



**Common Law Division  
Supreme Court  
New South Wales**

Case Name: **Application by Maksimilian Bebic, Mile Nekic and Vjekoslav Brajkovic pursuant to s 78 of the *Crimes (Appeal and Review) Act 2001 (NSW)***

Medium Neutral Citation: [2022] NSWSC 1153

Hearing Date(s): On the papers. Submissions closed 10 August 2022

Date of Orders: 30 August 2022

Date of Decision: 30 August 2022

Jurisdiction: Common Law

Before: Wright J

Decision: After considering the application under s 78 of the *Crimes (Appeal and Review) Act 2001 (NSW)* and on the Court's own motion, the Court directs pursuant to s 79(1)(a) of that Act that an inquiry be conducted by a judicial officer into the convictions on 9 February 1981 of Maksimilian Bebic, Mile Nekic, Vjekoslav Brajkovic, Anton Zvirotic, Ilija Kokotovic and Joseph Kokotovic.

Catchwords: CRIMINAL LAW – Application under s 78(1) of the *Crimes (Appeal and Review) Act 2001 (NSW)* for an inquiry into the applicants' conviction – Whether satisfied there is a doubt or question as to the convicted persons' guilt or as to any part of the evidence in the case – Court so satisfied in light of previous information and recent declassification of ASIO documentation and other recent material

CRIMINAL LAW – Application under s 78(1) of the *Crimes (Appeal and Review) Act 2001 (NSW)* for an inquiry into the applicants' conviction – Matter previously dealt with in an application in 2012 under Pt 7 of the Act – Whether Court not satisfied there are special facts or special circumstances that justify the taking of further action – Court satisfied there are special facts or special circumstances

Legislation Cited: Crimes (Appeal and Review) Act 2001 (NSW), ss 78, 79, 80, 81  
*Crimes Act 1900* (NSW), s 475 (now repealed)

Cases Cited: Application by AZ for inquiry into conviction pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 (NSW) [2020] NSWSC 1048  
Application by Brian Steer under Part 7 of the Crimes (Appeal and Review) Act 2001 [2020] NSWSC 623  
Application of Peter James Holland under s.78 Crimes (Appeal and Review) Act 2001 [2008] NSWSC 251  
*Buttrose v Attorney General of New South Wales* [2015] NSWCA 221  
*Clark v Attorney General of New South Wales* [2020] NSWCA 70  
*Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318; [2003] HCA 28  
*Kirk Group Holdings Pty Limited v WorkCover Authority of NSW* (2006) 66 NSWLR 151; [2006] NSWCA 172  
*Milat, Ivan Robert Marko - Application under Section 78 of the Crimes (Appeal and Review) Act 2001* [2015] NSWSC 209  
*R v Rogerson; R v McNamara (No 57)* [2016] NSWSC 1207  
*Rogerson v The Queen; McNamara v The Queen* [2021] NSWCCA 160; 290 A Crim R 239  
*Varley v Attorney General (NSW)* (1987) 8 NSWLR 30

Texts Cited: Hamish McDonald, *Framed* (2012, Fairfax Media)  
Hamish McDonald, *Reasonable Doubt: Spies, Police and the Croatian Six* (2019, Doosra Media)  
John Blaxland and Rhys Crawley, *The Secret Cold War, The Official History of ASIO, 1975 – 1989* (2016, Allen & Unwin)

Category: Principal judgment

Parties: Maksimilian Bebic, Mile Nekic, and Vjekoslav Brajkovic (Applicants)  
Attorney General for New South Wales (Respondent)

Representation: Counsel:  
Sebastian De Brennan (Applicants)  
David Kell SC and Joanna Davidson (Respondent)

Solicitors:  
Helen Cook Solicitors (Applicants)

Crown Solicitor for New South Wales (Respondent)

File Number(s):

2021/040894

## DETERMINATION OF APPLICATION FOR INQUIRY

- 1 On 12 February 2021, an application was filed in the Supreme Court of New South Wales on behalf of Maksimilian Bebic, Mile Nekic and Vjekoslav Brajkovic under s 78(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) (CAR Act) for an inquiry into their convictions in 1981 in relation to a conspiracy to bomb two travel agencies in Sydney, a Serbian Social Club, the Elizabethan Theatre in Newtown, and Sydney water supply pipes, as well as other offences of stealing or possessing explosives. Three other men, Anton Zvirotic and brothers Ilija Kokotovic and Joseph Kokotovic, were also convicted in relation to the same offending but they have not joined in the present application.
- 2 The application was supported by written submissions and substantial documentation as well as an affidavit of Hamish McDonald sworn 28 January 2021.
- 3 In accordance with s 78(2) of the CAR Act, notice of the application was given to the Attorney General for New South Wales, who is the Minister responsible for the administration of that Act.
- 4 On 31 January 2022, the Crown provided written submissions in response to the application and the affidavit of Lucy Nichols affirmed 28 January 2022, to which was exhibited further substantial documentation.
- 5 The legal representatives of the applicants and the Crown have provided helpful reply, rejoinder and reply to rejoinder submissions, with the last of these provided on 10 August 2022.
- 6 The application has been referred to me for consideration on the papers.
- 7 There have been earlier applications for review of or inquiry into these convictions. The last of those previous applications was dismissed by Barr AJ on 30 November 2012. His Honour's reasons for dismissing the application contain a useful summary of a number of aspects of the proceedings and

relevant events and I have relied to an extent on this material in setting out the background to the present application for an inquiry under s 78 of the CAR Act.

## **Background**

- 8 The applicants are of Croatian origin. At the time of their arrest on 8 February 1979 they, and the other three men, were members of Croatian national organisations that sought the dissolution of the state of Yugoslavia and the creation of an independent Croatian state. Their opposition to the Yugoslav government was partly nationalistic, in that the Yugoslav regime was seen as pursuing a policy of repression of legitimate Croatian national aspirations which had on occasions manifested itself in genocidal violence, and partly ideological or political, in that there was hostility to the communist system.
- 9 The six men have been called “the Croatian Six”.
- 10 On 8 February 1979, the six men were arrested and charged with a number of offences including conspiracy to bomb as well as explosives and firearms offences. All the men, excluding Mr Bebic, were also charged with conspiracy to murder.
- 11 During 1980 and early 1981, the trial of the six men continued over 172 sitting days. Two important aspects of the evidence at the trial were:
- (1) testimony from a witness known as Mr Vico Virkez (whose name was actually Vito Misimovic or Mesimovic), who had been born in Bosnia and moved to Australia in 1970, and who was allegedly involved in the bombing conspiracy before reporting his and the others’ plan to police in Lithgow in February 1979; and
  - (2) the evidence from 39 police officers including evidence of confessions said to have been made by the six men, following their arrest, to detectives at the Crime Investigation Bureau (CIB) (including Sgt Roger Rogerson) and evidence of police officers as to explosives and

equipment said to have been found by the officers at locations or premises associated with the six men.

- 12 The credibility and reliability of Mr Virkez were strongly challenged during the trial. At that time, the Yugoslav government included a Department of State Security, known as UDBa, and the accused sought to establish that Mr Virkez was a Yugoslav or UDBa agent and that he had a motive to lie. In his address book, Mr Virkez had details of the Yugoslav Consulate-General in Sydney but he explained in evidence that this was probably because he rang the Consulate to abuse them. Although he admitted he was not Croatian, he denied spying on the Croatians. He also denied giving evidence at the behest of anyone connected with Special Branch or the Yugoslav government. Mr Virkez had a history of mental illness. At the trial, the Crown put Mr Virkez forward as the key to its case and it was the Crown case that there was “not a skerrick of evidence that [Mr Virkez] was some sort of undercover agent, an UDBa or Yugoslav representative”.
- 13 In relation to another important aspect of the evidence concerning Mr Virkez at trial, Barr AJ provides a useful summary in his judgment as follows:

“38. At trial, on 20 May 1980, before Virkez gave evidence, counsel for Ilija Kokotovic called on subpoenas issued to the New South Wales Commissioner of Police, the Department of Immigration, the Director-General of the Australian Security and Intelligence Organisation (ASIO) and the Australian Federal Police seeking production of documents concerning the accused and Vico Virkez. On 26 May 1980, on the application of counsel for the Commonwealth and on the basis of an affidavit from the Commonwealth Attorney General as to the need to preserve secrecy about intelligence matters, the Honourable Mr Justice Maxwell upheld a claim for privilege made by the Commonwealth and set aside the subpoena directed to ASIO. His Honour did not inspect documents which had been produced. On the basis of the Attorney General’s affidavit, his Honour’s decision in this respect was considered by the Court of Criminal Appeal to be correct.

