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IN THE SUPREME COURT OF NEW ZEALAND — SC 70/2022

I TE KŌTI MANA NUI O AOTEAROA — [2023] NZSC Trans 10

BETWEEN **A**

Appellant

AND **MINISTER OF INTERNAL AFFAIRS**

Respondent

Hearing:	24 – 25 July 2023
Court:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Kós J
Counsel:	W L Aldred and T R Molloy for the Appellant

A L Martin, K Laurenson and A J Carr for the Respondent
B J R Keith (Special Advocate)

CIVIL APPEAL

MS ALDRED:
E ngā Kaiwhakawā, tēnā koutou. Ko Ms Aldred ahau. Kei kōnei māua ko Mr Molloy, mō te kaipira.

WINKELMANN CJ:
Tēnā kōrua Ms Aldred and Mr Molloy.

MR KEITH:
Tēnā koutou e ngā Kaiwhakawā. Ko Keith tōku ingoa. Ko (inaudible 10:03:44) mō te kaitohutohu mō motuhake mō te kaipira. May it please the Court, I appear as special advocate.

WINKELMANN CJ:
Tēnā koe, Mr Keith.

MR MARTIN:
E ngā Kaiwhakawā, tēnā koutou. Ko Martin ahau. Kei kōnei mātou ko Ms Laurenson, ko Mr Carr, mō te kaiwhakahē.

WINKELMANN CJ:
Tēnā koutou Mr Martin, Ms Laurenson and Mr Carr. So counsel, there are some preliminary matters we wanted to raise. First the timing of the hearing. Having read the materials our expectation would be that the open part of the hearing would conclude today. It seems a reasonable expectation given the scope of the issues that have to be traversed. Having said that, we also need to adjourn today at 3.45 because of other commitments, and we anticipate, Mr Keith, that you will follow on after Ms Aldred.

MR KEITH:

Yes, Ma'am.

WINKELMANN CJ:

That being the case, if we conclude the open material we had hoped to move to the closed hearing tomorrow morning rather than the afternoon. So that's our provisional thinking. We'll confirm that at the end of the day. There is a preliminary matter to be dealt with, which is the application to adduce additional evidence?

MS ALDRED:

Yes, that has been – that was made and is not opposed, as I understand it.

MR MARTIN:

That's correct, Ma'am.

WINKELMANN CJ:

So Mr Martin, did you want to file evidence in reply if it comes in, or not?

MR MARTIN:

We've reserved our position but we're not proposing to file anything substantive.

WINKELMANN CJ:

Thank you, we'll receive that evidence then I think. Well, we'll receive it de bene esse provisionally, because we may not reach a view about its relevance through the course of the hearing. Are there any preliminary matters counsel which to raise?

MS ALDRED:

Yes, your Honour. Just a couple of points. The first one is in relation to the permanent suppression orders made in respect of this proceeding. Those, of course, are continued but I just wondered because I intend to refer, to some extent, to the material included in the affidavit of the appellant in respect of which the application that your Honour referred to is being made. I think it would be helpful if the Court could simply remind anyone attending the hearing of the orders and their continuation?

WINKELMANN CJ:

Sorry, I just didn't hear you, your voice faded away.

MS ALDRED:

Sorry, I just –

WINKELMANN CJ:

I picked up the first bit, just the last bit. Anyone, remind anyone present of the orders, is that…

MS ALDRED:

Yes, of the orders basically, which are no identifying details of the appellant are to be published.

WINKELMANN CJ:

Okay, all present in court, there are suppression orders in place which prevent publication of the name of the appellant or of any particulars likely to identify her.

MS ALDRED:

Thank you, your Honour. That as really the only thing for me. I think Mr Martin has handed up by consent a full unredacted version of an authority, the *Commissioner of Police v R* [2021] NZHC 1022, [2021] 2 NZLR 429, and I have spoken to Mr Martin and counsel are agreed that in terms of any reference to the evidence or suppressed particulars in that judgment, counsel will deal with that simply by referring to the paragraph numbers.

WINKELMANN CJ:

Thank you. Anything else?

MR MARTIN:

No, thank you.

WINKELMANN CJ:

Right, Ms Aldred, the floor is yours.

MS ALDRED:

Thank you, your Honours. In terms of the presentation of oral argument in this open portion of the hearing, we have liaised with the special advocate, Mr Keith, with a view to avoiding duplication. We're mindful of the need to be efficient. In relation to the outline that we've also handed up, which your Honours will also have before you, you will see that the issues are broken down in a fairly granular way in terms of the matters that the Court will need to address. I can indicate that the focus of my oral submissions will be on issues 1, 1(a) and 1.3(a), both of which relate to the Ministers we say misinterpretation and misapplication of the statutory test.

KÓS J:

Is that 1.1(a)?

MS ALDRED:

1.1(a), yes, and 1.3(a), and also 4.3 relating to relief. Mr Keith, who of course has addressed these matters in the Courts below, will address the preponderance of the issues, but we and the special advocate should be taken as endorsing one another's submissions.

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So just by way of introduction, this appeal raises serious issues relating to a statutory power that hasn't previously been considered by this Court. Despite the unusual context in the exceptional procedure, the issues on appeal concern relatively conventional issues on judicial review including the proper interpretation of the statutory criteria of the Passports Act 1992 and Terrorism Suppression Act 2002, whether the Minister met requirements of fairness in his findings, and the decision paper on which he relied, whether the Minister acted consistently with relevant human rights obligations, and the role of the Court in the event of a finding that the Minister's decision was unlawful, and finally the question of appropriate relief.

So by way of preparatory comment, while those issues are conventional the Court must, in my submission, not at any stage lose sight of the exceptional

procedure that has been applied here. The Passports Act permits the Minister to rely upon material adverse to the appellant, that the appellant does not get to see. The provision of a summary and the closed material and special advocate procedure are of some compensation, or mitigation, but as the United Kingdom Supreme Court has said, and as his Honour Justice Dobson echoed in the High Court in this case, the process which has been adopted to serve the Crown's, and/or the public interest, is far from fair. The particular practical point is that as the appellant herself explains in her recent affidavit, the affected person in both the counsel and the special advocate are impaired in their ability to present a defence of the proceeding. this is also set out, for example, in the Supreme Court judgment in *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531, which his Honour Justice Dobson referred to expressly, and just going to that –

GLAZEBROOK J:

There is no challenge in front of us to the actual orders in relation to the information that was suppressed, so we're not really in a position to look at the test or that information in that light.

MS ALDRED:

That is correct your Honour, and there is no challenge to the decision to utilise the closed material procedure provided for specifically in the Passports Act.

GLAZEBROOK J:

Well, of course you can use the closed procedure. It's whether the information that was withheld should have been withheld, and that's' not before us.

MS ALDRED:

No, there's no application to that effect. There is no challenge to that. Of course the appellant would have very little chance of being able to make any reasonable attempt at a challenge of that kind given her complete ignorance of most of the material.

GLAZEBROOK J:

No, I understand.

MS ALDRED:

The reason that I raise this is purely contextual for the basis of a submission which will probably primarily be advanced by the special advocate in the context of the closed hearing, but which is very important from my client's point of view, which is just to say that that backdrop of this exceptional procedure must have a corollary that there needs to be a stringent approach to decision-making when a closed material procedure is available, and members of the Court may be thinking in this regard, as well as the statements of the Court which refer to materials using words like "Kafkaesque" and "Star Chamber" in *Al Rawi*. Members of the Court may be reminded of Lord Atkin's observation in *Liversidge v Anderson* [1942] AC 206 "…that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

So those are just really, I just wanted to, for the appellant, emphasise the impact of that procedure on her ability to prosecute this proceeding. The, in terms of, moving on to the factual background, I don't intend to spend any time on that. It is set out in my written submissions at paragraphs 5 to 14, and traversed in the decisions of the lower Courts, the cancellation decision was on 2 May 2016, and it was proceeded by a decision to suspend the appellant's passport, and the 12-month cancellation period expired on 2 May 2017.

