ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE APPLICANT.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2017-485-0032
[2020] NZHC 2782

UNDER	the Judicature Amendment Act 1972 and Part 30 of the High Court Rules
IN THE MATTER OF	an application for judicial review of the suspension and cancellation of a passport
BETWEEN	A Applicant
AND	MINISTER OF INTERNAL AFFAIRS Respondent

Hearing:	22 September 2020 24-25 September 2020 (closed hearing)
Appearances:	Applicant in person (via VMR) A L Martin and G M Taylor for respondent B J R Keith, special advocate
Judgment:	22 October 2020

RESERVED JUDGMENT OF DOBSON J

Explanatory Note: *As discussed at [9]–[10] below, the classified nature of certain aspects of the evidence in this case required parts of it to be heard in closed court hearings pursuant to s 29AB of the Passports Act 1992, and consequently the publication of separate open and closed judgments. Only this open judgment will be publicly available. In order to lessen the risk of the closed court procedure undermining Ms A's right to natural justice, I directed that Mr Keith be appointed as a special advocate to advance Ms A's interests. I detail at [44]–[48] of this judgment how Mr Keith, who had access to all relevant material including classified security information, advanced a number of factual and legal challenges to the lawfulness of the Minister's decision.*

Contents

The challenged decisions

[1] On 19 April 2016, the Acting Minister of Internal Affairs suspended the applicant's (Ms A's) passport for a period of 10 working days. That decision was taken on the ground that a report was being prepared about possible cancellation of the passport, and the passport holder was deemed likely to travel out of New Zealand before the report was prepared. On 2 May 2016, the Minister of Internal Affairs (the Minister) decided to cancel Ms A's passport (the decision) in reliance on what was then cl 2(2) of sch 2 of the Passports Act 1992 (the Act). That empowers the Minister to cancel a New Zealand passport if the Minister believes on reasonable grounds that the person is a danger to the security of a country other than New Zealand because the person intends to (inter alia) facilitate a terrorist act, and other pre-conditions for cancellation are found to exist.

[2] The notice advising Ms A of the cancellation set out the terms of cl 2(2) of sch 2 to the Act, and cited the grounds for the decision as follows:

> I have based my decision on Information provided to me by the New Zealand Security Intelligence Service (NZSIS). The majority of that information is classified but in summary I believe on reasonable grounds that you have been involved in activities of security concern. Specifically that:
>
> a. you previously attempted to travel to Syria to join the Islamic State of Iraq and the Levant (ISIL) in August 2015; and

> b. you intend to engage in, or facilitate, an act of terrorism overseas as defined in section 5(1)(a) of the Terrorism Suppression Act 2002 ("the Act"), with the intended outcomes in section 5(3)(a) and (b) of the Act (and which are not exempt under section 5(4) of the Act). Specifically, that you maintain an intention to travel to Syria to join the Islamic State of Iraq and the Levant (ISIL).
>
> I therefore believe on reasonable grounds that you are a person who is a danger to the security of another country because you intend to engage in, or facilitate, a terrorist act overseas (within the meaning of Section 5 of the Terrorism Suppression Act 2002), that the danger to security of that country cannot be effectively averted by other means, and that the cancellation will prevent or effectively impede your ability to engage in or facilitate a terrorist act.

[3] Solicitors instructed by Ms A initially commenced an appeal from the cancellation decision pursuant to s 28 of the Act. However, in December 2016 Ms A dispensed with the services of her lawyers and has not pursued the appeal. Instead, acting on her own behalf, she commenced the present proceeding seeking judicial review of the decisions to suspend and subsequently cancel her New Zealand passport.

[4] Ms A's February 2017 amended statement of claim alleged that the suspension decision was unlawful because the Minister had no reasonable grounds to be satisfied that she was likely to travel before the report was prepared and that the decision had been made negligently. Alternatively, that there were no grounds for believing she intended to travel beyond Australia, and in any event there was no prospect of her attempting to use her New Zealand passport to do so as it had been lost.

[5] As to the Minister's decision to cancel her passport, she alleged that the Minister had proceeded negligently, had failed to have regard to mandatory relevant considerations and took into account irrelevant considerations. In addition, she alleged that the process was procedurally unfair and in breach of natural justice. She sought orders quashing both decisions. Her claims for relief also contemplated an application for administrative law damages. In that regard, she pleaded that the decision had been made in bad faith, and with gross negligence, likely in order to overcome a statutory limitation of Crown liability to circumstances in which such conduct could be made out.[1]

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[1] Passports Act 1992, sch 2, cl 9.

Name suppression

[6] At an early stage of the proceeding, I granted Ms A's application for suppression of her name and details likely to lead to her identification. The terms of the order were that henceforth all references to the proceedings should refer to the applicant only as Ms A.[2] Those orders were on terms that they were to be reviewed in light of the matters traversed at the substantive hearing. Ms A has renewed her application for permanent name suppression, citing concerns for substantial adverse consequences should she be identified with the factual matters relied on by the Minister in making the cancellation decision. Those events are now at least four and a half years ago.

[7] The Crown abided the Court's decision on a final suppression order and Mr Keith submitted that it was justified.

[8] I am satisfied that there should be a permanent suppression order in respect of Ms A's name and any details likely to lead to her identification. It is clearly apparent that the report to the Minister and circumstances in which the cancellation decision was made were very much a reflection of concerns shared in New Zealand and other similar jurisdictions at the time. Relatively soon after the events relevant to the Minister's decision, the world had moved on. I am satisfied that an extraordinary extent of prejudice would result to Ms A if her current life, as described during the open hearing, was disrupted by the attention likely to follow from her being identified with the conduct from 2015 and early 2016 that is in issue. I now make permanent the suppression order I made in my re-issued judgment of 24 April 2017, requiring that all references to the applicant should only be to Ms A. It potentially constitutes a contempt of court not to comply with this order.

Involvement of classified security information and closed court procedure

[9] At an early stage, Crown Law submitted a request in the name of the Attorney-General under s 29AB of the Act for the Court to recognise certain classified security information (CSI), which was relevant in responding to the application for judicial

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2 *A v Minister of Internal Affairs* [2017] NZHC 746 at [97].

review, to be treated as such. The consequence would be that the CSI would be presented to the Court and considered in the absence of Ms A, and anybody representing her, as well as members of the public. Where the closed court procedure contemplated by s 29AB is to apply, the Court must approve an unclassified summary of the CSI to be provided to the other party to the proceeding and any barristers or solicitors acting for them.[3]

[10] Once the involvement of CSI in the proceeding was signalled, I directed that a special advocate should be appointed. Shortly after an initial appointment, Mr Keith was appointed and has discharged that role throughout.[4] Substantial resources have been committed to resolving differences between Mr Keith and Crown Law on the extent to which documents for which CSI status is claimed should be withheld from Ms A, and the extent to which matters that would likely be traversed in a closed court proceeding could be conveyed to Ms A in the unclassified summary of the CSI. After an iterative process, I settled the terms of the unclassified summary and it was served on Ms A in September 2018. Since then, Mr Keith has pursued residual concerns about the scope of disclosure of relevant information, with responses often causing quite lengthy delays. In addition, for a material part of the intervening period Ms A was not in a position to progress her case.[5]

[11] The five and a quarter page unclassified summary of CSI advised Ms A that the following factual matters had been conveyed to the Minister and relied on by him in making the challenged the decision:

> a. NZSIS assessed you attempted to travel to Syria to join ISIL in August 2015.
>
> i. In late August 2015 you were detained by Turkish authorities on the border of Turkey and Syria on suspicion of attempting to enter Syria to marry an ISIL fighter and join up with and support ISIL.

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3 Passports Act 1992, s 29AB(2)(a).

4 *A v Minister of Internal Affairs* [2018] NZHC 1328, [2018] 3 NZLR 583 dealt with my appointment of Mr Keith as special advocate.

5 On 14 November 2019 I heard an application on behalf of the Minister to strike out the judicial review for non-prosecution. I did not allow that but on condition that the matter be progressed to trial: *A v Minister of Internal Affairs* [2019] NZHC 2992.

ii. You were reportedly travelling in a minivan of people of various nationalities who were believed by the Turkish authorities to be ISIL supporters.

iii. You were detained, interviewed by Turkish authorities and then deported from Turkey on 4 September 2015 and had tickets to return to Australia.

iv. However, instead of completing your travel to Australia you changed flights in Kuala Lumpur and attempted to change your appearance before travelling around the Middle East for several weeks. It appears you were not allowed into some of the countries you travelled to. Your brother […] eventually met you in Qatar and you travelled to Oman and then on to New Zealand, arriving on 21 September 2015. You advised New Zealand Customs on your arrival that you had no intention to go to Syria, but were trying to visit family members in a refugee camp in Turkey.

v. Information available to the NZSIS indicated that others believed that you had been planning hijrah, which the NZSIS interpreted to mean travelling to live under ISIL, for some time; that you had been accessing ISIL propaganda; and that you had referred to marriage, which the NZSIS interpreted to mean that you intended to marry an ISIL fighter.

b. Although you previously held an Australian passport it was no longer available to you.

c. Following inquiries, the NZSIS assessed that you were the likely [person responsible for online material that included] pro-ISIL content. The NZSIS therefore assessed that you had therefore publicly indicated your support for ISIL. These posts were disclosed to you on 10 July 2018.

d. The NZSIS also undertook other inquiries that indicated other online activity in translating and/or disseminating what it stated to be pro-ISIL video material in 2015 prior to your travel. The NZSIS considered that this online activity demonstrated your support for ISIL and your ability to facilitate a terrorist act through dissemination of what it stated to be ISIL propaganda.

e. For a period up to April 2016 you were involved in sharing content online that the NZSIS assessed to be in support of ISIL. NZSIS assessed that this demonstrated your ability to share information that ISIL supporters could use as inspiration to travel to Syria and/or Iraq or to conduct domestic attacks in their own countries.

f. On 3 October 2015 you and your brother […] left New Zealand attempting to travel to Indonesia. You were interviewed, denied entry and returned to New Zealand. You both then travelled to Australia between 6-25 October.

g. By April 2016 you were back in New Zealand sharing short-term accommodation […]. After your New Zealand passport was

suspended you travelled to Australia relying on your Australian citizenship to gain entry there.

h. NZSIS assessed that you maintained an intention to travel to Syria to join ISIL based on your previous travel attempt and the information set out above, together with other classified information indicating you still wanted to travel to Syria.

i. You are not known to have any other valid travel documents.