39. Counsel for the accused was subsequently provided with edited copies of some of the privileged documents produced by parties other than ASIO. The Court of Criminal Appeal said one such document was a Commonwealth Police telex, sent on 8 February 1979, to the effect that Virkez, identifying himself by his original name of Vito Mesimovic, stated that he had been instructed with Brajkovich, Bebic and Zvirotic to place bombs in various locations and that New South Wales Police had been informed. It was understood that the telex was a redacted version of a report of a police intercept of a telephone call made on 8 February 1979 by Virkez to the Yugoslav Consulate-General in Sydney. Of

significance was that the telex did not indicate that Virkez on 8 February 1979 made any mention of either of the Kokotovic brothers, Mile Nekić or Joseph Stipić (who was also arrested on the night of 8 February 1979).

40. On 24 June 1980, the New South Wales Commissioner of Police also claimed privilege in respect of a collection of documents in the possession of Special Branch and the Police Internal Affairs Branch. Counsel for Ilija Kokotović relied on an affidavit by a journalist, Mungo McCallum, which annexed a document believed to have emanated from ASIO, which stated that the Yugoslav Intelligence Service was suspected of mounting agent provocateur operations in Australia. It seemed that the trial judge inspected the documents for which privilege was claimed. On 18 July 1980 his Honour upheld the Commissioner's claim of privilege."

- 14 The significance of Mr Virkez's evidence at trial denying he was engaged in undercover activities in Australia on behalf of the Yugoslav government was reflected in the Court of Criminal Appeal's observations that:

"It is important to note that Virkez throughout denied that he was a member of, or associated with, any Yugoslav intelligence service, or engaged in undercover activities in Australia on behalf of the Yugoslav Government; and there was no direct evidence that he had ever played either role. It was left to the jury, however, as an inference which they might draw. It seems improbable that they did so. We think that **to convict on the first count** [the bombing conspiracy] **the jury must have substantially accepted the truth of Virkez's evidence** about the conspiracy; although they may have rejected what he said in support of the second count [the conspiracy to murder]. They may have accepted him notwithstanding that they took him to be Yugoslav agent or something of that kind. But it is unlikely." (at pp 58-9 of *R v Bebić & Ors* (Unreported, Court of Criminal Appeal, 14 October 1982)) (emphasis added)

- 15 As to the police officers' evidence, all of the six men denied that they had made the confessional statements which police sought to attribute to them and four of the six – Mr Bebić, Mr Brajković, Mr Zvirotić and Mr J Kokotović – alleged they had been severely beaten by police. Further, other than Mr Bebić, the men denied possessing explosives or associated equipment and contended that the police evidence of finding the explosives and equipment was falsely contrived. In Mr Bebić's case, he claimed that Mr Virkez had stolen the explosives from the Wallerawang Power Station and told him that they could use them to mine opals.
- 16 On 9 February 1981, the jury returned verdicts of guilty for each of the six men in relation to the bombing conspiracy and explosives charges but verdicts of not guilty for the five men charged with conspiracy to murder. The jury was unable

to reach a verdict in relation to a charge against Mr Zvirotic of possessing an unlicensed pistol.

17 On 17 February 1981, the men were each sentenced to 15 years' imprisonment to date from 8 February 1979 and no non-parole period was set. It appears that they were released after serving seven or eight years of their sentences, although it is not clear exactly when or why this occurred.

18 The six men appealed to the Court of Criminal Appeal against their convictions and sought leave to appeal against their sentences. There were a number of grounds of appeal, but only those grounds that related to new or fresh evidence are relevant to this application. The fresh evidence was obtained as a result of a subpoena to the Prime Minister's Department. Although claims for privilege in the nature of public interest immunity were made in respect of the documents covered by the subpoena, certain documents were eventually made available to counsel for the appellants, some "on a limited basis". The new or fresh evidence included:

(1) An affidavit sworn by Mr R F Cavanagh, the Principal Intelligence Officer of the Australian Crime Intelligence Centre deposing to a conversation with Mr Virkez on 21 February 1980 at Parramatta Gaol. The affidavit contained the following:

"In the course of this interview I said to VIRKEZ, 'I have been told by the Yugoslav Consulate-General that you call them on the morning of 8<sup>th</sup> February 1979 and gave information which led to your own arrest and that of a number of members of the Croatian Republican Party'. He said, 'Yes, I did'. I said, 'I suggest to you that you have in fact been an informant of the Consulate-General for some time and that you have visited the premises on a number of occasions'. At the time I did not know that this suggestion was the fact but I was seeking to obtain a response from Virkez. He at first denied this claim but later said, 'You are right but I have only been giving them information about things in the community. I wanted no part of this plan to blow up people. That's why I got scared and told everybody about it'. I said, 'What things in the community?' He said, 'Who were on committees, I collected pamphlets and newspapers to hand on to them'. I said, 'I think that you are more than just a casual informant. I suggest to you that you are in actual fact an officer of UDBa'. He said, 'No way. I only got involved because they told me it was my duty as a patriotic Yugoslav. I have never even been

paid for it.' Virkez did not during the interview make any further statements regarding his relationship with the Yugoslav authorities.”;

- (2) Two letters to the Prime Minister from Mr Virkez, one of about 13 November 1979 and one dated 13 August 1980. These letters indicated that Mr Virkez sought return to Yugoslavia and that he had no apprehensions of being treated as a political dissident if he was returned.

19 The Court of Criminal Appeal in effect accepted that the material qualified as fresh evidence but ultimately rejected it as sufficient to uphold the grounds of appeal and quash the convictions. Although the Court of Criminal Appeal said that they were entirely persuaded that Mr Cavanagh’s evidence was true and accepted that the fact that Mr Virkez was “an agent in the limited sense which the new evidence now discloses of the Yugoslav Government in Australia” cast some doubt on the way his role was presented by the Crown at trial, they concluded:

“But, all in all, if one accords to the new evidence the greatest weight of which it is capable, it merely discloses a reason why Virkez might deliberately lie in order to implicate those who were his political adversaries or were at least in opposition to those whom he, albeit in a minor way, was serving. But it does not persuade us that he did; nor does it impeach the evidence of the appellant’s admissions. We are not satisfied, therefore of the appellants’ innocence; nor do we entertain a reasonable doubt of their guilt in the light of the evidence at the trial which the jury must have accepted.” (at p 71)

“Reading the evidence at the trial and endeavouring to construe the jury’s verdict most favourably to the appellants, we nonetheless think it likely that the jury accepted the substance of Virkez’s testimony.... It may be, and we are prepared to accept this, that the fact of Virkez’s association with the Yugoslav Consulate-General might well increase the reserve with which his evidence would be approached by a jury. But the critical matter is that the admissions made by the appellants, with the possible exception of Brajkovic, provided, if they were believed, powerful corroboration of what Virkez had said and, in the case of two of the appellants, inculpatory evidence which cannot be found in Virkez’s own testimony. **We do not overlook that Cavanagh’s evidence is in some respects in conflict with the denials made by Virkez in the witness box at the trial and would be likely thus to establish Virkez in these respects is a liar. But this consequence would not have affected the evidence of the police about the admissions allegedly made and these are, we think, decisive.** We are not satisfied, therefore, that had the evidence of Cavanagh been led at the trial, a different result would have been likely.” (at pp 74-5) (emphasis added)

- 20 The Court of Criminal Appeal's reasoning appears to have been that the police evidence of the confessional statements supported Mr Virkez's evidence concerning the bombing conspiracy so that the jury could have accepted the truth of Mr Virkez's evidence about the conspiracy even if Mr Cavanagh's evidence had been called at trial and established that Mr Virkez was a liar in other respects. It was also concluded by the Court of Criminal Appeal that neither of the letters to the Prime Minister tended to affect the evidence Mr Virkez gave at trial or to impeach his credit.
- 21 On 14 October 1982, the Court of Criminal Appeal dismissed each appeal against conviction and denied each leave to appeal against sentence.
- 22 On 14 March 1986, the High Court refused special leave to appeal against the convictions.

