejected by the Court of Appeal, stating:

"We agree with the trial court that just as there may be different levels of activity in lawful organisations, so too may there be different levels of activity in unlawful organisations. The analogy drawn by the trial court of the member of a sports club is a helpful one. At trial, there was evidence related to associations, related to a particular document, and related to a stolen vehicle. While, at trial, the evidence was adduced for the purpose of establishing the materiality of questions, we see nothing objectionable in the Court having regard to the evidence at the sentencing stage. The materiality of the questions at trial was established by proving the factual matters that underlay the questions beyond a reasonable doubt. It was not a mere prosecution tactic to submit that the facts did not corroborate the Chief Superintendent's opinion; what corroborated his opinion was the failure to answer material questions based upon those facts. This approach ensured that there could be no suggestion that the facts themselves were being in one sense relied upon twice, i.e. to form the Chief Superintendent's opinion, and also to corroborate. In the context of the sentence hearing, it seems to us that the factual background to the questions that was established showed that the appellant's membership was active and involved and went beyond what, to use the sporting club analogy favoured by the Special Criminal Court, could be regarded as social membership or

pavilion membership. In our view, it provided strong support for the suggestion that the membership with which the Court was dealing was an active membership and that this was not a situation of somebody who was a mere paper member. We do not see that the Court's approach to the assessment of gravity was an impermissible one."

The Present Case: Complaints in Respect of the headline sentence

207. The SCC properly had regard to the range of penalties in determining the headline sentence in this case. That range runs from non-custodial options up to a maximum of 8 years' imprisonment. The court said, "*in the case of an offence carrying an eight-year sentence, if it is divided into a tripartite scale of lower end, medium and upper end offences, this would result in a potential headline sentence for a low-end offence of up to 2 years and eight months.*" The headline sentence nominated by the SCC in the present case was 2 years and 6 months, reflecting the court's view that this case was properly to be located in the lower end subdivision, albeit in the upper reaches of that subdivision. Counsel for the appellant complains that even locating it there was excessive. We do not agree.

208. We are conscious that the offence of membership of an unlawful organisation is a controversial one, and that it has been criticised by many, including by respected legal writers, as representing an undesirable encroachment on freedom of expression and freedom of association, particularly in circumstances where it criminalises "*a state of being*", rather than positive activity. There are arguments on both sides, however. Significantly, in the Irish domestic context, following the Good Friday Agreement in 1998 a committee was established under the chairmanship of the Honourable Mr. Justice Anthony J Hederman to examine all aspects of The Offences Against the State Acts, 1939 to 1998, taking into account, *inter alia*, the threat posed by international terrorism and organised crime, and Ireland's obligations under international law. The majority of that committee recommended the retention of the offence of membership of an unlawful organisation contrary to s. 21 of the Act of 1939 (a dissenting view by Professor Dermot Walsh is annexed to the report). Accordingly, it remains State policy, reflected in primary legislation, that membership of an unlawful organisation should be a criminal offence punishable by up to 8 years' imprisonment. It is the law, and we must apply the law.

209. The Oireachtas, in enacting ss. 6(1)(b)(i) and 7(2) of the Act of 2005 has made similar provision with respect to membership of a terrorist group, outside the State, which is an unlawful organisation, and which if committed in the State would constitute an offence under s. 21 of the Act of 1939 as amended. It is not difficult to appreciate why this has been considered necessary.

210. On the evidence received by the SCC in this case, the Islamic State organisation challenges our fundamental democratic values, our respect for human rights and the notion of respect for the rule of law. It is not simply that its members have a different value system to ours but that they, and the organisation of which they are a member, are subversive of our values and committed to destroying them. In this case, the SCC

received clear evidence as to this, and as to the organisation's intolerance, brutality and extreme violence towards anybody who does not share their world view, including instances of torture, burnings, beheadings, crucifixions, drownings and other outrages. Such conduct is inimical to any concept of human decency and constitutes the most egregious crimes known to man, including crimes against humanity, war crimes, ethnic cleansing, and genocide.