Initially, of course, the Minister had made an application for extension of the period of prohibition, but that was subsequently abandoned, and it was accepted the appellant no longer posed a danger of the kind that the Minister had initially considered she did.

The significant part of the factual background for the purposes of the appeal, is the summary of the SIS' assessment of the risk, and that is set out at paragraph 10 of the written submissions.

So just turning to the statutory test for cancellation. A full copy of the Passports Act as it was enacted at the relevant time is in the appellant's authorities. The relevant provision at the time was clause 2 of the second schedule to the Act entitled "Cancellation of passport on grounds of national security". Subclause (2) provided specifically for cancellation where the "…person is a danger to the security of a country other than New Zealand…". Prior to 2014 the power to cancel depended on the person being a danger to the security of New Zealand. The extension of the power was enacted to give effect to New Zealand's obligations under the United Nations Security Council Resolution 2178.

I don't need to tell the Court that clause 2(2) is set out in highly prescriptive terms, and that is, those elements are broken down at paragraphs 16 of the written submissions. Those make it clear that all of these elements must be satisfied. The person is a danger to the security of a country other than New Zealand because the person intends to engage in or facilitate a "terrorist act" as defined in section 5 of the Terrorism Suppression Act, and the danger to the security of that other country cannot effectively be averted by other means, and the cancellation of the passport will prevent or effectively impede the ability of the person to carry out the intended action, and of course the requirement that the person intends to engage in or facilitate a terrorist act as defined in section 5 of the Terrorism Suppression Act introduces further layers of intention that must be met for the Minister to reasonably form the belief that he is required to under subclause (2), if the cancellation power is to be available.

So the relevant legislative history is actually, I deal with it later in the submissions –

ELLEN FRANCE J:

Sorry, Ms Aldred, so what are you saying in terms of section 5, that it adds…?

MS ALDRED:

Section 5 of the –

ELLEN FRANCE J:

You talked about it in terms of intention and I wasn't sure what you meant?

MS ALDRED:

Yes so, well if you turn to section 5 of the Terrorism Suppression Act, that makes it clear. So the act that must be intended by the appellant, so the appellant must intend to facilitate a terrorist act in terms of section 5 as defined. Section 5 as defined, section 5 defines "terrorist act" by reference not only to the kind of act that is required i.e. serious criminal conduct resulting in the outcomes addressed at section 5(3), but it also has to be conduct that is made for the specific purposes contemplated in section 5(2). So whilst the intention that the Minister has to find is o the part of the appellant, that intention must extend to bringing, to an intention to facilitate a terrorist act which itself has to be the subject of I suppose a further layer of consideration.

WINKELMANN CJ:

So what do you say that means for the intention under clause 2?

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MS ALDRED:

Well, in terms of the intention under clause 2, the Minister needs to have a belief, reasonably believe that the appellant's intention is to facilitate such an act. It's not their –

GLAZEBROOK J:

And you say that's an act that is designed to – sorry, induce terror –

MS ALDRED:

Yes.

GLAZEBROOK J:

– whatever is in that definition of terrorism?

MS ALDRED:

Yes.

GLAZEBROOK J:

So not just the act but the intent of the act? Is that the point you're making?

MS ALDRED:

Yes, it has – yes. I mean, I don't think I can really go any further than saying that I simply refer to section 5 which imposes this sort of layered approach to the kind of conduct that will be considered to be a terrorist act for the purposes of that legislation.

WINKELMANN CJ:

So the appellant has to intend to facilitate an act of the types specified, that has the purpose specified.

MS ALDRED:

Yes, that's it.

KÓS J:

Can we assume that, for the purposes of your argument, that ISIL has the purpose of advancing an ideological, political or religious cause? Just looking at that part of the layer. Putting your client to one side.

MS ALDRED:

I think we can certainly assume from the material that they do have that, that ISIL does have that purpose generally.

KÓS J:

At the time.

MS ALDRED:

Sorry, yes, at the time. The next part of subsection (2), of course, the special advocate's submissions, I think, and in my own to some extent, focus on the fact that part of ISIL's activities were undoubtedly the perpetration of acts of terror to induce terror in a civilian population, so there is no dispute about that,

but there also appears to have been quite a different range of activities that ISIL, in setting itself up as a proto-state, undertook.

So just turning to the relevant legislative history. That is dealt with at paragraphs 29 to 32 of my submissions, but I just want to turn to it at the outset. Significantly, the prescriptive and targeted nature of the provision was emphasised by the Minister at the second reading of the Countering Terrorist Fighters Legislation Bill 2014, and this is the parliamentary debates at page 1248, and Minister Finlayson was responding to hypothetical examples that had been put to him by Opposition Members, and he said, this is the third paragraph down on that page: "The first point that I think needs to be noted is that each and every case is different and turns on its own facts, so I cannot give absolute blanket assurances in the House about whether someone will or will not be caught. The second point to note is that the test to be satisfied before a passport can be cancelled has a very high threshold. There has to be sufficient information available to satisfy the Minister of Internal Affairs on reasonable grounds and the following conjunctive tests: that the person is a danger to the security of New Zealand or any other country because they intend to engage in or to facilitate a terrorist act, that the danger cannot be effectively averted by other means, and that the cancellation of the passport will prevent or effectively impede the ability of the person to carry out the intended action. All three limbs of the test must be satisfied before a passport could be cancelled." He says also: "The third point is that the legislation does not prevent New Zealanders from travelling to these areas, although we would strongly advise against it."

The last sentence relating to no travel ban refers to a point made earlier by the Minister at page 1208 of the debates, and you'll see there in this portion of the debates the Minister's third point about half way down the page is that: "…the bill does not go anywhere near as far as the Australian legislation, which seeks to ban Australian citizens from even travelling to certain areas unless they have lawful excuse. The legislation does not prevent New Zealanders from travelling to these areas, although obviously we would strongly advise against it." Then he goes on to say: "As I said, in order to have a passport cancellation occur, the Minister must be satisfied that the person intends to engage in, or

facilitate, a terrorist act. That is the core concept to which all these provisions apply.

Just finally, in terms of the debates, I note a couple of paragraphs down, the Minister says: "Secondly, the passport cancellation system is a system under ministerial control. It requires ministerial discretion." So the prescriptive nature of the provisions for passport cancellation are consistent with and informed by the significance of cancellation for the passport holder and the limitation of their right to freedom of movement.

In terms of judicial recognition of this point, I simply would refer the Court to the statement of the Court in *Black v Chrétien* (2001) 54 OR (3d) 215 (CA) which is reproduced at footnote 8 of our submissions.

WINKELMANN CJ:

Footnote 8?

MS ALDRED:

Footnote 8 of our submissions. The relevant quote is reproduced there: "In today's world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or a luxury but a necessity. Possession of a passport offers citizens the freedom to travel and to earn a livelihood in the global economy." They go on to say: "In Canada, the refusal to issue a passport bring into play Charter considerations; the guarantee of mobility under section 6 and perhaps even the right to liberty under section 7," and of course we have the same – we have Bill of Rights issues engaged in terms of the New Zealand context.