### **Previous applications for an inquiry into the convictions**

*1991-1994*

- 23 On 26 August 1991, a Four Corners program on ABC television entitled *Cloak & Dagger* was broadcast. This program included interviews with Mr Bebic, Mr Zvirotic, Mr Brajkovic and Mr Nekic in which they asserted their innocence and gave a description of how they had been threatened and bashed by police. As Barr AJ said, "they expressed their dismay at the way they were framed and beaten by police in a country which hitherto they had believed observed the rule of law". In addition, the program included an interview with Mr Virkez apparently in Bosnia and commentary by the interviewer, Mr Chris Masters. Among other things, it was said that Mr Virkez received training as a member of the Serbian Black Hand and that he had been in Australia spying for the Yugoslav authorities since the early 1970s. As to his contact with the Yugoslav Consulate-General in relation to the Croatian Six, Mr Virkez said:

"Well they [persons at the Yugoslav Consulate-General] say we're going to phone police. We want to thank you very much you done it. We will look after you now. You can go to Yugoslavia any time you want, we'll do the best for you, we'll give you some money, and we'll look after you."

24 As to Mr Virkez's evidence at trial, he said the following in his interview with Mr Masters:

"[Mr Masters:]

In the court, was the evidence that you gave all of the truth?

[Mr Virkez:]

No.

[Mr Masters:]

Were you given any instructions by police about what to say?

[Mr Virkez:]

I was. I was all told what I have to say there, be so sure...

[Mr Masters:]

So what were the instructions they gave you? What did you have to say?

[Mr Virkez:]

I had some list in the jail, on Yugoslav, names, of meetings, so I couldn't make mistakes in court.

[Mr Masters:]

So they coached you and made you learn that evidence?

[Mr Virkez:]

Yes.

[Mr Masters:]

Did they make you tell lies?

[Mr Virkez:]

Well I have to talk what they have written down. Whether lies or not I don't know. Because they say this is all-true. But I didn't know if it's true or not.

[Mr Masters:]

So you didn't know if it was true or not?

[Mr Virkez:]

No.

[Mr Masters:]

What was the deal done? Did the police make a deal with you about giving the evidence in court?

[Mr Virkez:]

There was many times, yes.

[Mr Masters:]

Were you threatened at all? Did they say they'd throw you in a cell with the people you'd informed on if you didn't cooperate?

[Mr Virkez:]

Yes.

[Mr Masters:]

Can you tell me about that? What did they say?

[Mr Virkez:]

Well, they said this is a big court, and big publicity. So if you not talk what we say, what was written in your statement we will throw you in with your mates, and you know, they say, the job will be finished."

25 As to the guilt or innocence of the Croatian Six, Mr Virkez's interview with Mr Masters included the following:

"[Mr Masters:]

... Let me get this clear: six men, the two Kokotovic brothers, Bebic, Zvirotic, Nedic, Brajkovic. You gave evidence against them. In your view, were they all guilty?

[Mr Virkez:]

No. I don't know if there's any guilt. May be guilty of possessing explosives and learning these things, but...

[Mr Masters:]

Were they all guilty of a conspiracy to blow up all these targets?

[Mr Virkez:]

No.

[Mr Masters:]

Could it be that they were all innocent?

[Mr Virkez:]

Yes, could be.”

- 26 There were other interviews and material in the Four Corners program which cast doubt upon the veracity and reliability of Mr Virkez’s evidence and the confessions obtained by police from the Croatian Six. The program referred to the letter Mr Virkez wrote to the Prime Minister in November 1979 before the trial started, seeking deportation to Yugoslavia and complaining of harsh treatment by being imprisoned. The program also revealed that meetings of government departmental and agency representatives had occurred in March and April 1980 in which the belief that Mr Virkez was a Yugoslav government agent had been discussed. It was also pointed out that, although sentenced to imprisonment for 2 years and 4 months, Mr Virkez was issued with a Yugoslav passport and departed Sydney for Yugoslavia on 24 December 1980, two months before the end of the trial of the Croatian Six. It was noted that none of these matters was revealed at the trial.
- 27 On 26 August 1991, the Sydney Morning Herald published a similar story by a journalist, Paul McGeough, in which it was claimed that Mr Virkez had been an informant for ASIO and had travelled to Sydney to telephone a man in ASIO in Canberra called Cavanagh. It was also said that Mr Virkez had told Mr McGeough that the evidence he had given at the trial was lies and he complained of having been double-crossed by police who said he would only spend two or three days in gaol and who bashed him. Mr Virkez also said that he was told to carry the bombs in his car, after he told ASIO of the plot and that he had been an informant for UDBa from 1978 and a member of the Serbian terrorist group, the Black Hand.
- 28 On 23 September 1991, Mr Roger Rogerson gave a television interview in which he spoke of the way in which police frequently “verballed” people, fabricated evidence and “loaded people up” resulting in their convictions. This was reported two days later in the Sydney Morning Herald. Subsequently in late 1991, articles dealing with similar matters including police deliberately lying under oath and planting guns or explosives on people appeared in the Sydney

Morning Herald and Sun Herald. This was consistent with the evidence given at, and what occurred in, the committal hearing in relation to Mr Stipic, who was originally charged along with the Croatian Six. After the police officers had all given evidence of finding explosives in a drawer in a desk in his room, it was established that there was no desk in the room and explosives could not have been found as the police witnesses said. Mr Stipic was not committed for trial, unlike the other six men.

- 29 Between 1991 and 1994, a number of applications were made to the Attorney General for a review of the convictions of the Croatian Six under the previous review provisions then found in s 475 of the *Crimes Act 1900* (NSW). These applications made reference to the Four Corners program and other information of the type referred to above. On 13 July 1994, those applications were refused.

2012

- 30 In early 2012, Mr Hamish McDonald, a journalist with the Sydney Morning Herald, published a short e-book, *Framed*, which dealt with the Croatian Six case. His e-book arose out of information originally provided in 2007 by Mr Ian Cunliffe, a lawyer and senior officer in the Department of Prime Minister and Cabinet, at an inquest into the deaths of five Australian journalists in Bilbao, East Timor. Mr Cunliffe's evidence related to an interdepartmental committee dealing with national security. In his evidence to the inquest, Mr Cunliffe said that:

"... [the committee] consisted of ASIO, Immigration, Foreign Affairs, Attorney-General's, the Commonwealth Police, chaired by the Prime Minister and Cabinet which decision closed [sic] matters that I thought were tantamount to perverting the course of justice in a criminal trial involving about six defendants here in Sydney.... And the decision was taken that none of this material should be made available... I asked the question, 'What happens if these things are subpoenaed?' – And they said, 'Well, they won't exist.' As an officer of the court, at that time, that troubled me."

- 31 Mr McDonald spent some time investigating in order to write his e-book. Those investigations included interviewing John Schindler, Professor of National Security Affairs at the US Naval War College, Rhode Island. Professor Schindler was a specialist in counterespionage and counterterrorism with

operational experience in Eastern Europe. He was Technical Director of Balkan Operations for the US National Security Agency and was a consultant to the United Nations International Criminal Tribunal for the former Yugoslavia. The transcript of Mr McDonald's interview with Professor Schindler on 2 December 2011 included:

“... It's very clear, the evidence has been available for a long time including from the Balkans more recently, that the so-called Croatian Six case which caused such a stir in Australia understandably was in fact a provocation by the Yugoslav intelligence services.