Minister's proceeding

[12] Pursuant to the Act, the cancellation of Ms A's passport would lapse after 12 months. In fact, the passport in question had only about six months to run when it was cancelled. In April 2017, the Minister commenced a separate proceeding seeking an order extending the period during which Ms A would not be entitled to obtain another passport for a further 12 months.[6] The pleading in that proceeding indicated that the Minister would rely essentially on the grounds used to justify the original cancellation decision. However, in December 2017, the Minister discontinued that proceeding and since that time has acknowledged that Ms A could apply again for the issue of a New Zealand passport. Ms A has not made application for a new passport to be issued to her.

[13] Numerous interlocutory issues have been argued.[7]

The evidence

[14] On 4 September 2017 and 30 August 2017, Ms Judith Collins and Mr Peter Dunne completed affidavits confirming the grounds on which they had respectively made the suspension and cancellation decisions. Mr Dunne's affidavit annexed the materials that had been presented to him and on which he relied in making the cancellation decision. Those documents comprised a 19 page report, together with some 210 pages of annexures to it. Those affidavits were served in redacted form so that all CSI was withheld from Ms A in copies served on her.

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6 Minister of Internal Affairs v A CIV-2017-485-382, relying on cl 2(8) of sch 2 to the Act.

7 *A v Minister of Internal Affairs* [2017] NZHC 746 [application of ss 29AA-29AC of Passports Act 1992]; [2017] NZHC 887 [various interlocutories]; [2017] NZHC 965 [non-publication of previous judgment]; [2018] NZHC 1328; [2018] 3 NZLR 583 [reliance on CSI]; [2018] NZHC 1797 [issues relating to CSI; suppression]; [2018] NZHC 2890 [unclassified summary of CSI; discovery; communications between special advocate and applicant]; [2020] NZHC 287 [applicant's interrogatories].

[15] In February 2018, the director of intelligence at NZSIS completed an affidavit addressing the circumstances in which the recommendation to the Minister was made.[8]

[16] On 26 February 2020, I granted Ms A leave to administer a small portion of a very large number of interrogatories to which she sought answers.[9] On 2 June 2020, an affidavit in response was completed by an officer in the Department of Internal Affairs (the Department), providing details from the Department's records as to the status of Ms A's New Zealand passport as at various dates, and providing explanations for the processes followed, both generally and in respect of her passport. The entries for her passport in the relevant period were:

Normal	Abnormal	Location	Username	Date Entered	Description
INV		WELLINGTON	Redacted	19-Apr-2016	
INV	LST	WELLINGTON	Redacted	22-Apr-2016	Y
INV	LST	WELLINGTON	Redacted	02-May-2016	Y
CAN	LST	WELLINGTON	Redacted	03-May-2016	

[17] The codes for the abbreviations used in the above entries were as follows:

CODE	DESCRIPTION
CAN	Cancelled Document
INV	Invalid Document
ISS	Issue Complete[10]
LST	Lost Document

[18] The first entry quoted on 19 April 2016 was in response to the Acting Minister's decision to suspend Ms A's passport whilst a report was prepared on a possible recommendation that it be cancelled. The move on 3 May 2016 from "invalid" to "cancelled" status reflected the Minister's decision made the day before.

[19] On 1 September 2020, Ms A filed a single page affidavit in support of her application for judicial review. Her affidavit did not address any of the factual matters about her previous conduct that had been conveyed in abstracted terms in the original reasons given to her for the cancellation decision, or in the unclassified summary of CSI. There was no denial of any of those matters deposed to, nor even a generalised contention that events have been misreported or misconstrued. Instead, her affidavit

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8 See [69] below.
9 *A v Minister of Internal Affairs* [2020] NZHC 287.
10 See explanation at [34] below.

was confined to a brief narrative of her present circumstances, and deposing to the circumstances in which she last left New Zealand on 22 April 2016, travelling to Australia without her New Zealand passport. She denied that she had, at the time or since, any plans for onward travel from Australia, and that she could not have intended to use her New Zealand passport as she did not have possession of it.

[20] Ms A confined the scope of her oral argument at the open aspect of the substantive hearing to advancing the point that the cancellation decision should be quashed on the ground that it was made at a time where there was nothing in existence to cancel. That was not a pleaded ground for review. Her argument depended in some detail on references to the status of any passport once it has been reported lost, as described on the Passport Office website, which was not in evidence.

[21] Ms A's succinct written submissions raised a number of other grounds for challenging the decision, the majority of which were advanced by Mr Keith.[11]

[22] Ms A had been given notice of the extensive grounds of challenge to the cancellation decision that Mr Keith intended to advance in her interests as special advocate. The scope of those arguments was conveyed to her in advance of the open hearing by Mr Keith presenting a redacted form of his full submissions, with the consent of the Safekeeping Agency confirming its approval of the extent to which references to CSI had been redacted. Ms A observed all of the argument during the open hearing and endorsed all of the arguments made in support of her case by Mr Keith.

Provenance of the power to cancel passports

[23] Since 2005, the Act has included, in s 8A, the power for the Minister to recall and cancel a New Zealand passport on the ground of a reasonable belief that the holder was a danger to the security of New Zealand because the person intended to engage in or facilitate a terrorist act or the proliferation of weapons of mass destruction or any unlawful activity designed or likely to cause devastating or serious economic damage

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[11] Those arguments are reviewed at [44]–[120] below.

to New Zealand.[12] Other preconditions in terms consistent with those subsequently introduced in the provision in issue in this proceeding also applied.

[24] In a climate of high levels of international concern at threats posed by activities of terrorist groups including ISIL, the United Nations Security Council adopted Resolution 2178 (UNSC 2178) on 24 September 2014. The full text of the resolution reflects the concerns of the time and is attached as an appendix to this judgment. An evident purpose of the resolution was to oblige member states to take steps to prevent foreign nationals going to territories occupied by terrorist groups, including ISIL, and joining those groups. Relevantly to the response reflected in the amendment to the Act, UNSC 2178 included a decision in the following terms:

> 5. Decides that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities;

[25] New Zealand's response to UNSC 2178 was to introduce temporary provisions in a schedule to the Act, initially from 12 December 2014 and then as sch 2 that was in force at the time relevant to this proceeding, from 30 November 2015. It included:

> **2 Cancellation of passport on grounds of national security**
>
> …
>
> (2) The Minister may also, by notice in writing, recall any New Zealand passport, and cancel it or retain possession of it, if the Minister believes on reasonable grounds that—
>
> (a) the person is a danger to the security of a country other than New Zealand because the person intends to engage in, or facilitate,—
>
> (i) a terrorist act within the meaning of section 5 of the Terrorism Suppression Act 2002; or
>
> (ii) the proliferation of weapons of mass destruction; and
>
> (b) the danger to the security of that country cannot be effectively averted by other means; and

[12] Section 8A was repealed by s 287 of the Intelligence and Security Act 2017. That Act inserted s 27GA into the Passports Act 1992, which contains materially similar powers and conditions.

(c) the cancellation of the passport, or its retention by the Minister, will prevent or effectively impede the ability of the person to carry out the intended action.

(3) To avoid doubt, the Minister may recall, cancel, or retain possession of a New Zealand passport for a person who is outside New Zealand.

(4) If the Minister cancels or retains possession of a passport under this clause,—

(a) the Minister must notify the person in writing of the cancellation or retention, and the reasons for it; and

(b) the person is not entitled to obtain that passport or another New Zealand passport during the 12-month period starting with the date of the decision, unless the Minister's decision under this clause is revoked by the Minister or by a court.

…

(7) If the period exceeds 12 months,—

(a) the person may, within 30 days after the date on which the notice was issued, make a written submission to the Minister about the length of the period and, if a submission is made, the Minister must review the length of the period, having regard to the person's submission; and

(b) the Minister must, every 12 months after the date on which the notice was issued (if yet to expire), review the decision by—

(i) inviting the person to make a written submission to the Minister about the decision; and

(ii) determining whether the decision should be revoked, having regard to the person's submission (if any).

…

[26] New Zealand's response to UNSC 2178 was more focused and on narrower terms than the response in some comparable jurisdictions. For example, Australia instituted a ban on travel by persons of the character defined in cl 2.[13]

[27] On the introduction of the amendment, the responsible Minister stated:[14]

> We are targeting people by behaviour or intended behaviour, not by a label.
> …

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13 Criminal Code Act 1995 (Cth), Div 119, enacted 2014.

14 (9 December 2014) 702 NZPD 1207.

> The second point is that any person whose passport was to be cancelled would need to be intending to carry out, or assist in, one of the terrorist acts specified in s 5 [of the Terrorism Suppression Act 2002] in line with the purposes outlined in that section. …

[28] The definition of a terrorist act in s 5 of the Terrorism Suppression Act 2002 (the TSA) is in the following terms:

> **5 Terrorist act defined**
>
> (1) An act is a terrorist act for the purposes of this Act if—
>
> (a) the act falls within subsection (2); or
>
> (b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or
>
> (c) the act is a terrorist act in armed conflict (as defined in section 4(1)).
>
> (2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:
>
> (a) to induce terror in a civilian population; or
>
> (b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.
>
> (3) The outcomes referred to in subsection (2) are—
>
> (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):
>
> (b) a serious risk to the health or safety of a population:
>
> (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):
>
> (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:
>
> (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.
>
> (4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—

(a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or

(b) intends to cause an outcome specified in subsection (3).

Ms A's arguments

[29] Ms A's New Zealand passport had been issued in October 2011 for the then usual five year period.

[30] The Department's records stated that Ms A had advised New Zealand Customs Service personnel at Wellington airport on 22 April 2016 that her passport was lost, which triggered the entry in the record of her passport on that day. During the course of the open hearing, Ms A provided somewhat inconsistent recollections as to that interaction. She was cautious not to be definitive about the circumstances, as she acknowledged not having a clear recollection of the events. However, at times she was inclined to dispute that she would have advised Customs personnel that her passport was lost, but she did not dispute that that was the case at the time.