In terms of the ongoing consequences of passport cancellation, which are noted at paragraph 17.2 of the written submissions as ongoing stigma and practical consequences of an official allegation that the appellant intended to facilitate an act of terrorism, these ongoing difficulties at least as the appellant apprehends them are set out in her evidence filed in this court, and particularly at paragraphs 3 to 14 which were introduced by way of updating evidence to

alert the Court to difficulties that the appellant and her family have had in relation to international travel very recently. Those paragraphs describe the appellant's travel for family purposes with small children and she, in summary – I'll leave it to the Court to look at the evidence in more detail, but in summary, she was on two occasions at airports detained and questioned for a significant period of time and in difficult circumstances. She was able to enter [redacted] but she had to go back [redacted] to attend a further interrogation in her words in relation to her movements and passport status. She, on returning from that family trip, had intended to –

WINKELMANN CJ:
Can we scroll down to the next page? I think we got…

MS ALDRED:
Sorry. Oh, no, I think we're at paragraph 11.

WINKELMANN CJ:
Oh, are we?

MS ALDRED:
Yes, and then at paragraph 11 –

WINKELMANN CJ:
But we have scrolled down another page.

MS ALDRED:
– the family flew to Dubai on the way back to New Zealand, but again, were detained at the airport, and on that occasion were not allowed to enter Dubai and the appellant was forced to arrange emergency travel for her and her three very small children back to New Zealand.
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I won't go further into the details of what the appellant had to endure, but what I will do is just refer the Court to paragraph 13 where the appellant expresses a

– after stating that she has engaged in correspondence with the Freedom of Information Commissioner in Australia to try and get some clarity around why she is having these ongoing difficulties and whether there are relevant Interpol documents that she might be able to access. She says at paragraph 13: "While I've not been able to get any Interpol files yet, I believe that the cancellation of my passport in New Zealand will at least have been a major factor in my detention in both Lebanon and Dubai as I was repeatedly asked during questioning in those countries about my previously cancelled New Zealand passport and whether I was carrying a renewed New Zealand passport as well as my new Australian passport."

KÓS J:

This evidence seems rather by hindsight to sustain at least the ministerial requirement in your paragraph 16.5 which is that: "The cancellation of passport will prevent or effectively impede the ability of the person to carry out the intended action," putting aside the intended action aspect.

MS ALDRED:

Yes. Yes, no, I think that's right. I mean, there isn't a technical – she isn't being technically impeded anymore in terms of the unavailability of a New Zealand passport, though. I don't – actually, that's perhaps not quite – I wouldn't quite agree with that, I think, your Honour, because of course she was travelling on an Australian passport. It's more the ongoing stigma as a result of any records –

KÓS J:

Well, she wasn't able to travel through those countries and she puts that down in part to at least the cancellation of her passport.

MS ALDRED:

Yes, but not because she didn't have a passport, but because she had that record of adverse findings against her in relation – which had resulted in the cancellation of her New Zealand passport. So it wasn't –

WINKELMANN CJ:

This is a bit of a side issue though, isn't it? I think we're going down a rabbit hole here.

MS ALDRED:

Yes. I think the point is that when you're looking at the requirement that the cancellation of the passport will effectively impede the ability of the person to carry out the intended action, I will say that that part of the statutory test must be read as referring to by removal of that person's travel document, i.e. the passport. I don't think there's an ongoing intention that for the rest of that person's – I don't think it refers to the informal downstream consequences of cancellation. I think that's probably all I have to say on that point.

KÓS J:

All right, well the Chief Justice thinks it's a rabbit hole. I happen to think it's a rather large rabbit.

MS ALDRED:

Have I answered your question, your Honour?

KÓS J:

Yes.

MS ALDRED:

Thank you. So I just –

WINKELMANN CJ:

I mean no one has argued, have they, that it wasn't effective?

MS ALDRED:

No. There was –

WINKELMANN CJ:

Never argued the objective wasn't there.

MS ALDRED:

No. There was some argument on that point at earlier stages but that's not –

WINKELMANN CJ:

But not now?

MS ALDRED:

No, it's not advanced on appeal.

I just wanted to turn, just in relation to the application that your Honour the Chief Justice raised earlier. The Crown filed a memorandum in relation to the applicant's – sorry, the appellant's evidence, and suggested in that memorandum, this is dated 20 June 2022, that the appellant's – well it says at paragraph 2 of that memorandum: "If the evidence is to be admitted, the respondent will briefly address the content of the evidence in his written submissions, noting it is not likely to assist the Court with the issues on appeal because it is speculative as to the appellant's travel difficulties and inaccurate as to the third exhibit," and indicates that the respondent may look to file evidence in reply addressing the third exhibit which isn't part of the argument but relates to the reliability of evidence.

In terms of the suggestion that the appellant's affidavit is speculative, I think all I can really say in response to that is that it is very difficult in a situation where the appellant is actively seeking to obtain information about her current status and has not been able to access it. I think there is – it seems reasonable, in my submission, that where her New Zealand passport status has been referred to in questioning by officials at these international airports, it is reasonable for her to have formed the belief that the decision of the Minister is continuing to have ongoing consequences for her freedom of movement. So whilst words like, I just submit that in this kind of context words like "speculative" aren't very helpful. The appellant has resisted speculation to the greatest extent possible in this proceeding, but in this case –

GLAZEBROOK J:

What you're really saying is because she doesn't have access to information, that's all that's available to her to draw inferences from what she does know?

MS ALDRED:

Yes, from her direct experience.

MS ALDRED:

It's accordingly the appellant's belief that the decision in issue has had, and continued to have these significant consequences for her. Now I just wanted to turn now to I suppose the substantive matters I wanted to deal with, and I don't intend to be very long, but I did want to say – because Mr Keith will deal with the broad question of facilitation of a terrorist act as well, and of course he does it in a great deal of detail in his written submissions, which comprehensively tackle all those issues of the relevance of international obligations, human rights and so on, but I did want to just focus on a couple of areas which relate basically to the way in which the decision appears to have been characterised. So as I've noted at paragraph 19 of the written submissions, the legitimacy of the exercise of the cancellation power will hinge on the meaning of a "terrorist act" as it's defined in section 5.

WINKELMANN CJ:

Are you on issue 1.3(a)?

MS ALDRED:

I'm issue 1.3(a), yes your Honour. Oh, actually.

WINKELMANN CJ:

What issue are you on?

ELLEN FRANCE J:

1.1(a) isn't it?

MS ALDRED:

Sorry, 1.1(a) and also 1.3(a). So I've already referred in questioning from her Honour Justice Glazebrook to the elements of section 5 itself, and I just note for present purposes that section 5(1)(a) is the relevant provision here, referring to "conduct" under section 5(2), and in turn section 5(2) which sets out the threshold test including that the act is carried out with a particular intention and for a particular purpose and with the objective of bringing about the particular serious outcomes identified in subsection (3).

GLAZEBROOK J:

And if I understood you, you accept that ISIL did commit acts and was continuing to commit acts that fall within that definition.

MS ALDRED:

Yes, that's –

GLAZEBROOK J:

Did I understand that correctly?

MS ALDRED:

Yes, undoubtedly. I don't think that could be disputed. The way that the international community has defined "terrorism" or "terrorist activities" is summarised in paragraphs 21 to 29 of the submissions, but in short, the background establishes that in common with our legislation terrorism or a terrorist act will comprise a very serious criminal act accompanied by intention of a particular kind likely to relate to the spreading of terror and destabilisation or coercion of governments.

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Now turning to the appellant's submissions about the test, at the outset I need to make it clear that it is accepted the Minister need not identify the terrorist act the passport holder is said to intend or facilitate, intend to facilitate by reference to a particular plan or scheme that I identified, for example, where or when an attack will take place. That is not what the appellant argues.

ELLEN FRANCE J:

Sorry, just slow down slightly.

MS ALDRED:

Sorry, your Honour. So it is accepted the terrorist act need not be identified by reference to a particular plan or scheme that includes details of where or when an attack will take place. That's not the appellant's argument. But the Minister does, in my submission, need to identify what will happen if the facilitation yields to the intended result. The way this may be articulated is that the form of conduct to be facilitated must be apparent to the Minister and capable of articulation in the decision.