...

As to direct evidence on the case of the Sydney Six [sic], I am happy to say that I have individuals who were formerly affiliated with UDBa who have admitted that the so-called Sydney Six case was one of their great successes. Though I have to say this is only icing on the cake. What Chris Masters and the ABC discovered 20 years ago was the truth. I've only gotten Balkan confirmation of that truth.

...

I spent a great deal of time in Bosnia during the late 1990s and the early 2000s and I asked about [Mr Virkez]. No-one seemed to know where he is. He may have died during the wars in the 1990s or disappeared. I'm really not sure.”

32 Mr Cunliffe also contacted the Sydney Morning Herald in 2012 stating, in his letter:

“... I am confident that the Commonwealth has records which demonstrate clearly the truth of my allegations that Canberra intelligence and police official suppressed information that would likely have resulted in a not guilty verdict in the Croatian Six case.

In particular, I was shown those records after I wrote a number of times to the then Federal Attorney General about my concerns in the mid—1980's.”

33 On 30 January 2012, an application for an inquiry under s 78 of the CAR Act was lodged with the Chief Justice on behalf of Mr Bebic and Mr Nekic. The application was accompanied by detailed submissions and supporting documentation. They contended, in general terms, that the information raised a doubt or question as to the reliability of the police evidence and about Mr Virkez's evidence. Submissions on behalf of the Crown were provided on 6

June, 10 August and 12 October 2012. As noted above, on 30 November 2012, Barr AJ dismissed the application for the reasons given at that time.

### **Further developments since 2012**

34 In relation to the present application for an inquiry under s 78 of the CAR Act, the applicants have identified certain further material and information that has emerged since the 2012 application. This included what is set out in the paragraphs which follow.

#### *2016 publication of Volume III of the Official History of ASIO*

35 In 2016, the third volume of the Official History of ASIO dealing with the years 1975 to 1989 was published: *The Secret Cold War, The Official History of ASIO, 1975 – 1989* (John Blaxland and Rhys Crawley, 2016, Allen & Unwin). The process by which this Official History was prepared was described in the Preface to that volume (p xiv) as follows:

“Once we had completed the manuscript for each volume, it needed to be cleared by ASIO to ensure it did not disclose techniques that might still be in use, information that had been received from foreign intelligence agencies (and could not be released by ASIO), and the names of ASIO officers and agents. The clearance process involved the authors sitting with ASIO officers and examining each matter ASIO wished to redact. Often ASIO would be satisfied with changing or redacting just one word or phrase. At no stage did ASIO seek to change any of our conclusions. If ASIO thought our conclusions were misguided, we demanded that ASIO show us documents that would prove us wrong. If ASIO could not do so, the manuscript was not changed. Naturally, some aspects of the story we have not been able to publish for reasons of national security or international relations. Not all the names of operations could be released, and in some cases an operational name has been replaced with another name so that the original name is protected.”

36 In the sixth chapter of *The Official History*, the authors deal with matters relating to activities of Croatians in Australia during the relevant period. It includes the following concerning the Croatian Six (at pp 138-9):

“Of the 60 Yugoslav officials and commercial representatives in Australia in 1978, ASIO assessed that about one-third had ‘intelligence connections’. They would eventually be linked to an extraordinary tale of bomb threats against Sydney’s water supply.

Vitomir Misimovic (known by a host of other names, notably Vico Virkez) walked into the Lithgow Police Station, west of the Blue Mountains, on 8 February 1979. There he 'confessed' to his purported role in an alleged conspiracy to bomb various targets, including the Sydney Water supply station, a concert by a group of Yugoslav singers, some Yugoslav travel agents and a Yugoslav club. What was not immediately apparent was that Virkez had acted as an informant on Croatian nationalist activities to someone ASIO suspected of being an intelligence official attached to the Yugoslav Consulate-General in Sydney. ASIO had, only a few hours earlier, intercepted a telephone call from Virkez made to officials at the Yugoslav Consulate in Sydney claiming that three others, Vjekoslav Brajkovic, Maks (Maksimilijan) Bebic and Anton Zvirotic, intended to carry out the attacks.

That night, NSW Police arrested nine Croatian nationalists associated with the intelligence from Virkez and ASIO's telephone intercept. The police found more than a tonne of explosives and detonators in the raid the homes of Bebic and another, Stipe Popic. Brajkovic was identified as the supposed organiser. In court, Virkez pleaded guilty and testified against the others. The proceedings were closely followed in the media, which gave prominence to Virkez's story. The lawyer representing the accused issued a subpoena for all police documents associated with the charges. This happened to include ASIO-sourced documents – a point that generated considerable anxiety and a modification to procedures for release of documents to the police. The sentences were handed down on 17 February 1981. Virkez received a 26 month jail sentence but was released in less than 10 months and subsequently returned to Yugoslavia, a move that raised more questions than it answered. In contrast, the group that became known as the 'Croatian Six' was sentenced to fifteen years in prison.

Journalist Chris Masters tracked down Virkez in Yugoslavia in August 1991 and on the ABC TV program *Four Corners* Virkez admitted he was a Serb named Vitomir Misimovic who had infiltrated the Croatian community in Australia and informed on its activities to Yugoslav diplomats. In a subsequent appeal it became apparent to the judge, Justice Samuels, that Virkez was indeed 'a probable YIS [Yugoslav Intelligence Service] source' and that this 'could have an effect on the credibility of Virkez's testimony'. The Croatian Six were released after it became clear that Virkez had fabricated his story. Later revelations indicated that the conviction of the Croatian Six resulted from a deliberate YIS operation to portray the Croatian-Australian community as extremists and terrorists and increase public support for Yugoslavia. In this case, according to *Sydney Morning Herald* correspondent Hamish McDonald, both the police and ASIO had failed to discern that agent provocateurs were employed, despite years of monitoring Croatians.

Perhaps the difficulty lay at least in part in ASIO's stovepiped management approach to counter-subversion, counterterrorism, and counterespionage. In this instance, Croatian extremists fell into the counterterrorism category for ASIO's internal management purposes, whereas the YIS fell into the counterespionage category. While ASIO is not directly to blame for what happened, its failure to discern YIS actions and intentions within the Croatian community clearly contributed to this misjudgement. The Croatian and Yugoslav targets combined were exceedingly difficult for any domestic security service or police force in Australia or overseas to keep an eye on, especially given the YIS was running a subversive operation within Australia. To add to the confusion was increasing government pressure to come up with a solution.

Unfortunately, the wrongful conviction of the Croatian Six was only one of a number of similar calls that in hindsight demonstrated a lack of insight.”  
(footnotes omitted)

37 The footnoted reference for the statement that the “Croatian Six were released after it became clear that Mr Virkez had fabricated his story” was an article in *Direct Action* in 1989 which was not included in the material put before me by the parties and it is difficult to determine whether the authors’ statement was intended to assert a causal link between their release and it having become clear that Mr Virkez had fabricated his story. The authors did not rely upon any other corroborating information. Furthermore, the description of the conviction of the Croatian Six as “wrongful” is only an opinion of the authors. Nonetheless, the status of the work as the “Official History” of ASIO, the records to which the authors had access, and the process by which this official history was prepared suggest that this opinion deserved some weight when considering an application for an inquiry such as the present.

38 I did not accept the Crown’s contention that this book did not advance the applicants’ case beyond the material included in Mr McDonald’s book published in 2019 and the declassified ASIO material.

*2016 conviction and sentence of Roger Rogerson for murder*

39 On 15 June 2016, Roger Rogerson was found guilty of murdering Jamie Gao and of supplying 2.78 kg of methylamphetamine. On 2 September 2016, he was sentenced to life imprisonment: *R v Rogerson; R v McNamara (No 57)* [2016] NSWSC 1207. An appeal to the Court of Criminal Appeal was dismissed: *Rogerson v The Queen; McNamara v The Queen* [2021] NSWCCA 160; 290 A Crim R 239.