[31] The Department's deponent confirmed that once a passport was recorded as "invalid" (INV), it could no longer be used so that it was, in practical terms, as if cancelled. Given that status of her passport at the time of the Minister's decision, Ms A argued that there was nothing for the Minister to cancel and his decision was therefore a nullity, or was void. She cited advice available on the Passport Office website which she treated as advising that once the Passport Office was given notice that a passport had been lost, it would be cancelled to prevent anyone else using the passport. Also, that the cancellation of an existing passport is a necessary pre-condition to the issue of a new one.

[32] Ms A did not produce evidence of the terms of such advice but urged me to access the website myself. Mr Martin was content for me to do that. Having done so, the advice Ms A was referring to about a lost passport appears to be that in the following terms:

> If you don't need to replace your passport straight away, it still needs to be cancelled immediately. This is to stop someone else using it.
>
> …
>
> Once your passport is cancelled it can't be used for travel again.
>
> If you're applying to replace your passport, your old one will be cancelled as part of your application. You don't need to declare it separately.

[33] Ms A's proposition was that once the Department recorded that the passport was lost, it was invalid, could not be used for travel and therefore no longer had status as a passport. That meant there was nothing in existence in respect of which the Minister could make a cancellation decision some days later.

[34] In answers provided by Crown Law to further questions in Ms A's interrogatories, she had sought clarification of the consequences of the notation "INV" in the "Normal" column, and "LST" in the "Abnormal" column. Crown Law confirmed that the "INV" status was entered in the record because the passport had been suspended. If a decision had not been made to cancel as the Minister did on 2 May 2016, the status in the "Normal" column would have reverted to "ISS" had it not been lost so that, whilst it could not be used so long as the "LST" notation appeared in the "Abnormal" column, the record would not show that the document was a cancelled one.

[35] On the basis of that clarification, Mr Martin submitted that the document still had sufficient status to be the basis for a replacement if relied on by the holder in an application for a new passport, until the power under the Act was exercised to cancel it. In usual circumstances, under s 9(1)(a) of the Act, cancellation would occur if the passport was produced in support of an application for the issue of another in substitution for it. As that sequence of events remained a prospect, and the Minister considered there were grounds for cancellation such as under cl 2(2) of sch 2 to the Act, then a formal decision of the type that was taken was open to the Minister.

[36] I accept the analysis of the position advanced for the Minister. Ms A's argument that the Minister's decision should be quashed because it was a nullity cannot succeed.

[37] Ms A did not develop her argument challenging the prior decision to suspend her passport further than her assertion that there were no grounds on which the Minister could have believed that she was likely to travel out of New Zealand in the period of 10 working days after the suspension decision was made.

[38] The belief required to invoke cl 7 of sch 2 to the Act was that the passport holder was likely to travel before the contemplated report on a possible cancellation was prepared. That does not require grounds for belief that such travel will be to the place in which terrorist activity would be engaged or facilitated, but merely out of New Zealand. Control of the passport, and any interactions with its holder, are complicated by their absence from New Zealand, so the holding measure of suspending the passport can be taken when travel anywhere is likely.

[39] The information available to the Minister at the time, which Ms A had no opportunity to comment on as it was all withheld as CSI, did provide grounds for the requisite belief. I am satisfied that the suspension decision was one that was reasonably open on the facts as the Acting Minister believed them to be at the time. In any event, its effect was subsumed within the cancellation decision, once that was made.

[40] In written submissions, Ms A contended that the Minister had not provided adequate reasons for the decision, contrary to the obligation in cls 2(2) and (4)(a) of sch 2 to the Act. It seems likely that this point was taken because Ms A wished to demonstrate an expectation that greater detail of the matters held against her would have been revealed. In a sense, this is a further challenge to the withholding of CSI.

[41] When read in light of the constraints on disclosure of CSI, I am satisfied that the reasons for the Minister's decision were adequately conveyed in the notice of cancellation provided to Ms A.

[42] In a related complaint, Ms A criticised the mode of service of the notice on her in Australia that was adopted by the Department. She contended that service by Australian Federal Police had been chosen to "maximise the damage and emotional harm". I am not satisfied that the mode of conveying the notice to Ms A was in any

way unreasonable. Her proposed alternative of tracked postal delivery might reasonably have been seen by the Department as not failsafe, and there was no evidence suggesting that the manner in which service of the notice was effected was chosen to aggravate the level of distress the cancellation decision would cause her.

[43] Ms A also challenged the adequacy of grounds for factual findings that there was any particular terrorist act the Minister believed she intended to facilitate, the failure to consider the practical difficulties in the way of alleged travel to Syria and the alleged absence of any basis for a reasonable belief that she constituted a danger to the security of Syria, which danger could be prevented or impeded by cancellation of her passport. Ms A also criticised the Minister's failure to consider the infringement of her rights under the New Zealand Bill of Rights Act 1990 (NZBORA), and whether the activities it was contemplated she might undertake came within the exclusions to the definition of terrorist acts in s 5(4) and (5) of the TSA. Each of these arguments was advanced in fulsome terms on her behalf by Mr Keith, and I deal with them, in the context of his submissions, below.

Grounds of challenge raised by the special advocate

[44] Mr Keith raised a number of factual and legal grounds for challenging the Minister's decision, having had access to all relevant information disclosed, including the CSI. Mr Keith spoke to an abstracted form of his submissions in the open hearing, without making reference to any CSI. I then heard more detailed argument in a closed hearing in which Mr Keith related the abstracted criticisms to the actual documents. His arguments included claims of absence of consideration of allegedly relevant considerations.

[45] My judgment on these grounds of challenge necessarily follows the same pattern. In this open judgment, I consider each of the grounds Mr Keith raised, reaching conclusions that in many respects can only be described in the open judgment in general terms. I am issuing a contemporaneous closed judgment which deals in greater detail with items of CSI that became relevant to the grounds of challenge. Circulation of the closed judgment is restricted to Crown Law, the Minister and the special advocate. I note that in accordance with the protocol applying to proceedings

including CSI, this open judgment was issued to the Safekeeping Agency 48 hours before its release to afford an opportunity for the Agency to identify any references in it that they consider compromise the confidentiality of CSI. Prior to the public release, a period has also been allowed for Crown Law and the special advocate to raise any confidentiality or anonymity concerns.

[46] In advancing his grounds of challenge, Mr Keith urged that I bear a number of factors in mind. First, that cancellation of a passport carried serious adverse consequences for Ms A. Not only because it denied or limited her right as a New Zealand citizen to enter and leave New Zealand, as affirmed by s 18 of NZBORA, but also because of the severe adverse reputational damage caused by a determination that Ms A was perceived as a threat to the security of another country. Mr Keith characterised the test necessary to make that decision as one requiring a finding of some extent of involvement in what would amount to a grave criminal offence, severely proscribed both by New Zealand and international criminal law.

[47] Secondly, given the nature of Ms A's conduct deemed relevant by the Minister, the adverse judgement amounted to a sanction on, and therefore denial of, her rights of expression, religious faith and observance and association, which are affirmed by ss 13 to 15 and 17 of NZBORA.

[48] Thirdly, the conduct of the proceeding and Ms A's exclusion from all the CSI meant that her challenge might fail because of reliance on matters she had no knowledge of and therefore no opportunity to respond to. That is antithetical to all basic notions of natural justice, and a recurring theme in Mr Keith's submissions was that substantial caution was required, as well as a measure of restraint in making any findings that the Minister's decision was justified on the basis of CSI alone. Mr Keith cited the strongly worded concerns of Lord Dyson in the Supreme Court of the United Kingdom decision in *Al Rawi v Security Service*.[15] Lord Dyson recognised that the closed court procedure, in which parties would not be able to develop their true case on the basis of all relevant material, meant that such parties will sometimes lose cases that they should win. His Lordship referred to a review of the experience of special

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15 *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [35]–[37].

advocates in such cases in the United Kingdom. The involvement of such advocates is seen as lessening but not removing the material impediments to litigants excluded from closed court procedures. It had been concluded that:[16]

> … the closed material procedure (with special advocates) operated under the statutory regimes is not capable of ensuring the substantial measure of procedural justice that is required.

[49] The point is well made.[17]

[50] I deal with the thorough grounds on which Mr Keith challenged the decision in the order set out in the index at the beginning of this judgment.

Wrong test for an intention to facilitate a terrorist act

[51] The Minister deposed that he had made seven previous cancellation decisions under the relevant provision, but Mr Keith took the point that they had all involved persons who were deemed to intend to engage in terrorist acts, rather than to facilitate such acts. The recommendation provided to the Minister did not provide any advice on what the legal test for such a finding should involve. Mr Keith submitted that omission rendered the report inadequate.

[52] As to what was required for reasonable grounds for the requisite belief, Mr Keith invited analogy with the Court of Appeal decision on the requirements for the grounds for a search warrant in *R v Williams*.[18] In reviewing some general principles about applications for search warrants, the relevant section in the Court of Appeal judgment began with the observation that, despite continued exhortations from that Court, woefully inadequate applications continued to be drafted and warrants continued to be issued on the basis of inadequate applications. In that context, the Court observed:[19]

> [213] Having "reasonable grounds to believe", … is a higher standard to meet than "reasonable ground to suspect", … Belief means that there has to be an objective and credible basis for thinking that a search will turn up the

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16 At [37].

17 See my earlier comments to similar effect: *A v Minister of Internal Affairs*, above n 2, at [74]–[84] and *A v Minister of Internal Affairs* [2017] NZHC 887 at [9].

18 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207.

19 Footnotes omitted.

> item(s) named in the warrant … while suspicion means thinking that it is likely that a situation exists. The issuing officer must hold the view that the state of affairs the applicant officer is suggesting actually exists ….

[53] As Mr Martin emphasised, the Minister's assessment is a prospective one about the passport holder's intentions during the foreseeable future. Past behaviour and any relevant current circumstances will be a primary basis for the assessment, but (unlike most circumstances in which search warrants are applied for) the belief must exist in respect of what the passport holder is intending to do in the future. With that qualification, the requirement for an objective and credible basis for forming a belief that the person in question intends to facilitate a terrorist act is the starting point.