GLAZEBROOK J:

You might have to – so does not need – does need to identify what will happen if the facilitation… if you can just repeat what you said?

WINKELMANN CJ:

I think I've got it down. That a Minister does need to identify the form of conduct to be facilitated?

MS ALDRED:

Yes. That must be apparent to the Minister and, I say, capable of articulation at some level in the decision.

ELLEN FRANCE J:

As I had it you said: "Does need to identify what will happen when the facilitation yields to the intended result"?

MS ALDRED:

Yes. So I've referred to the form of conduct needing to be identified in the decision, and when I say "form of conduct" I am referring in general terms to the kind of action that will be taken to cause the section 5(3) outcomes. Those are death, serious injury, interference with infrastructure and so forth.

The form of conduct could be bombing, mass shooting, introduction of an organism or a cyberattack, and subject to what I say later in relation to what I characterise as a sliding scale of mens rea and actus reus, this must be the case, in my submission, on any logical reading of the statutory test because of the specific nature of the intention the passport holder must be believed to have. That is they must have intended, by their actions, to facilitate an act which will have the consequences set out at section 5(3). Without any idea at all of what the act if carried out might be, how can the person know their proposed conduct would contribute to its realisation?

In terms of the necessary degree of contribution, and being the extent to which the intended facilitating conduct might assist the intended terrorist act, the Crown suggest a de minimis standard might be applicable. We say there would need to be evidence that the facilitation would make some kind of material contribution. However, whichever standard you apply, on an objective assessment I say there must be some discernible causative link between the intended mode of facilitation and the intended terrorist act, and the thrust of the appellant's submissions in this regard is that insofar as the open record discloses the reasons for the decision, it is not possible to discern such a causative link.

KÓS J:

Shall we just test this a bit. The ISIL organisation has a great palette of different terrorist acts, some of which have been completed, some of which are underway, others of which twinkles in its eyes. Now if the appellant were to say, "I'll come and fight for you", would that meet your test?

MS ALDRED:

It might meet the test, your Honour. The reason –

KÓS J:

No particular act in mind, but part of the palette of future terrorist acts in contemplation?

MS ALDRED:

Depending on the clarity of the intention that is established on the evidence, then if the appellant is intending to travel to, say, ISIL-held territory for the purpose of perpetrating a violent act and that is clear on the evidence, then it may be sufficient to, on my analysis or on the analysis that I think the Court ought to be applying, it may be sufficient to say that fighting for ISIL in the sense of contributing to or undertaking violent acts is, that might be a sufficient for a terrorist act. I found a great – I don't object to any questions along the lines of hypotheticals. I've tried to resist the –

GLAZEBROOK J:

Can we perhaps – on the basis of the open material, why do you say that's not facilitation on your test? That might be the easiest way of understanding what your submission is.

MS ALDRED:

Yes, okay, well –

GLAZEBROOK J:

And obviously, that's slightly hypothetical as well because it's based on the open material, but that's all you can base your submissions on.

WINKELMANN CJ:

Were you just accepting that it is sufficient facilitation if you're intending to travel to fight?

MS ALDRED:

Not necessarily, but it may be. It's got to be an evidence-specific assessment.

WINKELMANN CJ:

It just seems to me inconsistent with the submission you just made to say that to accept that it is, because you're saying that ISIL does many things including fight. Fighting is not necessarily a terrorist action.

MS ALDRED:

Yes, it depends – well, that is true, and that is why I say that it's got to be a decision that's rooted in the evidence and there would need to be some evidence in relation to the clarity of the intention that the appellant had.

WINKELMANN CJ:

Because by accepting what Justice Kós put to you, you just effectively accepted that actions removed from a terrorist act possibly, supporting actions removed from a terrorist act which support the organisation overall, could fit the bill.

MS ALDRED:

I didn't mean to accept that, your Honour, what I –

KÓS J:

Nor was it the hypothetical I put to you, which was that you are going to fight, and I wanted to then ask you whether it would have to be, under your test, a particular fight.

MS ALDRED:

It wouldn't have to be a particular fight in the sense of being nailed down in terms of where or when because we don't go that far.

GLAZEBROOK J:

Well, you'd say it would have to be a fight which could be shown to be effectively terrorist acts.

MS ALDRED:

Yes. As opposed –

GLAZEBROOK J:

That when you're saying the clarity of intention, I intend to go and fight and I'm really keen to involve myself in the beheading of people in order to –

MS ALDRED:

Infidels.

GLAZEBROOK J:

I mean obviously that is putting the intention matter very specific level, but that's what you're saying, really, isn't it? That it has to be the intention to be involved in something that is a terrorist act without necessarily needing to say it has to be this terrorist act or that terrorist act. Is that…?

WINKELMANN CJ:

I think that is her submission.

MS ALDRED:

Yes, I think that's fair. What I would like to do is to proceed on the basis of what your Honour Justice Glazebrook referred to which is just going through the two decisions and talking about why I don't see any relevant causative link. But then I would like to address, perhaps come back a little to this issue of how you approach what is required in terms of clarity of intention versus the need for specificity around the act, and that is a matter that has been – that I think I would like to turn to after I've dealt with the decisions, if that's all right with the Court.

WINKELMANN CJ:

Yes, go ahead.

MS ALDRED:

So in terms of paragraph 20 of my written submissions, I'd like to make a brief, just correction to the written material, actually. The head paragraph says: "Put at its simplest, the Minister's summary of the reasons for cancellation, set out at paragraph 10 does not refer to a terrorist act." These in fact, the reasons which are summarised –

WINKELMANN CJ:

Hang on. Where are you in your submissions?

MS ALDRED:

Sorry, paragraph 20.

1050

GLAZEBROOK J:

Before 20.1.

MS ALDRED:

Just before 20.1 on page 7 of my written submissions.

WINKELMANN CJ:

Yes, the second sentence.

MS ALDRED:

Second sentence. I just wanted to, just for accuracy's sake, the statement at paragraph 10, which is then broken up in the subparagraphs of section 20, is not, is actually a summary of the SIS' assessment that was given to the Minister, and the Minister refers to it in his affidavit. I just want to make that clear because there is another articulation of the Minister's reasons, which I'll turn to in a minute. So just in terms of that SIS assessment, I set out at paragraph 20, the subparagraphs of that paragraph, why I say each of these things isn't enough to get you to the requisite level of intention. First, the SIS says: "should A successfully travel to Syria and join a terrorist group…" and this is where I think it's clear from the Crown's submissions we part company. We say an intention to join ISIL would not, of itself, demonstrate an intention to facilitate a terrorist act, and that is line with case law establishing that membership of an organisation that carries out international crimes does not, of itself, demonstrate complicity in those international crimes.

The case that I have referred to is *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2011] 1 AC 184 at footnote 14, and in that case there are several judgments, but Lord Brown's judgment at paragraphs 30 and 31 deals with this point specifically, and really there what the Court is saying is that to, so the appellant in that case had been a voluntary member of the Tamil Tigers, an organisation which carried out various activities including acts of terrorism. But the Court said it was necessary to look at a

variety of factors specific to the case to decide whether his conduct met the criterion in that case for exclusion from seeking refugee status.

Paragraph 31 in particular refers to previous judicial expression referring to organisations that promote their objects only by acts of terrorism, but then Lord Brown goes on to say: “I repeat, however, the nature of the organisation itself is only one of the relevant factors in play and it is best to avoid looking for a ‘presumption’ of individual liability, ‘rebuttable’ or not. As the present case amply demonstrates, such an approach is all too liable to lead the decision-maker into error.”

Sorry, just going back to paragraph 30, that’s where the Judge sets out a whole series of considerations that need to be traversed by a decision-maker before being prepared to effectively attribute the terrorist activities of an organisation to an individual who is a voluntary member of that organisation.