40 The applicants submitted that the significance of those particular events was that:

“... if an enquiry were permitted, Mr Rogerson could be subpoenaed with questions relating to his precise involvement in the Croatian Six case, as well as that of his fellow police officers, asked of them. Indeed, in circumstances where Mr Rogerson is now serving a sentence of life imprisonment for

murder..., it is conceivable that he might be more forthcoming in relation to the role that he and other officers played in the Croatian Six case.”

41 The applicants were not submitting that Mr Rogerson’s conviction was evidence suggesting that he or somebody else involved in the present case acted improperly, but rather that if there was any impropriety, he may be more willing to disclose it now in light of his circumstances. The Crown submitted that the prospect he would be more willing to make admissions was “entirely speculative” and did not constitute special facts or special circumstances.

42 In this regard, the applicants also submitted that determining whether it appeared there was a doubt or question about a conviction presented a lower threshold of satisfaction than determining whether there was a miscarriage of justice.

#### *2018 declassification and availability of ASIO records*

43 In 2018, certain ASIO records relating to Mr Virkez were declassified and made available to Mr McDonald. He incorporated information derived from these declassified records into his book: *Reasonable Doubt: Spies, Police and the Croatian Six* (2019, Doosra Media).

44 Helpfully, the Crown obtained from the National Archives of Australia copies of two volumes of materials “from the series A6119, control symbols 6797 and 6798, barcodes 13935337 (Vol 1) and 325372220 (Vol 2), with the titles MISIMOVIC Vitomir Volume 1 and Volume 2” comprising 223 pages in Ex LN2 tab 1 which are declassified ASIO files relating to Mr Virkez. The applicant’s reply submissions also contained a helpful summary of some of this material.

45 Without attempting to conduct an inquiry into what is contained in this declassified material and its significance and without attempting to be exhaustive, the declassified material included:

- (1) A report from ASIO to the Special Inter-Departmental Committee for Protection Against Violence (SIDC-PAV) dated 28 February 1979 (p 130 of Ex LN2 tab 1) which stated:

“34. One of those arrested was to act as driver for those involved in the proposed bombing operation. For a period of at least six months prior to the arrests, that person also acted as an informer on Croatian nationalist activities to a person suspected by ASIO of being an intelligence official attached to the Yugoslav Consulate-General in New South Wales. Some hours before his arrest that person contacted officials at the Consulate-General and passed them detailed information about the proposed bombings.

35. The incident reveals the depth of the penetration of Croatian extremist groups by the YIS in Australia.”

- (2) A response dated 28 February 1979 to a ministerial enquiry in relation to the arrest of the alleged bombers on 8 February 1979 (p 129 of Ex LN2 tab 1) which included:

“2. You may wish to draw your Ministers attention to para 34, of ASIO report to the SIDC PAV dated 28 Feb 79 which mentions an informant of the YIS. That person is Vico Virkez, one of those now on trial. ASIO information that Virkez has been an informant of the YIS for several months was obtained from a secret source which must be protected.”

- (3) A telex from the NSW office of ASIO to Headquarters dated 14 March 1979 (p 111 of Ex LN2 tab 1) which contained the following:

“Roy Whitelaw Assistant Commissioner NSW police at 11.05 today was in touch with this office re para 34, page 13 of the Report to the Special Interdepartmental Committee on Protection Against Violence 28 February 1979.

2. Assistant Commissioner Whitelaw was very concerned re-this paragraph as if the opposition became aware of this information it could blow a hole right through the police case. He considered the paragraph to be sub judice

3. Whitelaw would appreciate ASIO permission to tell selected senior officers involved in the case the contents of para 34 as the caveat on page one prevents him from doing so

4. Your urgent reply appreciated”.

- 46 As a result of the telex of 14 March 1979, ASIO officers met and had a conversation with Assistant Commissioner Whitelaw on 16 March 1979 which was recorded in a Record of Conversation signed by a person identified as “Legal Adviser” (pp 108-110 of Ex LN2 tab 1). It contained the following:

“4. Mr Whitelaw explained his understanding of the circumstances leading to the arrest of the Croatians, nine in number, and indicated that very serious crimes, including conspiracy to murder, could be involved.... At this time police were continuing their enquiries and the formulation of all of the ‘charges’ had yet to be finalised.

5. He also explained that for some years there had been allegations and rumours to the effect that the official Yugoslav government representatives in Australia had been attempting to discredit Croatian nationalist organisations by the use of agents provocateur among their own people or that ‘incidents’ had been staged at the instigation of those representatives and then been blamed on them.

6. His view was that it was, at least, likely that this incident would give rise to similar allegations. For that reason the ASIO information should be available to the Police Prosecutions Branch so that the Police Prosecutor would be aware of all the circumstances and thus avoid ‘blundering’ into a possible untoward situation during the committal proceedings.

7. As one of the nine had been established by ASIO as an ‘informer’ to the Yugoslav Consulate-General in Sydney he believed that the respective heads of the CIB and the Prosecutions Branch should be made aware of the relevant information in [SIDC-PAV dated 28 February 1979].

8. It also appeared that the informer was a man prone to violence and that he has been known, over some two years, to a police officer stationed at Lithgow, NSW one Detective Sergeant Mahine (phonetic).

9. The discussion ranged at some length over the ways in which the police could be embarrassed during the Court hearing should allegations of the type mentioned in paragraph 5 be raised. Mr Whitelaw referred, several times, to the need to properly brief police as to the ALSO information in that context.

10. As is often the case a significant part of the police case in relation to the more serious offences will be based upon ‘admissions’. Mr Whitelaw’s concern is, therefore, understandable. However, it is considered that the need for concern is not as great as he presently believes. He also indicated that his concern related only to the committal proceedings and not the ultimate trial.

11. It was agreed that Mr Whitelaw should brief the head of the Police Prosecutions Branch upon the import of the ASIO information but in a non-attributable manner and in such a way as to avoid the possible embarrassment already mentioned.

...

14. Mr Whitelaw thought it possible that the Consulate-General would seek to influence the police to ‘go easy’ on its informer. It is unlikely that the police will accede [sic] to representations of that nature. They expect that the informer, who now realises the seriousness of the charges upon which he will be presented, will try to minimise his involvement by

asserting his status with the Consulate-General and that it was he who first alerted the police.

...

16. Throughout the discussion was relaxed and Mr Whitelaw appeared to have appreciated the very quick ASIO response to his initial communication to it....

17. It is highly unlikely that [SIDC-PAV report dated 28 February 1979] will be again raised in this matter and there is no likelihood that it will be prejudiced or compromised by the NSW Police."

- 47 From this material it appears that Assistant Commissioner Whitelaw was concerned that information available to ASIO could "blow a hole right through the police case" at the committal hearing if disclosed to the defence and he wished to avoid that occurring. It also appears that part of the Assistant Commissioner's concern arose out of his being aware of "allegations and rumours" of Yugoslav government representatives using agents provocateurs among Croatians and of 'incidents' being staged at the instigation of those representatives and then being blamed on the Croatians. It was apparently perceived that Mr Virkez's being an informer on Croatian nationalist activities to a Yugoslav intelligence official had the potential to support an inference that his evidence of a bombing conspiracy by the Croatian Six was untrue and was given in an attempt to discredit Croatians in Australia at the behest of the Yugoslav government. As a result, the Assistant Commissioner sought, in order to avoid the "embarrassment" of such allegations or inferences being available in relation to the prosecution of the Croatian Six based on Mr Virkez's activities, that the head of the Police Prosecutions Branch and possibly the head of CIB be briefed on the AISO information but "in a non-attributable manner".
- 48 A significant amount of other material in the declassified ASIO documents forcefully suggests that, at least, Mr Virkez was an informer to the Yugoslav Consulate-General for a number of months prior to the arrest of the Croatian Six in February 1979, if not a Yugoslav agent or agent provocateur.