[54] Messrs Keith and Martin took different approaches to the interpretation of what would amount to facilitation of terrorist acts. Mr Keith submitted that the concept of a terrorist act derived its meaning from international counterterrorism obligations and international criminal law. New Zealand's adoption of such provisions is in the International Crimes and International Criminal Court Act 2000 (which implements the Rome Statute of the International Criminal Court in New Zealand), the schedule to which creates criminal responsibility for conduct that occurs:[20]

> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. …

[55] These concepts are similar in scope to the approach to party liability in s 66 of the Crimes Act 1961.

[56] Mr Keith invited analogy with the Supreme Court's consideration of accessory liability where a person may become ineligible for refugee status under the United Nations Convention Relating to the Status of Refugees if there are serious reasons for considering that the person had been a party to international crimes.[21] The issue in that litigation was whether the putative refugee's conduct in assisting the scuttling of

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[20] Schedule to the International Crimes and International Criminal Court Act 2000, art 25(3)(c) and (d).

[21] *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721.

a vessel had been sufficiently close to the use of the vessel for an international crime for there to be the requisite serious reasons for considering he had been a party to an international crime. Mr Keith took from the Supreme Court's decision a requirement for a close fact-specific analysis of the relevant circumstances. It was necessary to show the individual's substantial contribution and an intention to facilitate a prohibited act, but it was unnecessary to show that the person intended to commit or assist any specific criminal act.

[57] Mr Keith emphasised the seriousness of the adverse consequences, as he characterised them, when, on the approach he proposed, a finding of facilitation would attribute to Ms A intentional involvement in an international crime.

[58] Mr Martin rejected the notion that a finding of facilitation required anything like a conclusion that Ms A intended to be a party to an international crime. Were that the test, arguably the provision would have little utility as in most circumstances the appropriate response would be to charge her with being a party to such a crime. Instead, Mr Martin submitted that "facilitation" should be interpreted in light of the concerns recorded in UNSC 2178, and the means of preventing terrorist activities agreed to in it. Its terms included recognition of relevant recruiting for, or otherwise supporting, acts or activities of entities such as ISIL, and the use of communications technology for the purpose of radicalising to terrorism, recruiting and inciting others to commit terrorist acts, including through the internet.[22] Mr Martin characterised the text as seeking international co-operation to prevent conduct that supported terrorist acts, and that facilitation should be interpreted in that light.

[59] Mr Martin cited the Black's Law Dictionary definition of "facilitate" or "intends to facilitate" as "to make the occurrence of (something) easier, to render it less difficult or, in criminal law, to make the commission of [a crime] easier". He acknowledged the definition of facilitation in the TSA as requiring the facilitator to know that a terrorist act is facilitated, but without requiring that the facilitator knows that any specific terrorist act is being facilitated.[23] It is not necessary that any terrorist act actually be carried out.

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22 UNSC 2178 at 2.

23 Terrorism Suppression Act 2002, s 25.

[60] Given the legislative purpose in enacting New Zealand's response to UNSC 2178, Mr Martin submitted that a purposive interpretation of facilitation would extend to a commitment to travel to ISIL-controlled territory to assist in pursuit of its aims. It would be unnecessary to identify a particular act of terrorism or type of act that Ms A intended to facilitate. Mr Martin acknowledged that certain exceptions would arise, such as where a person intended to travel for legitimate humanitarian or research reasons, but except in such cases a commitment to travel to ISIL-held territory to support the cause would be sufficient to qualify as facilitation of terrorist acts because such activities were the very raison d'être for ISIL.

[61] I am not persuaded by Mr Keith's submissions that any analogy with the requirements for party or accessory liability for a crime is appropriate in the interpretation of an intention to facilitate terrorist acts. The intention to facilitate is to be assessed prospectively, without regard to any specific act. A major concern reflected in UNSC 2178 was to limit the growth of ISIL's capabilities by stemming the flow of what were at the time a substantial number of international supporters going to the caliphate to fulfil a variety of roles in advancing its terrorist aims.[24]

[62] The concept of an intention to facilitate a terrorist act is clearly used in the statute in a manner reflecting the text in which the phrase appears and in light of the statutory purpose. I am not persuaded that any special meaning or gloss on the meaning reflecting ordinary usage of the phrase is warranted and there is nothing in either the recommendation, or the Minister's explanatory affidavit, which suggests he erred.

[63] Although it contemplates existing conduct rather than a projection of intended conduct, the dictionary definition is still consistent with a conscious commitment to steps that make the future carrying out of terrorist acts easier to accomplish. The assistance need not necessarily be defined by a connection to any particular terrorist act that would be necessary to make out criminal liability by the facilitator as a party to the offending.

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[24] See UNSC 2178 at 2.

[64] For reasons more fully understood by reference to CSI, I am satisfied that the Minister's decision was made by applying a definition of conduct intended to facilitate a terrorist act that was consistent with a proper interpretation of that expression in the Act, and was clearly open to him.

Was such an intention made out?

[65] The definition of a terrorist act in s 5 of the TSA is set out at [28] above. The well-publicised violent aspects of conduct in the name of ISIL (or ISIS, or Daesh) were inarguably within that statutory definition. A summary of activities appended to the submissions on behalf of the Minister, the accuracy of which was not challenged by Ms A or Mr Keith, included the following:

- in June 2014, ISIL launched an offensive on Mosul and Tikrit and its leader announced the formation of a caliphate stretching from Aleppo in Syria to Diyala in Iraq;

- in 2015, ISIS expanded to a network of affiliates in at least eight other countries, with attacks undertaken beyond the borders of its so-called caliphate;

- in November 2015, an Egyptian affiliate bombed a Russian aeroplane, killing 224 people and a series of co-ordinated attacks in Paris killed 130 people and injured more than 300; and

- in March 2016, three explosions in Brussels killed at least 30 people and injured dozens of others, for which ISIL claimed responsibility.

[66] The summary also acknowledged that by December 2017, the ISIL caliphate had lost 95 per cent of its territory, including its two biggest properties, namely Mosul, which was Iraq's second largest city, and the northern Syrian city of Raqqa, its nominal capital.

[67] In theological terms, ISIL espoused an extreme form of Sunni Muslim beliefs, being prepared to use and encourage violence against other Muslim sects, as well as followers of other religions.

[68] In his August 2017 affidavit, Mr Dunne deposed that he understood the terms of the statutory power and was particularly interested in the fact that this was the first case of a proposed passport cancellation he had considered that involved a passport holder who intended to facilitate a terrorist act rather than engage in one. He did not elaborate on his understanding of the interpretation of that concept.

[69] In his February 2018 affidavit, the director of intelligence at NZSIS affirmed:

> 52. In April 2016, ISIL held a vast amount of territory, with a population of approximately six million people, across Syria and Iraq. The territories included several urban strongholds, most significantly the Iraqi city of Mosul, and the 'caliphate's' de-facto capital, Raqqa, within Syria. It also controlled part of the Syrian-Turkish border, which provided the most accessible route for foreign nationals to travel to the caliphate from Turkey – although at lower rates than in 2015. ISIL-affiliated militants had also taken over Libya's city of Sirte – a feat claimed by ISIL-Core leadership as evidence of an expanding caliphate. …
>
> 53. However, ISIL was struggling to maintain the strength it had amassed in late 2014 and early 2015. Open-source reporting from April 2016 estimated ISIL had lost 22% of the territory it had held 15 months prior, and had lost a key source of its financing, through the loss of the territories' three million people and their taxes.

[70] Without elaborating on the legal elements required to make out the respective concepts, the recommendation to the Minister stated both that there were reasonable grounds to believe that Ms A intended to either engage in or facilitate a terrorist act, but more prominently that she intended to facilitate a terrorist act rather than to engage in one.

[71] On the basis of what NZSIS believed to be Ms A's use of an on-line presence, and what it believed to be her involvement in translations of pro-ISIL materials, such conduct was seen as demonstrating her support for ISIL and her ability to facilitate a terrorist attack through dissemination of ISIL propaganda.

[72] Mr Keith argued that the report could not have justified the Minister finding an objective and credible basis for a belief that Ms A intended to facilitate a terrorist act. He cited a single extract from the summary to the report, the unredacted aspect of which was in the following terms:

> Should [Ms A] successfully travel to Syria and join a terrorist group, NZSIS assesses she will be further indoctrinated into an extreme interpretation of Islam as espoused by ISIL; she will almost certainly … engage with individuals who encourage acts of terrorism based on their extreme interpretation of Islam and commitment of violent jihad; and she may contribute to the radicalisation of others, and possibly be involved in calling for external attacks.

[73] Inferentially attributing that level of conditionality to all the detail that followed, Mr Keith argued that it was too uncertain and qualified in the opinion proffered to the Minister for it to form the basis of a reasonable belief of her intention to facilitate a terrorist act.

[74] If the passage cited was consistent with all the information provided to the Minister, then Mr Keith's argument would be a credible one. However, it is several degrees more cautious and qualified than other content of the report. I am not satisfied that it provides a basis for doubting that the totality of information available to the Minister was sufficient for him to form the requisite reasonable belief.

Additional criticisms

Ex post facto justification to be ignored

[75] A further component of this aspect of Mr Keith's challenge was that the arguments now advanced in defending the Minister's decision go beyond the grounds cited in the recommendation and considered by the Minister, and to that extent should be ignored.

[76] The written submissions for the Minister advanced the proposition that preventing people who intended to join or support ISIL and its activities fell within the conduct which UNSC 2178 intended member states should prohibit or discourage. In oral submissions, Mr Martin expanded on this point by submitting that a commitment to travel to ISIL-held territory and join ISIL necessarily involved an

intention to facilitate terrorist acts because the entire rationale for its proto-state and aspirations for control of territory required commitments to a violent jihad.

[77] Mr Keith took the point that the report to the Minister did not treat an intention to join ISIL in territory it held as sufficient to make out the relevant intention to facilitate a terrorist act, as required by cl 2(2). Arguably, nor did the Minister adopt that reasoning as a justification for his decision. The Minister had deposed in his affidavit:[25]

> People travelling to ISIL-held territory with an intention to join ISIL were considered to increase the risk of terrorist acts being carried out in support of ISIL in other countries, both within ISIL-held territory and in countries outside of those territories.