The next element set out at 20.2 is that the SIS say, and this is contingent on the point at 20.1 of the submissions: “she would be further indoctrinated into an extreme interpretation of Islam as espoused by ISIL.” Of course, holding extreme religious views is not an “act” of any kind, and it’s certainly not a terrorist act within section 5.

The third point in the SIS analysis is that, again if, one, if the first point occurred and she travelled to Syria and joined ISIL “she would almost certainly [redaction] engage with individuals who encourage acts of terrorism based on their extreme interpretation of Islam and commitment to violent jihad.” Again, I simply echo the point in relation to the first assessment of the SIS, which is that membership of an organisation isn't sufficient for complicity.

SIS goes on to say “and she may contribute to the radicalisation of others”. Again, holding radical beliefs isn't sufficient per se, and it’s not clear what the “radicalisation” of another without more would connote. Specially the dissemination of radical views would not be objectionable in the absence of an intention to bring about the consequences in section 5(3) of the Terrorism

Suppression Act, with the further intentions set out in subsection (2) of that definition.

Finally, we get to what seems to be the high water mark of the assessment, and possibly be involved in calling for external attacks. So I just want to adjust slightly what I say at paragraph 20.5 to read like this. Calling for violent attacks to further ISIL's purpose would be more likely to satisfy the definition. It would not, however – so I would say it would be more likely to satisfy the definition but there would need to be some consideration of the evidence to see whether facilitation was a reasonable conclusion based on the nature of the acts and all of the proof of those. But in any event I say there is an inherent recognition in the Minister's statement of the SIS' reasons that this is a possibility only and contingent on the occurrence of an earlier sequence of events, and therefore I say that this element could not satisfy the requirement in clause 2(2) that the Minister must believe that the person is a danger to the security of another country, because in this case the danger only arises on the completion or occurrence of a sequence of contingencies.

GLAZEBROOK J:

Do you – is part of your point that it has to be a current intention to do that, not something that might happen after you've travelled?

MS ALDRED:

Yes, because the Minister has to form, has to have a reasonably formed, a belief on reasonable grounds that the person has the intention at the time the decision is made. I think that's clear from the statutory text.

GLAZEBROOK J:

So here you say at least on the basis of this, there isn't a belief on the SIS report of a current intention, it's a possibility that might happen in the future?

MS ALDRED:

Yes, yes, and that's not enough. So I also, that deals with the SIS assessment, which is clearly, as I said, reproduced in the Minister's decision, and he says

this is the basis on which I understood the SIS advice, but I would like additionally to refer to the summary of classified security information before the Court. I haven't expressly referred to this or dealt with it in the submissions, but if I can take the Court to it. It's attached to the respondent's memorandum of 21 September 2018, which summarised the redacted parts of the Minister's affidavit, and if you could just go to the schedule 2 please. So you'll see in the schedule 2 that memorandum, under the heading "Minister's decision to cancel your passport".

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This is where the Crown is responding to a request via the special advocate for a detailed summary, or as much detail as possible about why the Minister reached the decision he could. After some initial points over the page at section 7(c), this is the expression of what the Minister thought, and it says: "The Minister considered that while it was not entirely clear what activities you would be involved in if you were to join up with and support ISIL in Syria or Iraq, it seemed likely you would not only provide practical support to that organisation, especially if you were to become married to a member of it, but would also likely contribute technical knowledge and capability from your education and work experience, for example, by sharing online content in support of ISIL for the benefit of facilitating a terrorist act."

So in response it is immediately apparent, first of all, that this explanation of the Minister's reasons differs from the SIS' assessment of the relevant danger just discussed, and if you put one explanation next to the other, or one assessment next to the other, you'll see that there are material differences. For a start the Minister refers to the likelihood of the appellant getting married, or the possibility of a marriage to an ISIL person, and therefore the provision of practical support, that is not an element in the SIS assessment of risk. The Minister also talks about her contributing technical knowledge and capability from her education and work experience. Again, a matter that isn't addressed by the SIS' assessment. But again, just looking at this statement by –

GLAZEBROOK J:

What's the – sorry. So what do you take from that? Because the Minister, presumably if they're – well the Minister isn't obliged to either accept or reject the SIS assessment.

MS ALDRED:

The difficulty for me is that I of course have no idea whether the Minister has provided further explanation about the basis for his belief.

KÓS J:

Or the SIS.

MS ALDRED:

Or the SIS' belief.

KÓS J:

That's with difficulty with saying the SIS hasn't said this.

MS ALDRED:

Yes, that's right.

KÓS J:

Yes.

MS ALDRED:

So whilst the Minister, and also the Minister expressly refers to the SIS assessment, and I think when you read that reference it's clear that that's what the Minister was saying he was informed by, including the SIS report, which he speaks about in complimentary terms.

ELLEN FRANCE J:

So just in a hypothetical sense you would accept that the Minister could bring her or his own knowledge to the exercise?

MS ALDRED:

Absolutely. Provided –

ELLEN FRANCE J:

I mean I appreciate then there are things about how that's recorded et cetera but just at that general level.

MS ALDRED:

I do accept that, and I don't think – I think essentially this is a matter for Mr Keith in closed.

ELLEN FRANCE J:

Yes.

MS ALDRED:

Because he'll be able to inform the Court about what, perhaps with more specificity, about the basis for those –

GLAZEBROOK J:

Perhaps putting this in those terms then. Assuming in the closed hearing there's evidence to back up what the Minister has said was the basis of the decision, what do you say about it? So marriage and provision of practical support and technical knowledge?

MS ALDRED:

Well, what I say is that none of the things that the Minister apparently thought the appellant might have done by way of facilitation are acts that could, without significantly more, bring about any of the section 5(3) consequences, and I'll just turn to that specifically. So just looking at the Minister's summary, still on the screen, first he seems to make an assumption that living with an ISIL member as a spouse would equate with providing ISIL with practical support, and not just practical support, but practical support that would enhance its ability to perpetrate terrorist acts. But no evidential basis, expert or factual, is provided for this conclusion. Again, of course, I don't have access to that, but the lack of

specificity in the Minister's broadly cast assumption doesn't indicate to me that there is likely to be that expert evidence.

It needs to be borne in mind in this regard that ISIL had established itself as a proto-state at this time, inviting families to come to its territory and live under the true Islam. It is not at all disputed that in furtherance of its agenda of violent jihad, it had perpetrated horrific acts of terror. But in this factual context that we're concerned with it is submitted that travelling to live in the caliphate cannot, without more, automatically be equated with the provision of support for ISIL's terrorist activities sufficient to enhance the realisation of those activities.

GLAZEBROOK J:
The reason I wanted you to repeat what you've said, there seems to be a mixing up of intention to – I think you say it's a two-prong test, that you have to have an intention to help, and what you intend to do must contribute to helping. Is that – it seems to be a two-prong test?

MS ALDRED:
Yes, it must be capable of making a material contribution.

WINKELMANN CJ:
But the intention to help is an intention to help a terrorist act as defined.

MS ALDRED:
Yes.

WINKELMANN CJ:
It may not be a specific one but it is an intention to help that category of act.

MS ALDRED:
Yes.

GLAZEBROOK J:

It's just that if I think that doing something will help, and I intend to do that in order to help, you say not only that but it has to be an act that would be capable of helping. So it's a two-prong test, is that…

MS ALDRED:

Yes, yes I do say that.

GLAZEBROOK J:

So it's – I mean it's –

WINKELMANN CJ:

And where'd you get that from?