49 In addition, a note apparently created on 20 May 1980 (p 87 of Ex LN2 tab 1) by an unnamed person headed "Croatian Republican Party (HRS)" included an "Agent Comment":

"I believe that some of those on trial are innocent and that the charges are framed. I would help to raise money for them but the community so hates the HRS that any prestige I have would be lost if I was seen to support those on trial. I further believe that Vico VIRKEZ... was an UDBa informer and that one other was also an UDBa spy. If Virkez is lucky he will be deported to Yugoslavia and go into hiding, if not he is a dead man either here or there as those on trial have friends in Croatia".

50 Another ASIO document dated 6 July 1982, identified Mr Virkez, as well as a number of other persons, as a "YIS informant" and "suspected agent provocateur" (p 21 of Ex LN2 tab 1).

51 The declassified documents also gave further information concerning Mr Cavanagh's involvement with Mr Virkez and the interview at Parramatta Gaol on 21 February 1980 and a later interview when Mr Cavanagh was accompanied by NSW Police. In particular, a letter from the Australian Federal Police to the Department of Prime Minister and Cabinet dated 11 March 1980 (pp 103-4 of Ex LN2 tab 1) records that:

"...

(b) VIRKEZ, in the opinion of the interviewing offices, has been operating in Australia as an agent of the Yugoslav Government and it was in this connection that he became involved with the Croatian Republican Party (HRS).

...

(e) his main intent in talking with this Force appears to be a desire to make a deal with the New South Wales authorities i.e. he is prepared to testify against the others if he has a guarantee that he will be immediately deported following trial without having to serve a goal sentence.

The N.S.W. Crown Law authorities are anxious to come to some form of agreement with VIRKEZ as his voluntary testimony is considered to be vital to the successful outcome of the case. ... Proof of his involvement with the Yugoslav Government will be extremely difficult to produce even though it has been confirmed to the satisfaction of this Force from delicate intelligence sources ...".

52 Other documents suggest that Mr Cavanagh's evidence in his affidavit "would seem to be at variance with what he told ASIO in 1980": see for example a Minute Paper with the subject "Subpoena of documents: "Lithgow Bombers" Appeal Case 31 May 1982 (p 25 of Ex LN2 tab 1).

53 The declassified documents also include material concerning Mr Cunliffe's efforts while at the Department of Prime Minister and Cabinet and later at the Australian Law Reform Commission to draw attention to material that he contended other officials withheld from the trial of the Croatian Six which was such that "the jury's verdict is likely to have been very different had material to that effect been available to put to Mr Virkez or Mr Cavanagh" as stated in his letter of 5 December 1985 to the Federal Attorney General (p 200 of Ex LN2 tab 1).

*2019 publication of Reasonable Doubt: Spies, Police and the Croatian Six by Mr McDonald*

54 As noted above, Mr McDonald published *Reasonable Doubt: Spies, Police and the Croatian Six* in 2019. The book, for example at pp 223-5, appears to contain further information derived from the declassified ASIO documents and other sources which calls into question whether the New South Wales Police and relevant persons involved in the prosecution of the Croatian Six did not have knowledge of Mr Virkez's activities as an informant to the Yugoslav authorities and the possibility or suspicion that he was a YIS or UDBa agent or an agent provocateur. Other information concerning Mr Cunliffe and Mr Cavanagh which is included at pp 227-229 suggests that the non-availability of relevant information to the defence deprived the Croatian Six of a chance of acquittal which was fairly open

*2021 ABC Podcast – Croatian Six Episodes 1 and 2*

55 In February 2021, the ABC made available a podcast in two episodes dealing with the Croatian Six arising out of further investigations by the journalist Joey Watson. Much of this content of the 2021 podcasts was, however, based on the earlier material which has been referred to above. In the first episode, there

was additional information concerning the police evidence as to finding explosives at the premises of the Croatian Six. Joey Watson recounted that he contacted one of the police officers involved in the case and questioned him concerning the evidence of finding explosives at the premises of some of the six men. The officer said, “we didn’t find any explosives. I think we found a gun but not any explosives” but asked for his comment to be kept off the record. The Crown submitted that this statement was consistent with an inability to remember events, and noted the events had now occurred 42 years ago. It was further suggested that there was no reference to the police “planting” explosives which further diminished the significance of this material.

56 In the second episode, Mr Cunliffe spoke about the letters Mr Virkez had written to the Prime Minister in about 1980 protesting his innocence and questioning why he was imprisoned and about a meeting involving ASIO, the Commonwealth Police and a number of Commonwealth Government departments. Mr Cunliffe indicated that he felt constrained not to provide any detailed information. The episode included the following concerning Mr Cunliffe’s involvement:

“[Mr Watson]:

As far as Ian Cunliffe knew, it was to be a normal criminal trial, and as was routine, Cunliffe forwarded [Mr Virkez’s] letter to the Australian Federal Police, then known as the Commonwealth police, with some questions.

[Mr Cunliffe:]

What’s happening here? What’s the story? How should we respond?

[Mr Watson:]

But the response surprised him.

[Mr Cunliffe:]

The Commonwealth police said that they knew things about Virkez. The role that he was playing were quite different from what was being represented to the defence in relation to the six people who were coming up for trial.

[Mr Cunliffe was summoned to a meeting with people from ASIO, the Commonwealth Police and a number of Commonwealth Government departments at which certain information was provided.]

[Mr Watson:]

This information was only granted to people with the highest security clearance. [Mr Cunliffe] felt these facts could change the course of a criminal trial. He asked, if this could be shared in the courts in the interests of justice?

...

[Mr Cunliffe] says the answer was clear; if the records were requested, they would be made to disappear.

[Mr Cunliffe:]

There will be no records.

...

The New South Wales Police would not reveal to the accused in the trial information which was plainly relevant to their defence.”

- 57 The second episode also touched upon the publication in 2019 of Mr McDonald’s book and the information disclosed in the declassified ASIO documents, as well as other information concerning the activities of other Yugoslav agents in Australia at about the relevant time who were reported to have infiltrated the Croatian community. The Crown submitted that the information relating to other active agents infiltrating the Croatian community was not new and did not advance matters further than the 2012 application.

### **Relevant statutory provisions and relevant principles**

- 58 Under s 78 of the CAR Act, a convicted person or someone acting on that person’s behalf can make an application to the Supreme Court for an inquiry into the person’s conviction. Section 78 provides:

“(1) An application for an inquiry into a conviction or sentence may be made to the Supreme Court by the convicted person or by another person on behalf of the convicted person.

(2) The registrar of the Criminal Division of the Supreme Court must cause a copy of any application made under this section to be given to the Minister.”

59 As noted above, three of the Croatian Six have made an application under s 78(1) and the requirement in subs (2) has been complied with in this case.

60 Section 79 governs what the Court may do after considering the application. That section is relevantly in the following terms:

“(1) After considering an application under section 78 or on its own motion—

(a) the Supreme Court may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or

(b) the Supreme Court may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the *Criminal Appeal Act 1912*.

(2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person’s guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.

(3) The Supreme Court may refuse to consider or otherwise deal with an application. Without limiting the foregoing, the Supreme Court may refuse to consider or otherwise deal with an application if—

(a) it appears that the matter—

(i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or

(ii) has previously been dealt with under this Part or under the previous review provisions, or

... and

(b) the Supreme Court is not satisfied that there are special facts or special circumstances that justify the taking of further action.

...

(4) Proceedings under this section are not judicial proceedings. However, the Supreme Court may consider any written submissions made by the Crown with respect to an application.

(5) The registrar of the Criminal Division of the Supreme Court must report to the Minister as to any action taken by the Supreme Court under this section (including a refusal to consider or otherwise deal with an application).”

61 In relation to the three of the Croatian Six who have not joined in the present application, the Court can direct an inquiry into their convictions “on its own motion” under s 79(1)(a).

62 If an inquiry is directed under s 79(1)(a), the inquiry is to be conducted in accordance with ss 80 and 81 of the CAR Act which relevantly include the following:

**“80 Inquiries**

An inquiry is to be conducted as soon as practicable after a direction for it has been given under section 77 or 79.

**81 Procedure for conducting inquiry**

(1) An inquiry under this Division is to be conducted by—

...