211. The Islamic State is an exporter of terrorism inasmuch as returnees from there, and adherents to that organisation, are often radicalised or at the very least have been exposed to extremist ideas. Islamic State adherents therefore represent a grave security threat to Ireland and other democratic states. Many, although not all, have been trained to fight and some are believed to have links with an international jihadist network. It has been widely reported that, for example, the Charlie Hebdo and Bataclan shootings in France in 2015 were terrorist attacks that were committed by male returnees from Islamic State controlled territory. Such attacks paved the way for a whole range of EU policies, that aim to ensure the security of EU citizens, prevent radicalization and foster cooperation with third countries to curb terrorism. This is reflected within individual states by a multidisciplinary and cross sector approach, ranging from repressive to rehabilitative and socio-preventative policies, involving law enforcement and civil society-based organisations. In Ireland, the criminalisation of any terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity represents part of the Irish State's response. It is uncontroversial in the context of the present case that Islamic State qualifies as an unlawful organisation for the purposes of the Act of 2005.

212. Of course, not every member of an unlawful organisation or terrorist group necessarily participates actively, or is involved at a high level, in that organisation or group. Their membership may, in some instances, be passive, and extend no more than to providing comfort and support for it through the very fact of their membership. In other instances, members may be very actively involved in promoting the organisation or group and in pursuing its policies. Such persons are much more culpable than passive adherents. The greater the involvement, the greater the culpability. We think there is merit in the approach that views prominent members of the organisation, or persons who were significantly involved in the running of the organisation, as being most culpable; those that are active at a level below that but who are not prominent members, or significantly involved in the running of the organisation, as being somewhat less culpable; and those who are passive members as being least culpable. But even in the case of purely passive adherence, there is an intrinsic moral culpability on the part of the adherent to an unlawful organisation or terrorist group, and a potential for harm in terms of encouragement having been provided to those who would threaten the security of our State, and would seek to subvert our fundamental democratic values, respect for human rights and respect for the rule of law.

213. Where a person has been convicted of membership of an unlawful organisation, or membership of a terrorist group as in the case of the appellant, it is therefore necessary

to assess the intrinsic culpability of their said membership, and the extent to which that may have been aggravated by the level at which they actively participated in, assisted or provided comfort or support for the organisation or group in question.

214. Counsel for the appellant submitted to the court below, and reiterates before us, that Lisa Smith's role as a member of Islamic State or ISIS was wholly passive. We accept (there being no evidence to the contrary) that it was wholly passive once she arrived in Syria, but the mere fact that she travelled to Syria, in circumstances where the evidence establishes that she travelled with her eyes open and with knowledge of what Islamic State/ISIS stood for, of its methods and of its brutal activities, was an overt expression of support for that organisation.

215. In terms of the assessment of a headline sentence, and informed by our survey of sentencing practice in s. 21 cases based on such data we have been able to access, we consider that the appellant's culpability, and the potential for harm consequent upon her overt expression of support, was such that the custody threshold was manifestly crossed. We consider that the sentencing court was right to assess the gravity of the appellant's individual case as falling within the lower one third of the tripartite division of the available scale of punishments that it adopted. On any view of it, the intrinsic culpability of the appellant's conduct would have required the offence to be located at the midpoint of the lower division. The sentencing court opted to precisely locate it towards the upper end of that division, and we consider that this was a decision that was legitimately within their margin of discretion. Because of her generally passive involvement, the appellant's culpability was not greatly aggravated but it was somewhat aggravated. The aggravation is to be found in the manner in which the offence was committed, namely her travel to Syria following the declaration of the Caliphate with the intention of submitting to the authority of Abu Akbar al-Bagdadi and living there subject to Islamic State rule, and, in doing so, being seen by her actions as expressing overt support for the terrorist group that is Islamic State. We do not accept the submission on behalf of the appellant that the sentencing court was improperly influenced in setting a headline sentence by suspicions concerning the extent to which the appellant may have been actively involved in the organisation following her arrival in Syria. On the contrary, the sentencing court expressly eschewed any notion that it would act on that basis. The presiding judge said:

> *"We've already determined, by reference to our findings, that this offence is in the lower part of the spectrum of such offences because there is nothing beyond justifiable suspicion about the precise nature of Ms Smith's activities during the time that she allied herself to the Islamic state organisation in Syria. However, this court is bound to act on evidence and not to act on unproven speculation and to resolve any reasonable doubts in this regard in her favour."*

216. We find no error with regard to the setting of the headline sentence.

Complaints in regard to the affording of mitigation

217. Of course, the setting of a headline sentence beyond the custody threshold did not mean that the appellant would inevitably face a custodial sentence. It was possible that when mitigating circumstances were taken into account that the sentencing court might still have been able to dispose of the case on a non-custodial basis. However, the appellant's difficulty in that regard was that the greatest mitigating factor that might potentially have been available to her, had she taken a certain course, was not available to her. She did not plead guilty, but rather contested the trial. She is not to be penalised for having fought the case, but the fact that she did so has the consequence that she was not entitled to avail of the very substantial mitigation that would otherwise have been available to her had she pleaded guilty.