MS ALDRED:

Well there's, I get it from, I think first of all I would say that must be just a sensible reading of the section, because otherwise a person with some intention to do something that might, that they thought would assist a terrorist organisation, but in fact they were a sheer fantasist, and there was no chance of that helping, ought not to be caught by this section, because they simply don't present a danger, which is the threshold requirement of section 5 – sorry, of clause 2(2). They need to be a danger. So the person is not going to be a danger if they intend some act of facilitation that can't conceivably assist in any way the realisation of a terrorist act. But I will address the materiality threshold.

GLAZEBROOK J:

So it's not, so it's actually related to another part of the definition that not what an intention to facilitate is.

MS ALDRED:

Well the person, they're intrinsically, they're linked together in the section because the person is only considered to be a danger in terms of section 5(2) if the person has the intention set out in the remainder in the subclause.

WINKELMANN CJ:

But it comes – it's from schedule 2 of the Passports Act.

MS ALDRED:

Yes.

WINKELMANN CJ:

Not from the definition of terrorist act.

MS ALDRED:

No.

WINKELMANN CJ:

Because you're saying that the protective purpose of that clause is not engaged when you're dealing with a fantasist.

MS ALDRED:

Yes, that's right, sorry, I think, your Honour, I might have referred mistakenly to section 5(2). What I meant was to refer to subclause (2) of clause 2 of the second schedule, which requires, as a sort of headline point, that the person has to be a danger to the security of a country. So to meet that requirement there would have to be some ability for the intended facilitating conduct to achieve its aim. It couldn't be some completely, you know, act that was totally unlikely to bring about any consequence of that kind.

KÓS J:

This sounds quite like the law of attempt.

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MS ALDRED:

Yes, I'm going to come onto that your Honour. Can I – if you don't mind, can I continue just to finish off dealing with that statement of the Minister's reasons, because I think that will – just to keep the structure of –

WINKELMANN CJ:

Yes, please.

MS ALDRED:

– that part of the address, and then I'd like to come onto that point.

So while it might initially seem more credible, I'm talking here about the second part of the Minister's explanation, which is that you would likely contribute technical knowledge and capability from your education and work experience, for example by sharing online content in support of ISIL for the benefit of facilitating a terrorist act. So here is what I have to say about that. The suggestion that the appellant would likely contribute technical knowledge and capability from her education and work experience, for example by sharing online content in support of ISIL, falls short, in my submission, of explaining how her conduct would facilitate a terrorist act. The appellant does have information technology skills which is presumably what the Minister's referring to, but there's no attempt to articulate why these professional skills are required for sharing online content and that small part of the evidence that I have had access to through the open record tends to show nothing more than simply the sharing on public fora of content related to ISIL. It doesn't seem to be sharing that requires some specific skill or knowledge in terms of the appellant's technical capabilities.

KÓS J:

Isn't the inference being suggested here that she would operate under the direction of ISIL if she were living there, married to one of its active members? I mean, that's the difference, isn't it, between being an enthusiast sitting in your hotel bedroom in Australia or New Zealand and actually being there, married to a member, on the ground?

MS ALDRED:

Yes, so what your Honour's proposing seems to me again to suffer, in terms of meeting the definition, from the requirement of a sequence of other

contingencies occurring as a prerequisite to the appellant in any way contributing to the terrorist activities of ISIL.

WINKELMANN CJ:

Same point of contingency. There's no actual evidence of intent at the time, it's speculative?

MS ALDRED:

Yes.

KÓS J:

Yes, except it's a little bit less speculative, isn't it, if she's physically there and married to this chap?

MS ALDRED:

Yes, I mean, for what it's worth, the appellant in her recent affidavit I think addresses the potential for evidence of marriage proposals saying that this is something that occurs frequently and is not unusual in her culture. Again, it's going to come down to the evidence, your Honour, in terms of, you know, what evidence is there of an intention to marry a fighter, what evidence is there of, if she did go and live in the caliphate, married to a member of ISIL, became a member of ISIL herself, is it necessarily the case that she would be acting under the direction of that organisation and facilitating terrorist acts or could she simply be living the life under, in ISIL's characterisation, the true Islam in terms of setting up family, having children, living in the proto-state. I just say it's too far removed.

WINKELMANN CJ:

Well, isn't your best way of formulating it to stick with your point which is the issue for the Minister was whether she had the intention at that point to facilitate a terrorist act, not what circumstances might come to pass?

MS ALDRED:

Yes, yes, and I think it's as simple as that, your Honour. The other thing, too, is that the Minister seems to be simply referring to sharing online content in support of ISIL, and that's quite a different thing to, for example, sharing online content that might enable someone to construct an explosive or undertake some other – or support someone in some sort of technical way, so it's not clear to me from the Minister's decisions how sharing general support for ISIS online could be said to assist the organisation necessarily.

WINKELMANN CJ:

What about recruiting terrorists?

MS ALDRED:

Well, again, that's not what the Minister says. He doesn't go that far. He doesn't say that he thinks she's going to recruit terrorists. The SIS say that in their assessment, but that's, as I said, couched in terms of being a possibility even in the SIS' language.

Finally, just in relation to that, the Minister's articulation of his reasons, he ends with the words "for the benefit of facilitating a terrorist act", and it seems to me that that appears to be nothing more than an add-on drafted to echo the statutory language without any further context to explain it.

So, just in terms – just to summarise my submissions, in both statements of the SIS and the Minister's reasons respectively, all of the things the appellant is said to have intended to do are simply too remote from the statutorily required intended outcomes under section 5. The only predicted action of the appellant that could come close might be calling for external attacks, and that, even in the SIS' words, is consigned to the realms of mere possibility.

So the next point I wanted to come to was the point that Justice Kós asked me about, which was the point that I raised in written submissions from paragraph 33, where we propose that the way that the courts have approached criminal liability for attempts might provide an analogy to assist in identifying the level of

clarity or specificity required for the elements of clause 2(2) of the second schedule.

So the basis for comparison is set out at head paragraph 34: "…the appellant's alleged conduct was an incomplete act accompanied by an intention," and that is the basis –

GLAZEBROOK J:
But you've already accepted, however, that you don't need to identify an act and that what you're looking at is an intention to do something to facilitate terrorism and that would have that effect.

MS ALDRED:
I've accepted –

GLAZEBROOK J:
So it is quite different from an attempt, isn't it?

MS ALDRED:
I don't say it's the same kind of offence. What I say is that the underlying principles in relation to the sliding scale –

GLAZEBROOK J:
You actually have to, for an attempt, to have done something to start it off.

MS ALDRED:
Yes.

GLAZEBROOK J:
By definition here, you wouldn't need to do that because you only need an intention to do that, don't you?

MS ALDRED:
Yes.

GLAZEBROOK J:

So there's nothing about having to have done something?

MS ALDRED:

You don't have to have done something, but there needs to be evidence of what you intend.

GLAZEBROOK J:

Well, it's I don't see that "attempt" helps you because you have to have done something and actually have got yourself far enough along to say that it is actually an attempt and not a mere intention, whereas under this Act, an intention is actually enough, isn't it?

MS ALDRED:

Yes. I don't say that the law in relation to "attempt" or the articulation of the proof requirements in relation to "attempt" have to be transposed directly into this context. Perhaps I can just address my submissions by reference to the law in relation to "attempt" and try to explain how I say the underlying principle assists. So –

ELLEN FRANCE J:

Sorry, I'm not sure how it fits in within the definitions in the Terrorism Suppression Act including section 25 which was in force at the relevant time.

MS ALDRED:

I can – section 25, in my submission, did not apply at the time of the Minister's decision-making to the extended definition of "facilitation". That's one of the respects in which both myself and the special advocate say that the Court erred –

ELLEN FRANCE J:

Erred, right.

MS ALDRED:

– in finding that that extended definition of "facilitation" could apply. I will come onto that if you're happy to let me address that later.

ELLEN FRANCE J:

No, no, that's fine.