[78] That statement was relied on in submissions on the Minister's behalf as justifying the proposition that the mere act of travelling to ISIL-held territory and joining ISIL was sufficient to make out an intention to engage in or facilitate terrorist acts. However, the prospect of a person's presence in ISIL-held territory increasing the risk of terrorist acts being carried out is not the same as a finding of that person's intention to facilitate such acts.

[79] In those circumstances, Mr Keith submitted that such reasoning could not now be relied on by the Minister as justification for the decision. In judicial review, a challenged decision must, with limited exceptions, stand on the terms on which it was made. Decision-makers must refrain from descending into ex post facto justification in an attempt to improve the original decision,[26] and the same limitation applies here to counsel's submissions. If the decision appears to have reached the correct conclusion but for the wrong or inadequate reasons, then that could possibly be relevant to relief but it could not save a decision that had been made in error of law or fact.

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25 Affidavit of Peter Francis Dunne, sworn 30 August 2017 at [36].

26 *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [33], and see Matthew Smith *NZ Judicial Review Handbook* (2nd ed, Thomson Reuters, New Zealand, 2016) at [30.3.4].

Insufficient evidence for the findings on mandatory considerations

[80] Mr Keith mounted a thorough challenge to the adequacy of the evidence before the Minister, not only on whether there were reasonable grounds for a belief that Ms A intended to facilitate a terrorist act, but also on the other necessary pre-conditions to a cancellation decision, namely that she intended to travel to Syria, that she represented a danger to the security of Syria and/or Iraq that could not effectively be averted by other means, and that the cancellation of her passport would effectively impede her ability to carry out her intended actions.

[81] Both counsel referred to passages in the Court of Appeal's decision in *Air Nelson Ltd v Minister of Transport* on the requirement for a ministerial decision-maker to accept responsibility for inadequacies in a report relied upon in reaching a statutory decision where, on subsequent review, the report is found to have material inadequacies.[27] That litigation involved judicial review challenges to two ministerial decisions setting increases in landing charges at Hawke's Bay airport. The first decision had been made in reliance on a report prepared by officials that omitted relevant material. The Court of Appeal confirmed the requirement for a Minister in such circumstances to be equipped with a fair, accurate and adequate report upon which to make such decisions.[28] The required standard is for such reports to contain all relevant matters, at least in general terms, so that the Minister could consider them and, if thought necessary, request further information about them. If there were failures in that regard, then the characterisation in judicial review terms was that the Minister had been led to fail to take into account relevant considerations.[29]

[82] The arguments on these grounds for challenging the decision could only be addressed in general and abstracted terms at the open hearing. Meaningful engagement on the adequacy of the evidence was only possible at the closed hearing and accordingly can only be reflected in my closed judgment.

[83] That point applies particularly to Mr Keith's submission that, in preparing the report, NZSIS had breached a duty of candour and good faith that he contended it

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27 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139.
28 At [53].
29 At [54] and [55].

owed to Ms A. His argument was that, in the context of an ex parte process, as in applications for search warrants as considered in *R v Williams*, an applicant has a duty to be balanced and comprehensive. The task is to be contrasted with the preparation of a "prosecutor's brief", which Mr Keith, drawing on propositions from Canadian authorities,[30] contended would be inadequate in the current circumstances.

[84] In an interlocutory judgment in this judicial review I considered Mr Keith's proposition that NZSIS owed a duty of utmost good faith in being balanced and comprehensive in its disclosures in a report to the Minister, which proposition was said to affect the scope of the disclosure that was relevant in this proceeding.[31] In that decision, I found that it was neither necessary nor appropriate to impose a duty of utmost good faith owed to the affected person by the officers responsible for compiling a report and recommendation for the Minister. I expressed doubts that the Canadian jurisprudence Mr Keith was relying on supported the expansive form of duty for which he contended. However, I did conclude that the absence of a duty of utmost good faith did not derogate from the proposition that the person subjected to a cancellation decision had a legitimate interest in all the information available to those who prepared a report.[32] The outcome was that the scope of discovery had to comprehend all of the information to which the officers have had access, and not a subset of it which they had elected to give to the Minister.[33]

[85] In the open hearing, Mr Keith approached the proposition somewhat differently, contending that the ex parte character created a duty of candour and good faith in providing sufficient information to the Minister in a balanced way so that the Minister could consider topics on which he might seek more information, and make a decision without a concern that the report and recommendation had been prepared in the style of a "prosecutor's brief".

[86] The instances Mr Keith cited as potential breaches of these obligations all involved CSI and are considered in my closed judgment. In one respect he criticised

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30 *Canada (Citizenship and Immigration) v Harkat* [2014] SCC 37, [2014] 2 SCR 33; *Suresh v Canada* [2002] 1 SCR 3 at [126].
31 *A v Minister of Internal Affairs*, above n 4.
32 At [45].
33 At [44]–[47].

the report for dealing with a matter adverse to Ms A in an unbalanced way, in two other respects that the report omitted potentially exculpatory matters that could have been to Ms A's advantage, and that in one other respect the standard of research was inadequate. Certainly, these aspects did not meet the very high standards Mr Keith contended for. However, assessed cumulatively with other criticisms, I am not persuaded that in light of all that was available, they rendered the report less than fair, accurate and adequate.

[87] Mr Keith was critical of an assumption made in the report, and which he also attributed to the Minister, in treating Ms A's previous dealings with material used by ISIL for propaganda purposes as necessarily promoting terrorist acts, without undertaking detailed analysis of their content. Without doing so, Mr Keith submitted that the Minister could not reasonably discount the prospect that the material contained matters of theological or doctrinal concern to Sunni Muslims, without necessarily containing propaganda that was intended to encourage potential fighters to join ISIL, or to incite violent acts in support of ISIL's philosophy.

[88] Mr Martin disputed that any close analysis of the items Ms A had been involved in was required. Irrespective of the possible absence from those items of specific incitement to violence, they were an integral part of the ISIL creed which was entirely dominated by its aim of establishing a state under a radical form of Shari'a law by violent means. Mr Martin relied on items of CSI to demonstrate that Ms A's involvement did not distinguish between non-violent theological adherence, and what he characterised as the dominant theme of violence in support of the form of Sunni Muslim ideology promoted by ISIL.

[89] A further criticism by Mr Keith as to the adequacy and balance of information was that the Minister was not provided with up-to-date information and therefore it lacked balance. He cited a report published in the *Washington Post* on 27 April 2016 that the numbers entering ISIL-held territory from Turkey had dropped by 90 per cent relative to the volume of previous traffic, and that the Turkish border authorities had substantially stepped up their activities to prevent such travel. That specific report was published two days before the report was presented to the Minister, and it is to be expected that the terms of the NZSIS report would largely have been settled by the

time the *Washington Post* report became available. There is no acknowledgement in the report that ISIL was already in retreat, although that was subsequently acknowledged in the February 2018 affidavit, extracts from which are cited at [69] above.

[90] In her own submissions, Ms A criticised the absence of any acknowledgement that persons deported from Turkey were thereafter banned from entering Turkey for a period of five years. After the open hearing, Mr Keith produced an extract from the website of the United Nations High Commissioner for Refugees (UNHCR) which stated that an entry ban of a period not exceeding five years is imposed on foreigners who are deported from Turkey.[34]

[91] The other impediment to Ms A travelling to Syria was the absence of a passport. She is a dual Australian and New Zealand citizen. The Minister was advised that her Australian passport had been cancelled and the report to him also acknowledged that her New Zealand passport had slightly less than six months before it expired, reflecting the fact that a number of countries do not permit entry on a passport with less than six months' validity. The only prospect of her travelling using her New Zealand passport would therefore be if she was able to retrieve it and travel through and to countries that permitted entry using a passport due to expire in less than six months. In addition, such entry would need to be achieved without the authorities in the relevant countries being aware of the Department treating the passport as lost and accordingly no longer valid for travel outside New Zealand.

[92] I am not satisfied that the absence of a balanced weighting of all these considerations deprived the report, or the Minister's decision made in reliance on it, of a reasonable basis for finding that Ms A intended to attempt to travel to Syria. If the other conditions for a cancellation were present, the remaining prospect that Ms A could retrieve her passport and make use of it to attempt to travel to ISIL-controlled territory remained a viable risk. The alternative would have been to find cancellation of the passport not warranted on the basis that Turkish authorities would prevent her entry to that country or, if the ban adverted to was not effective, that authorities would

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[34] Law No 6458 of 2013 on Foreigners and International Protection [Turkey], 4 April 2013, Part 1, Section 1, Article 9.

apprehend her before she was able to cross into Syria, and that there were no prospects of getting to Syria other than through Turkey. Those considerations would not reduce the prospect of her travelling to a point where the Minister could not be satisfied, in reliance on all the CSI, of the need to prevent such travel.

[93] Mr Keith criticised the assumptions involved in this aspect of the Minister's decision, when no attempt had been made to discuss with Ms A the dangers that would be involved in travelling to Syria and joining ISIL. He submitted that an assurance should have been sought from her that she would not endeavour to do so. Ms A had told Customs personnel on arrival in New Zealand in September 2015 that she had not intended to cross into Syria because it was in a state of civil war. However, NZSIS concluded that Ms A had refused to engage honestly with authorities when questioned about her travel. Accordingly, the Minister could treat the prospect of reliable assurances from her as somewhat naïve when assessed in light of all the information that had been put to him.

[94] Mr Keith also challenged the existence of a basis for reasonable belief by the Minister that cancellation of the passport would either prevent or effectively impede Ms A's ability to carry out her intended actions. There were arguably no grounds on which the Minister could reasonably believe that impeding her ability to travel would prevent her undertaking the intended action. Arguably, if Ms A had been able to further the propaganda aims of ISIL whilst in either Australia or New Zealand, then preventing her travel to Syria would not impede her ability to continue with such work.

[95] The other perspective on that issue is that the report projected that if Ms A reached ISIL-held territory in Syria, there was a very real prospect of her being further indoctrinated into ISIL's beliefs, and to assist in the promotion of further volumes of and potentially more extreme propaganda to advance its interests.