(b) a judicial officer appointed by the Chief Justice, if the conduct of an inquiry was directed by the Supreme Court.

(2) The judicial officer conducting the inquiry has—

(a) the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923*, and

(b) in the case of a person who is a Judge of the Supreme Court or whose instrument of appointment under this section expressly so provides, the powers and authorities conferred on a commissioner by Division 2 of Part 2 of the *Royal Commissions Act 1923* (except for section 17).

(3) The *Royal Commissions Act 1923* applies to any witness summoned by or before the judicial officer conducting the inquiry (except for sections 13 and 17 and, subject to subsection (2) (b), Division 2 of Part 2).

(4) If it appears that the character of any person (being a person who was a witness at the proceedings from which the conviction or sentence arose) may be affected by the inquiry, the judicial officer must permit the person to be present at the inquiry and to examine any witness who attends the inquiry.”

63 These provisions and the other provisions of Pt 7 of the CAR Act are remedial legislation designed to overcome injustices that sometimes arise in the course of the administration of criminal justice: *Application of Peter James Holland under s.78 Crimes (Appeal and Review) Act 2001* [2008] NSWSC 251 at [5], citing *Kirk Group Holdings Pty Limited v WorkCover Authority of NSW* (2006) 66 NSWLR 151; [2006] NSWCA 172 at [8].

- 64 Determining an application under s 78 in accordance with s 79 does not involve a judicial proceeding: s 79(4). In making such a determination, the Court is making an administrative decision: *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318; [2003] HCA 28 (*Eastman*) at [124], citing *Varley v Attorney General (NSW)* (1987) 8 NSWLR 30 at 49-50.
- 65 The powers available under s 79(1) are limited to the direction of an inquiry, as sought by the applicants in the present case, or referral of the case to the Court of Criminal Appeal. They do not extend to a power to quash convictions or direct acquittals.
- 66 Section 79(2) stipulates that an inquiry may only be directed “if it appears that there is a doubt or question as to the convicted person’s guilt ... or as to any part of the evidence in the case”. The issue is not whether there is a relevant doubt or question but rather whether there appears to be a doubt or question to the satisfaction of the Court determining whether that condition has been fulfilled: *Buttrose v Attorney General of New South Wales* [2015] NSWCA 221 at [16].
- 67 A “question” referred to in s 79(2) is not the same as a “doubt” referred to in that subsection. A “question” involves a less intense mental state than a “doubt” and particular information can stimulate a question without any particular answer being pointed to: *Eastman* at [134]; *Application by Brian Steer under Part 7 of the Crimes (Appeal and Review) Act 2001* [2020] NSWSC 623 at [16].
- 68 Furthermore, in determining whether a relevant doubt or question arises, it should be borne in mind that, as Heydon J explained in *Eastman* at [103]:

“[t]he result of the inquiry might have revealed that there is more than a doubt or question. The doubt might have swelled into certainty that something had gone wrong. The question might have been answered in positive terms favourable to the [applicant]. Alternatively, the result of the inquiry might not only have answered the question adversely to the [applicant], thereby removing any doubt, but also have shown that the conviction was unquestionably well-based, and that public confidence in its soundness could legitimately intensify beyond the point which had been reached when the inquiry was directed.”

69 In a case such as the present, where there have been a number of previous unsuccessful applications for an inquiry under s 78(1) of the CAR Act and the previous review provisions in s 475 of the *Crimes Act*, it is also appropriate to consider the application of s 79(3) which establishes that the Court may refuse to deal with an application if:

- (1) it appears that the matter has previously been dealt with under Pt 7 of the CAR Act or under the previous review provisions in, as in this case; and
- (2) the Court is not satisfied that there are special facts or special circumstances that justify the taking of further action.

70 The principles to be applied in relation to s 79(3) include the following:

- (1) The balance being struck by s 79(3) is between an appropriate remedial process for applications for a post-conviction inquiry and the need to guard against the waste of judicial resources that can flow from repeated unmeritorious applications for inquiries: *Milat, Ivan Robert Marko - Application under Section 78 of the Crimes (Appeal and Review) Act 2001* [2015] NSWSC 209 at [20] (Johnson J).
- (2) The discretion conferred by s 79(3) to refuse to consider or otherwise deal with an application is not conditional upon the establishment of any particular matter. As is clear from the words “without limiting the foregoing” in s 79(3), the matters stated in pars (a) and (b) serve as a guide to the proper limits of that power but its exercise is not conditional upon their being satisfied: *Clark v Attorney General of New South Wales* [2020] NSWCA 70 (*Clark*) at [39] (McCallum JA, Basten and Macfarlan JJA agreeing).
- (3) The emergence of new evidence or new arguments (which have a reasonable foundation) not previously raised may amount to “special facts or special circumstances”: *Application by AZ for inquiry into*

*conviction pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 (NSW) [2020] NSWSC 1048 at [21] (Cavanagh J).*

## **Consideration**

- 71 In determining whether I was satisfied, for the purposes of s 79(2), that there is a doubt or question as to the applicants' guilt or as to any part of the evidence in the present matter, I could not, and was not required to, conduct the type of inquiry envisaged under s 81 or even an abridged version of such an inquiry.
- 72 Having regard to all of the material, which was provided by the applicants and the Crown and which included summaries of or extracts from the evidence at trial, it appeared to me, and I was comfortably satisfied, that there are a number of doubts or questions as to parts of the evidence in the case and the guilt of the Croatian Six.
- 73 First, it appeared to me that there is a doubt, or at least a question, as to whether the evidence of Mr Virkez at trial was deliberately false in a number of respects including when he gave evidence about the alleged bombing conspiracy, when he denied spying on the Croatians, and when he denied giving evidence at the behest of anyone connected with the Police Special Branch or the Yugoslav government. I was satisfied that this doubt or question arose having regard to the information identified above, including but not limited to the information contained in: the declassified ASIO documentation; the book *Reasonable Doubt: Spies, Police and the Croatian Six*; Mr McDonald's interview with Professor Schindler; the book *The Secret Cold War, The Official History of ASIO, 1975 – 1989*; the e-book *Framed*; Mr Virkez's interview with Mr Masters, parts of which were included in the Four Corners program; the ABC podcasts including Mr Cunliffe's information; and, the documents and accounts concerning Mr Cavanagh's evidence.
- 74 Secondly, it appeared to me that there is a doubt, or at least a question, as to the evidence of the police concerning the confessional statements and the finding of explosives at locations associated with the Croatian Six. In relation to the police evidence of confessional statements made by the Croatian Six,

the information provided by Roger Rogerson concerning “verbals” and his involvement in these proceedings, when considered in light of all the other information available in relation to this application, including what has been summarised above, caused me to have a distinct doubt or question about the truthfulness and reliability of the evidence concerning those confessions. Furthermore, Roger Rogerson’s information and the information provided by the police officer to whom Mr Joey Watson spoke, together with the established falsehood of the evidence given at the committal hearing in relation to the explosives said to have been found in a drawer in Mr Stipic’s desk in his room, when there was no such desk, also caused me to have a doubt or question concerning the veracity and reliability of the evidence about the explosives found at the premises of five of the six men, especially when considered in the context of the all the other information available. Mr Bebic’s evidence about the explosives that Mr Virkez had stolen from Wallerawang Power Station and said could be used to mine opals was, in my view, inherently credible and reinforced my conclusion that there was a doubt or question as to this aspect of the police evidence. The doubt, or at least a question, as to the evidence of Mr Virkez also, in my view, supported my being satisfied that there is a doubt, or at least a question, as to the police evidence because the two categories of evidence are corroborative and bear upon one another, and thus should be analysed together, not in isolation, in many instances.

75 Thirdly, I accepted that there appears to be a doubt, or at least a question, as to the truthfulness and accuracy of Mr Cavanagh’s evidence to the Court of Criminal Appeal which was accepted as establishing that Mr Virkez was an agent but only “in [a] limited sense”. This was particularly so given what was contained in the declassified ASIO documents and the other material referred to in more detail above which suggested that Mr Virkez’s activities may have extended to being an agent provocateur and beyond merely gathering intelligence for the Yugoslav government.