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MS ALDRED:

In terms of this idea of instruction that can be taken from the Court's approach to assessing whether the necessary actus reus is established in cases of attempts, so, the way the courts and the criminal law have approached the difficult task of determining when conduct is sufficient to be considered an attempt is described at paragraph 34.2 and that comes from the decision in *R v Harpur* (2010) 24 CRNZ 909 (CA), and –

GLAZEBROOK J:

Sorry, what paragraph did you say?

MS ALDRED:

I'm on paragraph 34.2 of the written submissions.

GLAZEBROOK J:

Thank you.

MS ALDRED:

This is the decision of the High Court where the appellant –

KÓS J:

This is the police sting case, isn't it?

MS ALDRED:

Yes, that's right, where the accused had expressed an extremely clear intention in relation to his desire to sexually violate young children by reference to, as your Honour says, children who didn't in fact exist, but he had made statements

to the police informant in that case that made it very clear what he intended to do.

Whilst the Court found in that case that he'd only got as far as actually doing acts that might otherwise be considered merely preparatory, what the Court found, at paragraph 25, was that, and just to the bottom of that paragraph: "…any analysis of the actus reus must be viewed in conjunction with the mens rea," and then the Court referred to a passage from Professor Kent Roach's book and said it agreed with that, and in that passage, it – so what Professor Roach wrote was: "Determining whether the accused has gone beyond mere preparation and committed an actus reus for an attempted crime is difficult to predict. In a practical sense, much will depend on the strength of the evidence of wrongful intent." Then he gives a couple of examples which I won't read out, but he says at the end of that passage: "In practice, a more remote actus reus will be accepted if the intent is clear." Now, just –

WINKELMANN CJ:
This all seems rather an obscure and oblique approach to these issues, but in paragraph 36, you do refer us to a case which seems to assist you, which is *Khawaja v R* 2012 SCC 69, [2012] 3 SCR 555.

MS ALDRED:
Yes.

WINKELMANN CJ:
I mean, does that make the point you're trying to make here, really, which is that there is a need for connectedness at the mens rea level? Heightened. You say heightened mens rea.

MS ALDRED:
Yes, I think that's true. But in relation – and I accept what your Honour says. I don't suggest a direct importation of the law of attempt in this context at all, but what I do say is that the sort of sliding scale that the courts have been prepared to adopt in the attempt context might be something that the Court could employ

here in cases where – so what I submitted is that the requirement to facilitate a terrorist act does not require that the person who's the subject of the decision must have known the specific act was going to occur in terms of a specific attack. What I've said is that there must be some understanding of a general form of conduct; so, what is the danger that the Minister is seeking to avert by cancelling the passport?

So the reason that I say this analogy with the principles recognised in *Harpur* is useful is because while the clause 2(2) power consists of more elements, in a way, and layers of intention than a criminal offence of the kind addressed in *Harpur*, applying this underlying principle that there might be some sliding scale between mens rea and actus reus between elements of the offence, the Minister could find, I say, that in a case where the intention to commit particular acts of assistance is extremely clear, the nature of the ultimate intended terrorist act can be inferred.

WINKELMANN CJ:
Okay, so what you're saying is the less specific the terrorist act, the more specific the requirement of an intentional act to facilitate?

MS ALDRED:
Yes.

WINKELMANN CJ:
Right.

MS ALDRED:
Yes. I think that's the submission, that I've been able to find this similar approach in the attempt cases. I think it makes sense just in terms of the text of the statute itself, but for what it's worth, I suggest that there's a similar underlying principle that may or may not exist.

KÓS J:

I mean, the cases themselves don't really help, because the drafting of schedule 2 clause 2(2) is really quite different, and there could be no doubt that Mr Harpur was a danger to the security of children because he intended to engage in a crime against children.

MS ALDRED:

Yes.

KÓS J:

And no doubt that Mr Johnston was a danger to young women in New Zealand as he intended to commit crimes against young women. It's a rather different context. I take your point, but actually, those two cases kind of make out – in each case, if you'd applied their facts to this, and use "crime" rather than "terrorist act", the crime would've been met in each case because of the specificity of intention.

MS ALDRED:

Yes, yes, absolutely, and that's where I say the Court – you know, that kind of analysis might be open in this context.

WINKELMANN CJ:

Can I just suggest to you that *Khawaja* makes your point much better than we've just…

MS ALDRED:

Okay. I'm happy if you're –

WINKELMANN CJ:

I think – so did you want to take us to that?

MS ALDRED:

Yes, so –

WINKELMANN CJ:

45 to 47.

MS ALDRED:

Can I –

WINKELMANN CJ:

Because it elucidates the point you're making, I think.

MS ALDRED:

Yes. So *Khawaja* is, the Court in that case was considering the scope and application of section 83.18 of the Canadian Criminal Code which provides for the offences of participating and/or contributing directly or indirectly to any activity of a terrorist group to facilitate or carry out a terrorist activity.

That was a widely-drawn provision which actually included at subsection (2) that the offence may be committed whether or not the accused knows the specific nature of any terrorist activity that may be carried out, and that's of course – I say there's no similar provision in the current context.

But even with that broadening of – even in that context where there was a deliberate provision saying there's no need to specify the actual nature of the terrorist activity, the Court found that the statutory wording imported a heightened mens rea standard, that's at paragraph 45, and that required, in the words of Professor Roach about half way down that paragraph: "The use of the words 'for the purpose of' in s. 83.18 may be interpreted as requiring a 'higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity." And at 51 –

WINKELMANN CJ:

Well, at 47: "The effect of this heightened *mens rea* is to exempt those who may unwittingly assist terrorists or who do so for a valid reason. Social and professional contact with terrorists…will not, absent the specific intent to enhance the" blah blah blah. I assume you'll be taking us to that? Right.

MS ALDRED:

Well, yes, and they give the example at the bottom of that paragraph that, you know, a lawyer assisting someone in court who represents a known terrorist isn't going to be falling foul of the legislation simply by providing that professional service. So, yes, the point of this enhanced level of intention is to ensure that innocent or at least not dangerous conduct isn't caught.

The thing that also I think assists is the adoption of or the recognition of a materiality threshold. I've noticed it's half past 11, your Honour –

WINKELMANN CJ:

Oh, yes. All right, we'll take the – well it's one minute to, but we'll take the morning adjournment one minute early.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.48 AM

WINKELMANN CJ:

So Ms Aldred, thinking about timing, are you nearly finished?

MS ALDRED:

Yes. I'm conscious of the time your Honour. I have a few – I'd like to talk a little bit about *Khawaja* which we started discussing, then I'd like to make a related point in relation to the application of section 25. A broad and brief submission in response to the Crown's submissions on materiality, and then just turn very quickly to relief. I don't think any of that will take very long.

So just in relation to *Khawaja* as your Honour noted from about paragraph 45 there's a discussion of this heightened mens rea standard, which requires this very specific level of subjective intention, and that was one of the things that the Court felt led to a tailored and appropriately particular interpretation of the relevant offence, and we had been to paragraph 47.

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If we can just turn the page, it goes on to talk about the criminal standard, because of course that was in the criminal context at paragraph 48, and then at paragraph 49 the appellants had made an argument about overbreadth and just in response to that at paragraph 50 the Court says that: "This argument relies on an incorrect interpretation of… The actus reus of s. 83.18 does not capture conduct that discloses, at most, a negligible risk of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. Although…" they say it "… punishes an individual who 'participates in or contributes to… any activity or a terrorist group', the context makes clear that Parliament did not intend for the provision to capture conduct that creates no risk or a negligible risk of harm."

Then in support of that, the Court refers to the offence carrying with it a sentence of up to 10 years' imprisonment, and significant stigma, and go on to say: "This provision is meant to criminalise conduct that presents a real risk for Canadian society."