[96] I accept that when subjected to Mr Keith's intensive scrutiny, the reasoning on this aspect is not exhaustively balanced. However, in the context of all that was put to the Minister, I do not consider that he made his decision on a demonstrably inadequate report. The report and the Minister's response to it justified his forming the belief on

reasonable grounds that cancellation of the New Zealand passport would impede Ms A's ability to carry out her intended actions.

No consideration of exclusions from definition of terrorist acts

[97] The report to the Minister did not include any consideration of whether the range of activities Ms A might facilitate would fall outside the definition of a terrorist act in s 5 of the TSA by virtue of their being within the exceptions in subss (4) and (5) of that section.[35] Mr Keith submitted that a relevant mandatory consideration was whether the types of activity Ms A intended to facilitate would fall outside the relevant definition by virtue of being activity in an armed conflict occurring in accordance with the rules of international law applicable to conflict (s 5(4)), or facilitation only of engagements in protest, advocacy or dissent as excluded from the definition by s 5(5).

[98] The notice to Ms A advising her of the Minister's decision included an acknowledgement that the acts the Minister believed she intended to facilitate were caught by s 5 of the TSA and not exempt under s 5(4) of the TSA.[36] Mr Keith rejected that statement as having been included as a matter of form, and not because of any fact-specific assessment of the activities it was believed Ms A intended to facilitate.

[99] Mr Keith submitted that such considerations were an important part of the decision-making process. He cited decisions of both the Supreme Court of Canada and the Belgian Court of Appeal which have recognised the prospect of distinguishing between actions taken in armed conflict, and terrorist acts which are criminal under international law.

[100] In *R v Khawaja*, the Supreme Court of Canada recognised the need to exclude conduct within the exception that is in s 5(4) of the TSA.[37] That appeal considered a challenge to the constitutionality (under the Canadian Charter of Rights) of anti-terrorist provisions in the Canadian Criminal Code. The Supreme Court considered whether, in the criminal context, the Crown or a defendant had the burden of establishing that the armed conflict exception did or did not apply. In that case, the

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35 Section 5 of the TSA is set out at [28] above.
36 The terms of that notice are quoted at [2] above.
37 *R v Khawaja* [2012] SCC 69, [2012] 3 SCR 555 at [100]–[102].

exception clearly did not apply on the facts. Mr Khawaja's activity related to an on-going war in Afghanistan that amounted to an armed conflict arguably conducted in accordance with international law applicable to such conflicts. However, Mr Khawaja espoused a violent jihadist ideology that was found fundamentally incompatible with international law. As noted by the Court, there was "no air of reality" to the suggestion that Mr Khawaja believed that the terrorist group he was involved in intended to act in compliance with international law, or that he cared if it did. The Geneva Conventions prohibit acts aimed at spreading terror amongst civilian populations, which are considered war crimes, and his conduct was in support of a group that pursued such tactics.[38]

[101] Mr Keith also cited the decision of the Belgian Court of Appeal in *Federal Public Prosecutor v X*, where conduct in support of the Kurdistan Workers' Party (PKK), which had been designated as a terrorist entity, nonetheless fell within the exception because it amounted to conduct in an armed conflict.[39]

[102] Mr Keith's submission on this point highlighted the difficulties that arise in dealing with an evaluation potentially having serious adverse effects for the person in question, without affording any opportunity for them to influence that evaluation. It is speculative to suggest Ms A could have raised an argument that any support she intended for ISIL was not caught by the definition of a terrorist act because it came within the exclusion for an armed conflict regulated as such by international law. The issue now raised in her judicial review is whether the decision was materially flawed because the prospect of such an exclusion was not explicitly considered in the report to the Minister, nor by him.

[103] On all the information available, I am satisfied that such prospect is entirely theoretical, and not one that needed to be included in a fair, accurate and adequate report to the Minister. In early 2016, ISIL was among the most concerning of terrorist organisations so far as the United Nations and governments such as New Zealand's were concerned. There was no suggestion at any point in UNSC 2178 that a

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38 *R v Khawaja*, above n 37, at [102].

39 *Federal Public Prosecutor v X*, Decision No 2017/2911, 14 September 2017, ILDC 2890 (BE 2017).

distinction could be drawn between legitimate and illegitimate armed conflict activities of ISIL. Mr Keith's proposition was that ISIL was at the time engaged in a "recognised non-international armed conflict against the United States-led coalition and also other armed forces, including the Al-Assad regime in Syria". I do not see that as raising a prospect of the exclusion applying in the context of the activities identified in the report which Ms A was considered likely to undertake. Whether the statement in the notice to Ms A that the exemption in s 5(4) of the TSA did not apply had been included as part of a standard form for such notices or not, it was substantively justified.

[104] Mr Keith also criticised the absence of any consideration of whether the projected conduct was within the exception for protest or dissent in s 5(5) of the TSA. He pointed to the terms of UNSC 2178 as recognising the importance of maintaining respect for human rights, fundamental freedoms and the rule of law.[40] Arguably, that made it a mandatory consideration for the Minister to be satisfied that the conduct Ms A intended to undertake was not any more than protest, advocacy or dissent. This argument was bolstered by Mr Keith's point that the report writer had assumed that items of propaganda translated by Ms A for ISIL would inevitably promote its raison d'être of violent jihad whereas, if the content was properly analysed, the essential character might be found to be no more than theological debate. Mr Keith suggested that items of that character were matters of advocacy or dissent from other Muslim teachings, thereby excluded from the definition of terrorist acts.

[105] I have assessed the overall impression of Ms A's state of mind and her intentions in light of all the information, including CSI that was available to the Minister. Having done so, I am not satisfied that the prospect of the s 5(5) exclusion applying arose as a sufficiently credible prospect so that the omission to consider it amounted to a failure to have regard to a mandatory relevant consideration. The materials before the Minister identified Ms A with the core of ISIL's predominant themes at the time, and there is no credible basis for assessing her intentions as supportive of ISIL in a theological sense, but withholding support for its core aim of

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[40] UNSC 2178 at 1.

violent jihad. Some non-violent content in propaganda materials publicised in support of ISIL cannot save the rest and bring it all within s 5(5) of the TSA.

[106] I do have a reservation about a lack of balance in the way in which one component of the CSI was presented to the Minister in the report. I also accept Mr Keith's criticism that the reasons advanced in answer to his challenges to the decision go beyond, in a subtle but material way, the reasons cited in the report to the Minister, and the Minister's own explanation for the cancellation decision. However, those and other complaints of a lack of balance are not adequate to establish that the report was not fair, accurate and adequate or that the decision was made with inadequate information on mandatory considerations.

Decision in breach of NZBORA rights

[107] The last group of Mr Keith's criticisms of the report and the Minister's decision is that they failed to recognise that a decision to cancel her passport would infringe her rights under ss 13 to 15 and 18 of NZBORA, with the consequence that no evaluation was undertaken as to whether the extent of infringement of those rights was no more than could be justified on the test in s 5 of NZBORA.[41] Mr Keith characterised the absence of consideration as a process error that could justify a finding that the cancellation decision was unlawful.

[108] Mr Martin's response was that the Minister did acknowledge that the s 18 right was engaged. He cited the Minister's statement in his affidavit that he was acutely aware of the significant impact that cancellation of a passport may have on a person's freedom of movement between countries and that a result of any cancellation is that a person's freedom to travel for business, education, family, religious or other personal reasons may be curtailed. The Minister contended that the prospect of infringing the remaining NZBORA rights cited was not a mandatory relevant consideration.

[109] Mr Keith invited analogy with the decision in *Smith v Attorney-General*, which involved a prisoner's challenge to a decision by the prison manager declining him

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[41] Section 5 provides that, subject to s 4, the NZBORA rights and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

permission to wear a hairpiece, which Mr Smith complained was in breach of his right to freedom of expression under s 14 of NZBORA.[42] Wylie J recognised that the degree of formalism in requiring NZBORA considerations to be explicitly included in decision-making depended on context. In that circumstance, he considered that the prison manager ought to have acknowledged Mr Smith's right to freedom of expression and should have set out:[43]

> … albeit briefly but in a transparent way, why he had reached the conclusion that the limitation he proposed was justified under s 5.

[110] Mr Martin submitted that the Minister's decision here was made in a very different context. Whether the decision breached Ms A's rights under NZBORA should not be determined as a matter of the form in which the decision was arrived at, but rather in substance as to whether, to the extent NZBORA rights were infringed, that occurred to no greater extent than was justified under s 5. Mr Martin relied on the House of Lords decision in *R (SB) v Headteacher and Governors of Denbigh High School* where a number of the speeches emphasised that, in the context of a head teacher's decision not to admit an applicant to the school wearing a particular form of Muslim dress, a decision claimed to be an unjustified limitation on her freedom to manifest her religion or beliefs was to be assessed by the Court reflecting the practical outcome, not the quality of the decision-making process that led to it.[44]

[111] The approach in *Denbigh High School* was confirmed by the House of Lords in the subsequent decision in *Miss Behavin' Ltd v Belfast City Council*, in which Baroness Hale observed:[45]

> In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.

That observation by Baroness Hale was immediately preceded by the point that the role of the court in human rights adjudication is quite different from that in ordinary judicial review of administrative action.

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42 *Smith v Attorney-General* [2017] NZHC 463, [2017] 2 NZLR 704.
43 At [83], [87].
44 *R (SB) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [31] per Lord Bingham.
45 *Miss Behavin' Ltd v Belfast City Council* [2007] UKHL 19, [2007] 1 WLR 1420 at [31].