218. There was other mitigation in the case and we are satisfied, having carefully considered the SCC's sentencing judgement that these were properly taken into account in discounting from the headline sentence of 2 years and 6 months (30 months in total) by 50% leaving a net custodial sentence to be served of 15 months. Proper regard was had to her previous good character; her positive contribution to society during her military service; her vulnerability; her status as a mother; her personality and background including the fact that she had been a victim of domestic violence; the other adversities she had suffered in her life up to that point as detailed in the evidence and in the various reports that had been put before the court, and; the fact that she was considered as being at low risk of reoffending.

219. A complaint is made that there was a failure on the part of the court to give like for like credit for the time that she spent in the al *Hol* and *Ein Issa* displaced persons camps. We are satisfied that there was no basis in law for doing so. She was not in custody on suspicion of having committed any crime. Yes, her freedom of movement was curtailed but not for penal purposes or in connection with the criminal justice process. It was simply an adversity in her life brought about by the circumstances in which she found herself. That she was a victim of such circumstances was very largely of her own making. We offer that observation not in harsh judgment of her but simply to say that her situation is clearly distinguishable from that of the respondent in the *AM* case relied upon by her. The respondent that case was detained by the immigration authorities in the Philippines on suspicion of having committed an immigration offence. Even then, this Court took the view that he was not entitled to have account taken for it on a like for like basis. The approach of the court in *A.M.* was that some account could be taken of it in the consideration of the respondent's personal circumstances at sentencing, on the basis that it was an adversity suffered by the respondent, and that was done. The sentencing court in this case adopted a similar approach. Although they rejected the "*German approach of assigning mathematical ratios to such time periods*", they nevertheless determined to "*adopt the traditional approach to sentencing in this jurisdiction by adding these experiences as a mitigating factor to the other such factors which are present in the case"*, and duly took account of the time she had spent in the displaced persons camps in their synthesis of the personal circumstances of the appellant. In this Court's view, the SCC was rightly not disposed to treat it in the same way as they would treat time spent in custody by a person who is remanded by a lawful court pending trial or extradition. The

situations are not at all comparable. We do not, therefore, consider that there was any error in the approach of the sentencing court in taking account of the time spent by the appellant in the displaced persons camps.

220. While it is accepted that Ms. Smith suffered some curtailment of her liberty by the restrictions imposed on her during the regime of bail that was imposed on her while her trial was pending, we do not detect any error in terms of a failure on the part of the sentencing court to take account of that in dealing with her. Indeed, the bail terms imposed on her after her repatriation, and her counsel's argument that these should be taken into account, were explicitly referenced in the sentencing judge's remarks. We consider the 50% deduction from the headline sentence which was to cover a synthesis of all of the mitigating circumstances in her case was more than adequate and that there is no basis for believing that the court was not alive to, and had not taken account of, the fact that she had been on bail subject to a curfew and other restrictive conditions pending the trial.

221. Finally, having considered the entire transcript including the sentencing phase of the proceedings we are satisfied that the sentencing was conducted with scrupulous fairness and with appropriate regard to the evidence. A complaint is made that insufficient regard was had to the expert reports placed before the sentencing court, and which we have reviewed in some detail in this judgment. We are in no doubt whatsoever that appropriate regard was had to this material by the sentencing court. The sentencing court expressly says that "*we have since considered the reports handed in at the sentence hearing*" and goes on to offer observations on certain of the matters covered in those reports. The fact that other matters contained in those reports are not specifically referenced in the SCC's sentencing remarks is of no significance insofar as we are concerned. It is clear that the court had the reports and duly gave consideration to their contents. It was not necessary that they should reference every point made. We find no error of principle with regard to how the sentencing court dealt with the expert reports placed before it.

222. Finally, we do not consider that the evidence as to the appellant's expressed willingness to participate in the "*Breaking the Counternarrative Project*" and join the fight against militant jihadist groups would have greatly influenced the sentence. It was undoubtedly a mitigating circumstance, but it was referred to in the expert reports, and we have no reason to believe that the court did not take due account of it. However, it was not something to be treated in the same way, or perhaps given anything approaching the same weight, as a sworn undertaking given to a sentencing court to dissociate, such as is sometimes received by the SCC in s. 21 cases.

Conclusion

223. In conclusion, the Court is not disposed to uphold any of the grounds of appeal advanced by the appellant and in the circumstances must dismiss the appeal.