76 Fourthly, it appeared to me that there is a doubt, or at least a question, as to the guilt of the Croatian Six as a result of information being withheld from the defence, either legitimately on the basis of a proper claim for public interest

immunity at the time, or illegitimately as Mr Cunliffe believed. The unavailability to the defence at the trial of the information of the type disclosed in the declassified ASIO documents may well have deprived each accused of a chance of acquittal that that was fairly open. The information from Mr Cunliffe supports this conclusion. The conclusion is also supported by the view expressed by Assistant Commissioner Whitelaw that “if the opposition became aware of this information it could blow a hole right through the police case” at the committal hearing.

77 Fifthly, it also appeared that there is a doubt, or at least a question, as to the guilt of the Croatian Six as a result the real possibility that the Yugoslav Intelligence Service used Mr Virkez as an agent provocateur or informer, to cause false information to be given to the NSW Police, and possibly ASIO, as to the existence of a bombing conspiracy involving the Croatian Six, in order to discredit Croatians in Australia. Mr Virkez’s information led to the arrest and charging of the Croatian Six and their eventual conviction for conspiracy to bomb and possession of explosives. The principal evidence relied upon to secure those convictions was the testimony of Mr Virkez and the evidence of police officers of confessions said to have been made by Croatian Six and explosives said to have been found at their premises. As I have explained, there is, in my view, a substantial doubt or question as to the veracity and reliability of Mr Virkez’s evidence and as to the police evidence. Mr Master’s interview with Mr Virkez and the information from Professor Schindler also indicated that the Croatian Six may not have been part of the alleged conspiracy to bomb. This and other material concerning the alleged finding of explosives at the premises of five of the Croatian Six also led me to conclude that there is a doubt or question about the convictions relating to the explosives offences. Furthermore, on Mr Bebic’s case, the explosives found had been stolen by Mr Virkez and were said by Mr Virkez to be for opal mining. Consequently, there appeared to me to be a doubt or question as to whether the Croatian Six were guilty of any the offences for which they were convicted.

- 78 In short, I was satisfied that the condition in s 79(2) of the CAR Act has been met in this case and that the discretion to direct that an inquiry be conducted into the conviction of the Croatian Six is enlivened.
- 79 As has been noted above, there has been a previous unsuccessful application for an inquiry under s 78(1) of the CAR Act and earlier applications for review under the review provisions formerly found in s 475 of the *Crimes Act*. In addition, the Croatian Six's matter has been fully dealt with in the Court of Criminal Appeal and High Court. Accordingly, the present application involves a matter that falls within both subpars (i) and (ii) of s 79(3)(a) of the CAR Act, and the Court may refuse to consider or otherwise deal with the present application, if it is not satisfied that there are "special facts or special circumstances" that justify the taking of further action: CAR Act, s 79(3)(b).
- 80 While the previous applications were unsuccessful, it does not appear to me that they were entirely lacking in merit, although the present application is made considerably stronger than the earlier applications by the availability of the declassified ASIO documents and the further research and information contained in the publications and podcasts since 2012. It can be noted that the parties made quite detailed submissions as to whether Barr AJ made errors when determining to dismiss the 2012 application for an inquiry. It does not appear to me that it is necessary or appropriate to consider whether any relevant errors were made in relation to the determination of that application. The present application is to be considered on the basis of the material before me, some of which is different from that which was before Barr AJ, and does not depend on the correctness or otherwise of his Honour's determination.
- 81 In my view, the fact that additional, important material has come to light since 2012, including especially the declassified ASIO documents, as well as the other information referred to in: *The Secret Cold War, The Official History of ASIO, 1975 – 1989; Reasonable Doubt: Spies, Police and the Croatian Six*; and, the 2021 ABC podcast *Croatian Six* episodes 1 and 2, means that there are "special circumstances" in the present case that justify the taking of further action by way of directing that there be an inquiry. Consequently, even though

there have been previous unsuccessful applications, the condition in s 79(3)(b) has not been met. Accordingly, I cannot refuse to consider or otherwise deal with the present application as provided in the second sentence in s 79(3).

82 Furthermore, given the nature and extent of the doubts or questions that now arise in relation to the convictions of the Croatian Six and parts of the evidence at their trial and on appeal, it is not appropriate on any other ground to refuse to consider or otherwise deal with the present application.

83 Finally, in considering whether to exercise the discretion under s 79(1) to direct that an inquiry be conducted, I have also taken into account, on one side of the balance, that:

- (1) the Croatian Six were convicted 41 years ago;
- (2) the passage of time is likely to have made recollections less reliable and the conduct of an inquiry more difficult than if the inquiry had been directed earlier; and
- (3) a number of those involved in the trial or in the various agencies to whom the information in the possession of ASIO was disclosed have died, with the result that they will not be able to give evidence in any inquiry and they will not have the opportunity directly to explain or defend their conduct, should it be called into question.

84 These factors generally weigh against directing an inquiry in response to the present application. On the other side of the balance, however, I have taken into account that:

- (1) in a number of cases, relevant participants in events have given their versions of what occurred or explained their reasons for doing what they did in a form which has been recorded and may be able to be relied upon in any inquiry, despite the passage of time;

- (2) the ASIO documents, which are key to understanding what may have occurred, were only declassified in about 2018 and their significance could only be properly and openly assessed in the last few years;
- (3) the relevant volume of the “Official History” of ASIO, published in 2016, describes the convictions of the Croatian Six as “wrongful” which supports the conclusion that investigation of the circumstances of these convictions is warranted and appropriate; and
- (4) the doubts and questions which arise in this matter based on all the material provided suggest a significant miscarriage of justice may have occurred, even if there were no errors on the part of the trial judge or the Court of Criminal Appeal and, thus, the usual safeguards inherent in the trial and appeal processes may not have been sufficient to prevent, investigate and remedy any such miscarriage in this case.

85 Having regard to those countervailing factors, I do not consider, contrary to the Crown’s submission, that ordering an inquiry would be futile because of the period of time that has elapsed since the incident.

86 I have also taken into account that only three of the six men convicted of conspiracy to bomb and explosives offences have applied for an inquiry under s 78(1) of the CAR Act. Nonetheless, the Court has power under s 79(1) to direct that an inquiry be conducted “[a]fter considering an application under section 78 or on its own motion”.

87 Having regard to all the material presently before me on the application by Mr Bebic, Mr Nekic and Mr Brajkovic, including the helpful written submissions of the applicants and the Crown, in my view, it is appropriate to direct that an inquiry be conducted into the convictions of these three men, for the reasons set out above.

88 Furthermore, there do not appear to be any material points of distinction between these three applicants and the other three men, Mr Zvirotic, Mr Ilija

Kokotovic and Mr Joseph Kokotovic, or any significant reasons why the convictions of those other three men would be likely to be unaffected by the doubts or questions that arise in relation to the applicants' convictions. Even though these three men may not now wish to participate in any inquiry, for example because of their previous experiences with the legal system, in my view they should not be denied the opportunity to participate in an inquiry into their convictions if an inquiry is directed in relation to the applicants' convictions.

89 In all the circumstances, I consider that it is appropriate to direct, on the Court's own motion, an inquiry into the convictions of Mr Zvirotic, Mr Ilija Kokotovic and Mr Joseph Kokotovic as well as an inquiry into the convictions of the applicants.

### **Determination**

90 After considering the application under s 78 of the *Crimes (Appeal and Review) Act 2001* (NSW) and on the Court's own motion, the Court directs pursuant to s 79(1)(a) of that Act that an inquiry be conducted by a judicial officer into the convictions on 9 February 1981 of Maksimilian Bebic, Mile Nedic, Vjekoslav Brajkovic, Anton Zvirotic, Ilija Kokotovic and Joseph Kokotovic.

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I certify that this and the 36 preceding pages are a true copy of the reasons for the determination delivered herein by the Honourable Justice Wright and of the Court.



Associate to Justice Wright

30 August 2022