[112] Mr Martin contrasted the approach Wylie J had taken in *Smith* with my decision in *Lowrie v Hutt City*, in which I focused on the substantive issue as to whether an administrative decision had infringed the applicant's rights to an extent greater than was justified under s 5 of NZBORA.[46] That case involved a challenge to a local authority decision to trespass the applicant from Council facilities where the decision was made without acknowledging the applicant's right to freedom of expression under NZBORA as a relevant consideration. I found that the absence of explicit acknowledgement of the right and whether the extent of its constraint was justified could not turn a decision that was otherwise acceptable on judicial review into one that was unacceptable.[47]

[113] This is a decision-making context in which it would clearly be preferable if the analysis recognised the nature and extent of the infringement of NZBORA rights that would be caused by an adverse decision, and whether the infringement of rights was to no greater extent than was reasonably necessary. I reach this conclusion, given the relative formality of the process by which the NZSIS prepared the report for the Minister, plus the severity of the potential adverse consequences for Ms A and the inevitability that the Minister's decision was to be made without affording her an opportunity to make submissions on the potential loss of her passport. However, certainly in the circumstances confronting the Minister on this occasion (including the time pressures on reaching a decision), I would not be prepared to treat that inadequacy in the process of decision-making as sufficient to vitiate or add weight to grounds for quashing the decision unless I was satisfied that substantively the decision did infringe rights to an extent that was greater than reasonably justified under s 5.

[114] The right most directly engaged by the Minister's decision is that under s 18 of NZBORA, which confirms the rights of New Zealand citizens to have freedom of movement, and the right to enter and leave New Zealand. The Minister did have a discretion as to whether to cancel the passport if the grounds in cl 2(2) of sch 2 were made out. However, in the climate existing in early May 2016 it would be unlikely for a Minister confronted with grounds for cancellation in circumstances such as Ms A's to exercise the discretion against ordering cancellation of her passport.

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46 *Lowrie v Hutt City* [2019] NZHC 359, [2019] NZAR 620.
47 At [76].

Certainly, given the conditions required to be made out, once satisfied of their existence, the extent of the resulting constraint on Ms A's freedom of movement is an adverse consequence that follows to an extent that I consider to be justifiable on the test in s 5.

[115] I took Mr Keith to contend that the Minister's decision indirectly constrained Ms A's rights under each of ss 13, 14 and 15 of NZBORA. They are in the following terms:

> **13 Freedom of thought, conscience, and religion**
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
>
> **15 Manifestation of religion and belief**
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

[116] By the time the Minister made his decision, Ms A had elected to travel to Australia. There was no evidence as to whether, once in Australia, she had any greater or lesser extent of freedoms to practise her religious beliefs, write and speak about them and maintain her freedom of thought. In the absence of evidence, I assume those freedoms are available to her to a more or less equivalent extent in Australia. If they are not, then her move there is likely to have been made appreciating any such difference.

[117] Mr Keith suggested that taking her religious beliefs, including her public utterances in support of ISIL's position, into account as part of the analysis justifying a cancellation of her passport would have a chilling effect on her own perception of the extent of these relevant freedoms. Mr Keith cited *R v Khawaja* for recognition of the prospect that provisions such as powers to cancel travel documents can have a

chilling effect on a citizen's perception of their entitlement to exercise such freedoms.[48]

[118] Any such chilling effect in the present circumstances arises out of the cancellation decision once it has been made, and would operate to constrain Ms A's exercise of those freedoms because of a concern that more examples of her exercise of those rights might be taken into account in any subsequent decision to deny her a further passport or cancel one that does issue. To the extent that the decision causes such a chilling effect, it is certainly no more than I consider to be justified under s 5, when weighed against the statutory objectives of exercising the cancellation power.

[119] Accordingly, I am not satisfied that the Minister's decision was made in circumstances that breached Ms A's NZBORA rights to any extent greater than was justified under s 5.

Standing back

[120] Notwithstanding that the proceeding was a judicial review challenge focusing on the lawfulness of the decision, rather than an appeal challenging its merits, given the unfairness of the closed court procedure, I allowed Mr Keith considerable latitude to advance matters going to the merits of the decision. However, those matters do not make out the case for quashing the decision. Viewed overall, I am satisfied that there was sufficient information on which the Minister could rely to satisfy himself that there were reasonable grounds to believe that Ms A would make a further attempt to travel to ISIL-held territory, for purposes including the facilitation of terrorist acts as that phrase is properly interpreted.

[121] Importantly, it was a decision that must be assessed in the global security climate prevailing in early May 2016. As is implicit in the Minister's withdrawal of his separate proceeding in late 2017, it is not a decision that could likely have been justified 18 months later. Certainly, on all the evidence before me, it is not one that would withstand scrutiny now. Viewed in the climate of the time, however, Mr Keith

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48 *R v Khawaja*, above n 37, at [81]–[82].

cannot make out a material inadequacy in the report and I can find no administrative law error in the Minister's approach.

[122] In this regard, I acknowledge a further argument adverted to in Ms A's written submissions. As an aspect of contending that the decision was made negligently or in bad faith, Ms A submitted that if the decision was not made negligently at the time, then it ought soon after to have become apparent that it was wrong, triggering an obligation for the Minister to reverse the cancellation decision as soon as the state of his knowledge warranted doing that. The point was not developed, and Ms A did not identify any particular point in time which arguably triggered an obligation for the Minister to reconsider the cancellation decision. The earliest deadline would have been in the period prior to the passport expiring in October 2016. The next deadline would be before the expiry of the 12 month period for which the cancellation applied in early May 2017, and thereafter the next deadline was the December 2017 point at which the Minister's own proceeding was discontinued in circumstances signalling the end of opposition to Ms A applying for a fresh passport.

[123] Reconstructing the evolution of the perception of prospects of supporters travelling to ISIL-held territory is a difficult task. I am not satisfied that there is evidence on which a finding could be made that Ms A was entitled to expect the Minister to initiate a reconsideration of the cancellation decision at any point before December 2017.

Summary and result

[124] Ms A's sole ground of challenge advanced at the open hearing, namely that her passport ceased to exist before the Minister's decision so that there was nothing to which the decision could attach, rendering the decision a nullity or void, is untenable and has not been made out.

[125] With the advantage of access to all the CSI, Mr Keith has raised and thoroughly pursued a wide range of grounds for challenging the lawfulness of the cancellation decision, including the remainder of the grounds raised by Ms A in her written submissions. None of those grounds are made out. Accordingly, the application for judicial review is dismissed.

[126] It is fundamental to the analysis of administrative law criticisms that the decision be assessed in light of the context that applied in April and May 2016. It is not a decision that could be justified now, and there would likely be difficulty justifying it from about December 2017 when the Minister accepted that Ms A could apply for a further passport. She has been free to do so since that time but has not done so.

[127] I do not understand there to be any issue as to costs. If the Minister wishes to pursue costs (which is not a course I encourage), then a memorandum not exceeding 10 pages may be filed within 20 working days of delivery of this judgment.

[128] I have made an order for permanent suppression of Ms A's name and any details that might lead to her identification. It potentially constitutes a contempt of court not to comply with this order.

[129] I am grateful to all counsel who have been involved for their assistance with what has been a procedurally cumbersome and difficult judicial review.

Dobson J

Solicitors:
Crown Law, Wellington for respondent

Copy to:
The applicant
B J R Keith, Wellington

Appendix

United Nations S/RES/2178 (2014)

Security Council

Distr.: General
24 September 2014

Resolution 2178 (2014)

Adopted by the Security Council at its 7272nd meeting, on 24 September 2014

The Security Council,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and *remaining* determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,

Noting with concern that the terrorism threat has become more diffuse, with an increase, in various regions of the world, of terrorist acts including those motivated by intolerance or extremism, and *expressing* its determination to combat this threat,

Bearing in mind the need to address the conditions conducive to the spread of terrorism, and *affirming* Member States' determination to continue to do all they can to resolve conflict and to deny terrorist groups the ability to put down roots and establish safe havens to address better the growing threat posed by terrorism,

Emphasizing that terrorism cannot and should not be associated with any religion, nationality or civilization,

Recognizing that international cooperation and any measures taken by Member States to prevent and combat terrorism must comply fully with the Charter of the United Nations,

Reaffirming its respect for the sovereignty, territorial integrity and political independence of all States in accordance with the Charter,

Reaffirming that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, *underscoring* that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and *noting* that failure to comply with these and other international obligations, including under the Charter

of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity,

Expressing grave concern over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and *resolving* to address this threat,

Expressing grave concern about those who attempt to travel to become foreign terrorist fighters,

Concerned that foreign terrorist fighters increase the intensity, duration and intractability of conflicts, and also may pose a serious threat to their States of origin, the States they transit and the States to which they travel, as well as States neighbouring zones of armed conflict in which foreign terrorist fighters are active and that are affected by serious security burdens, and *noting* that the threat of foreign terrorist fighters may affect all regions and Member States, even those far from conflict zones, and *expressing* grave concern that foreign terrorist fighters are using their extremist ideology to promote terrorism,

Expressing concern that international networks have been established by terrorists and terrorist entities among States of origin, transit and destination through which foreign terrorist fighters and the resources to support them have been channelled back and forth,

Expressing particular concern that foreign terrorist fighters are being recruited by and are joining entities such as the Islamic State in Iraq and the Levant (ISIL), the Al-Nusrah Front (ANF) and other cells, affiliates, splinter groups or derivatives of Al-Qaida, as designated by the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), *recognizing* that the foreign terrorist fighter threat includes, among others, individuals supporting acts or activities of Al-Qaida and its cells, affiliates, splinter groups, and derivative entities, including by recruiting for or otherwise supporting acts or activities of such entities, and *stressing* the urgent need to address this particular threat,

Recognizing that addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying factors, including by preventing radicalization to terrorism, stemming recruitment, inhibiting foreign terrorist fighter travel, disrupting financial support to foreign terrorist fighters, countering violent extremism, which can be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development and social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and rehabilitation,

Recognizing also that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and *underlining* the need to address the conditions conducive to the spread of terrorism, as outlined in Pillar I of the United Nations Global Counter-Terrorism Strategy (A/RES/60/288),

Expressing concern over the increased use by terrorists and their supporters of communications technology for the purpose of radicalizing to terrorism, recruiting and inciting others to commit terrorist acts, including through the internet, and

financing and facilitating the travel and subsequent activities of foreign terrorist fighters, and *underlining* the need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law,

Noting with appreciation the activities undertaken in the area of capacity building by United Nations entities, in particular entities of the Counter-Terrorism Implementation Task Force (CTITF), including the United Nations Office of Drugs and Crime (UNODC) and the United Nations Centre for Counter-Terrorism (UNCCT), and also the efforts of the Counter Terrorism Committee Executive Directorate (CTED) to facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipients, in coordination with other relevant international, regional and subregional organizations, to assist Member States, upon their request, in implementation of the United Nations Global Counter-Terrorism Strategy,

Noting recent developments and initiatives at the international, regional and subregional levels to prevent and suppress international terrorism, and *noting* the work of the Global Counterterrorism Forum (GCTF), in particular its recent adoption of a comprehensive set of good practices to address the foreign terrorist fighter phenomenon, and its publication of several other framework documents and good practices, including in the areas of countering violent extremism, criminal justice, prisons, kidnapping for ransom, providing support to victims of terrorism, and community-oriented policing, to assist interested States with the practical implementation of the United Nations counter-terrorism legal and policy framework and to complement the work of the relevant United Nations counter-terrorism entities in these areas,

Noting with appreciation the efforts of INTERPOL to address the threat posed by foreign terrorist fighters, including through global law enforcement information sharing enabled by the use of its secure communications network, databases, and system of advisory notices, procedures to track stolen, forged identity papers and travel documents, and INTERPOL's counter-terrorism fora and foreign terrorist fighter programme,

Having regard to and highlighting the situation of individuals of more than one nationality who travel to their states of nationality for the purpose of the perpetration, planning, preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and *urging* States to take action, as appropriate, in compliance with their obligations under their domestic law and international law, including international human rights law,

Calling upon States to ensure, in conformity with international law, in particular international human rights law and international refugee law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, including by foreign terrorist fighters,

Reaffirming its call upon all States to become party to the international counter-terrorism conventions and protocols as soon as possible, whether or not they are a party to regional conventions on the matter, and to fully implement their obligations under those to which they are a party,

Noting the continued threat to international peace and security posed by terrorism, and *affirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, including those perpetrated by foreign terrorist fighters,

Acting under Chapter VII of the Charter of the United Nations,

1. *Condemns* the violent extremism, which can be conducive to terrorism, sectarian violence, and the commission of terrorist acts by foreign terrorist fighters, and *demands* that all foreign terrorist fighters disarm and cease all terrorist acts and participation in armed conflict;

2. *Reaffirms* that all States shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents, *underscores*, in this regard, the importance of addressing, in accordance with their relevant international obligations, the threat posed by foreign terrorist fighters, and *encourages* Member States to employ evidence-based traveller risk assessment and screening procedures including collection and analysis of travel data, without resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law;

3. *Urges* Member States, in accordance with domestic and international law, to intensify and accelerate the exchange of operational information regarding actions or movements of terrorists or terrorist networks, including foreign terrorist fighters, especially with their States of residence or nationality, through bilateral or multilateral mechanisms, in particular the United Nations;

4. *Calls upon* all Member States, in accordance with their obligations under international law, to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalization to terrorism and recruitment of foreign terrorist fighters, including children, preventing foreign terrorist fighters from crossing their borders, disrupting and preventing financial support to foreign terrorist fighters, and developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters;

5. *Decides* that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities;

6. *Recalls* its decision, in resolution 1373 (2001), that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and *decides* that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense:

(a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to

travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;

(b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training; and,

(c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training;

7. *Expresses* its strong determination to consider listing pursuant to resolution 2161 (2014) individuals, groups, undertakings and entities associated with Al-Qaida who are financing, arming, planning, or recruiting for them, or otherwise supporting their acts or activities, including through information and communications technologies, such as the internet, social media, or any other means;

8. *Decides* that, without prejudice to entry or transit necessary in the furtherance of a judicial process, including in furtherance of such a process related to arrest or detention of a foreign terrorist fighter, Member States shall prevent the entry into or transit through their territories of any individual about whom that State has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory for the purpose of participating in the acts described in paragraph 6, including any acts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida, as set out in paragraph 2 of resolution 2161 (2014), provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals or permanent residents;

9. *Calls upon* Member States to require that airlines operating in their territories provide advance passenger information to the appropriate national authorities in order to detect the departure from their territories, or attempted entry into or transit through their territories, by means of civil aircraft, of individuals designated by the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) ("the Committee"), and further *calls upon* Member States to report any such departure from their territories, or such attempted entry into or transit through their territories, of such individuals to the Committee, as well as sharing this information with the State of residence or nationality, as appropriate and in accordance with domestic law and international obligations;

10. *Stresses* the urgent need to implement fully and immediately this resolution with respect to foreign terrorist fighters, *underscores* the particular and urgent need to implement this resolution with respect to those foreign terrorist fighters who are associated with ISIL, ANF and other cells, affiliates, splinter groups or derivatives of Al-Qaida, as designated by the Committee, and *expresses* its

readiness to consider designating, under resolution 2161 (2014), individuals associated with Al-Qaida who commit the acts specified in paragraph 6 above;

International Cooperation

11. *Calls upon* Member States to improve international, regional, and subregional cooperation, if appropriate through bilateral agreements, to prevent the travel of foreign terrorist fighters from or through their territories, including through increased sharing of information for the purpose of identifying foreign terrorist fighters, the sharing and adoption of best practices, and improved understanding of the patterns of travel by foreign terrorist fighters, and for Member States to act cooperatively when taking national measures to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law;

12. *Recalls* its decision in resolution 1373 (2001) that Member States shall afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings, and *underlines* the importance of fulfilling this obligation with respect to such investigations or proceedings involving foreign terrorist fighters;

13. *Encourages* Interpol to intensify its efforts with respect to the foreign terrorist fighter threat and to recommend or put in place additional resources to support and encourage national, regional and international measures to monitor and prevent the transit of foreign terrorist fighters, such as expanding the use of INTERPOL Special Notices to include foreign terrorist fighters;

14. *Calls upon* States to help build the capacity of States to address the threat posed by foreign terrorist fighters, including to prevent and interdict foreign terrorist fighter travel across land and maritime borders, in particular the States neighbouring zones of armed conflict where there are foreign terrorist fighters, and *welcomes* and *encourages* bilateral assistance by Member States to help build such national capacity;

Countering Violent Extremism in Order to Prevent Terrorism

15. *Underscores* that countering violent extremism, which can be conducive to terrorism, including preventing radicalization, recruitment, and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters is an essential element of addressing the threat to international peace and security posed by foreign terrorist fighters, and *calls upon* Member States to enhance efforts to counter this kind of violent extremism;

16. *Encourages* Member States to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious, cultural and education leaders, and all other concerned groups of civil society and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion;

17. *Recalls* its decision in paragraph 14 of resolution 2161 (2014) with respect to improvised explosive devices (IEDs) and individuals, groups, undertakings and entities associated with Al-Qaida, and *urges* Member States, in this context, to act cooperatively when taking national measures to prevent terrorists from exploiting technology, communications and resources, including audio and video, to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law;

18. *Calls upon* Member States to cooperate and consistently support each other's efforts to counter violent extremism, which can be conducive to terrorism, including through capacity building, coordination of plans and efforts, and sharing lessons learned;

19. *Emphasizes* in this regard the importance of Member States' efforts to develop non-violent alternative avenues for conflict prevention and resolution by affected individuals and local communities to decrease the risk of radicalization to terrorism, and of efforts to promote peaceful alternatives to violent narratives espoused by foreign terrorist fighters, and *underscores* the role education can play in countering terrorist narratives;

United Nations Engagement on the Foreign Terrorist Fighter Threat

20. *Notes* that foreign terrorist fighters and those who finance or otherwise facilitate their travel and subsequent activities may be eligible for inclusion on the Al-Qaida Sanctions List maintained by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) where they participate in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of, Al-Qaida, supplying, selling or transferring arms and related materiel to, or recruiting for, or otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof, and *calls upon* States to propose such foreign terrorist fighters and those who facilitate or finance their travel and subsequent activities for possible designation;

21. *Directs* the Committee established pursuant to resolution 1267 (1999) and 1989 (2011) and the Analytical Support and Sanctions Monitoring Team, in close cooperation with all relevant United Nations counter-terrorism bodies, in particular CTED, to devote special focus to the threat posed by foreign terrorist fighters recruited by or joining ISIL, ANF and all groups, undertakings and entities associated with Al-Qaida;

22. *Encourages* the Analytical Support and Sanctions Monitoring Team to coordinate its efforts to monitor and respond to the threat posed by foreign terrorist fighters with other United Nations counter-terrorism bodies, in particular the CTITF;

23. *Requests* the Analytical Support and Sanctions Monitoring Team, in close cooperation with other United Nations counter-terrorism bodies, to report to the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) within 180 days, and provide a preliminary oral update to the Committee within 60 days, on the threat posed by foreign terrorist fighters recruited by or joining ISIL, ANF and all groups, undertakings and entities associated with Al-Qaida, including:

(a) a comprehensive assessment of the threat posed by these foreign terrorist fighters, including their facilitators, the most affected regions and trends in radicalization to terrorism, facilitation, recruitment, demographics, and financing; and

(b) recommendations for actions that can be taken to enhance the response to the threat posed by these foreign terrorist fighters;

24. *Requests* the Counter-Terrorism Committee, within its existing mandate and with the support of CTED, to identify principal gaps in Member States' capacities to implement Security Council resolutions 1373 (2001) and 1624 (2005) that may hinder States' abilities to stem the flow of foreign terrorist fighters, as well as to identify good practices to stem the flow of foreign terrorist fighters in the implementation of resolutions 1373 (2001) and 1624 (2005), and to facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipients, especially those in the most affected regions, including through the development, upon their request, of comprehensive counter-terrorism strategies that encompass countering violent radicalization and the flow of foreign terrorist fighters, recalling the roles of other relevant actors, for example the Global Counterterrorism Forum;

25. *Underlines* that the increasing threat posed by foreign terrorist fighters is part of the emerging issues, trends and developments related to resolutions 1373 (2001) and 1624 (2005), that, in paragraph 5 of resolution 2129 (2013), the Security Council directed CTED to identify, and therefore merits close attention by the Counter-Terrorism Committee, consistent with its mandate;

26. *Requests* the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) and the Counter-Terrorism Committee to update the Security Council on their respective efforts pursuant to this resolution;

27. *Decides* to remain seized of the matter.