Then at 51 they sort of summarise the position in relation to the level of contribution potentially needed, saying: "A purposive and contextual reading… confines 'participat[ion] in' and 'contribut[ion] to' a terrorist activity to conduct that creates a risk of harm that rises beyond a de minimis threshold. While nearly every interaction with a terrorist group carries some risk of indirectly enhancing the abilities of the group, the scope of s 83.18 excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity."

So they were the sort of – that reflected the approach that the Court in *Khawaja* said ought to be adopted when you're looking at something as here with an offence provision in that case which potentially captures conduct of a very broad nature.

O'REGAN J:

But that talks about "contribute to", doesn't it, not "facilitate"?

MS ALDRED:

Yes, it's not the same, I don't say it's the same. There is actually an offence of facilitating in Canada as well, but that isn't the subject of direct discussion by the Court in the way that they discuss section 83.18, and as I'll come to in relation to the submissions I forecast on section 25 of the Passports Act, the Canadian offence of facilitation imports a broad definition of "facilitation" that I say we don't have here. But in terms of the application of principle, what I would urge on the Court is that for reasons of, I say just logic and common sense, there needs to be a materiality threshold also in the context of the need for the person's conduct to present some danger, or a danger, to the security of any other country, in the words of our section, then there must be a materiality threshold.

I won't address the specific threshold that we say is sufficient, because this is matter that will be addressed by the special advocate relating to consistency with international law standards. But what Mr Keith submits, and what we support is that a threshold of conduct that could be object – a threshold of conduct is required that objectively viewed could make a significant contribution to an intended terrorist act, but I'll leave it to him to advance that matter.

What we do say is that it's more than a de minimis threshold, and in that respect, we differ from the Crown's submissions, which I just want to turn to briefly, at paragraph 46. So that is a much lower standard than we say ought to be adopted by this Court. And the Crown depends in part, for that submission, on the Court of Appeal's finding which it supports by reference to the decision in *Keen v R* [2015] NZCA 221 and that is an appeal against forfeiture order made against the appellant after he was found guilty of possessing methamphetamine for supply, and that was a case where the Court had to construe "facilitation" in the context of section 32(3) of the Misuse of Drugs Act 1975 and where the Court was satisfied that a person was in the possession of funds for the purpose of facilitating the commission of an offence against the section, beings a drugs offence, then a forfeiture order could be made.

So the Court in *Keen* applied the dictionary definition, which is supported by the Crown, of making something easier, but there are a couple of things to say about that. The main – my primary submission in that regard is that the Court, for obvious reasons when you look at the very short judgment in *Keen*, had no difficulty in finding that the funds held by the appellant facilitated the commission of further offending because as a matter of evidence, the Court found that the funds were held by way of float for the purpose of funding criminal activities. So, again, we have a very clear – this is one of those cases where, applying that sort of analogy we discussed before the break, where there is a very clear intention to use that, those proceeds in a particular way.

Of course, there's a difference in statutory context here, but ultimately, I just say that there are many compelling contextual and other reasons why that standard ought not to be applied in the present context, and particularly, the importance of consistency with the way that international legal norms are applied which will be dealt with by Mr Keith.

The Crown also relies on the case of *R*, which is the unredacted, handed up version of that judgment. This is *Commissioner of Police v R*. In relation to that case, that case related to the making of orders against the respondent called interim control orders, which were made under the Terrorism Suppression (Control Orders) Act 2019 and there's a discussion there of the threshold for application of those orders which is essentially, and you'll see at paragraph 10 of the judgment, that the term "relevant person", as a person in respect of whom an order can be made, has to have "engaged in terrorism-related activities…or travelled, or attempted to travel, to a foreign country to engage in terrorism-related activities in a foreign country," and clearly, whilst terrorism is defined in that act by reference to section 5, the hyphenated "terrorism-related" activities, I say, takes it clearly beyond conduct that would be confined to a terrorist act, but clearly engages a broader range of intended conduct.

The other thing I need to say in relation to *R* is that as set out in that judgment at paragraph 14, there is a specific statutory definition of "facilitation" which

goes beyond – well, there is no definition of "facilitation" in the Passports Act for the purposes of the decision under consideration.

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Finally, in relation to that case, referring to the evidence which is set out broadly at paragraphs 24 and 29 of her Honour Justice Ellis' judgment, I don't want to necessarily go through that evidence but you'll see that it's a very different factual situation where the person is currently detained overseas having travelled there unlawfully from [redacted].

The other point I want to make about the evidence in that case as apparent on the judgment is that at paragraph 29(c)(iii), the evidence referred to there is based on expert evidence filed by the Commissioner which talks about the risks of [redacted] in similar circumstances to those of R posing a continuing threat when they are repatriated to those countries, but of course, first of all, that relates to a threat in relation to continuing risk of terrorism-related activities, being again that broader statement, and secondly, as I said, it was established by expert evidence which I'm not aware of in this case.

KÓS J:

These are associated pieces of legislation though, aren't they? So –

MS ALDRED:

They are associated pieces of legislation, but –

KÓS J:

So, what do we make of the fact that they draw a distinction of some sort between "facilitated" and "materially-supported"? Because your argument is that "facilitated" means materially assist. That's your paragraph 45.

MS ALDRED:

Yes. It's difficult to – I was thinking about how that might be addressed, and you're right, it's one of those difficult provisions where it – while "facilitates or "supports materially" is the term that's used in section 8, this is at section 13 of

the judgment, nevertheless they are rolled into one for the purposes of definition at section 8(3) which is in the following paragraph. So, there is a single definition for both of those terms together, so it seems to me that they're not necessarily – the legislation isn't necessarily picking – I don't think it's correct, necessarily, to say as you might assume from simply looking at section 8(1), that "facilitates" is a different concept to "supporting materially" when they are then the subject of a joint or, yes, a joint definition section.

I have one more point to address in relation to facilitation, and that is the extended definition that her Honour Justice France referred to in section 25 of the Passports Act. So this is – at the time that the Minister made his decision, section 25 of the Passports Act provided at section 25(2) an extended definition of "facilitation" or "facilitating", specifically saying that: "…a terrorist act is facilitated only if the facilitator knows a terrorist act is facilitated, but this does not require that (a) they know that any specific terrorist act is facilitated" –

ELLEN FRANCE J:

Sorry, we're in the Terrorism (Suppression) Act, aren't we?

MS ALDRED:

Sorry, we are in the Terrorism (Suppression) Act, yes. My apologies. Did I say the Passports Act?

WINKELMANN CJ:

You did.

MS ALDRED:

I apologise for that. That was just a slip. In subsection (2)(b), it doesn't require that: "any specific terrorist act was foreseen or planned at the time it was facilitated," and it doesn't require at (c) that: "any terrorist act was actually carried out." So while I would accept, for example, that (c) will necessarily apply, or would necessarily be an element of facilitation, there does seem to be some general intention to broaden the meaning of facilitation to some extent in section 25.

WINKELMANN CJ:

But you tend to accept, don't you, that the schedule to the Passports Act encompasses non-specific terrorist acts anyway. So that's consistent –

MS ALDRED:

Yes, yes so what I say about this is firstly, in terms of actual application of this section to the decision before the Minister, I say that it didn't apply for the reasons that the High Court canvassed in *R v S* [2020] NZHC 1710, [2021] 2 NZLR 54, which is set out in the submissions.

KÓS J:

At where?

MS ALDRED:

Sorry, I'm just finding the reference. So in *R v S*…

KÓS J:

That's paragraph 39?

MS ALDRED:

Yes. Sorry. In *R v S* from 38 to 51 where – sorry, 38 to 51 of *R v S*, this is at paragraph 39 of the submissions, and essentially in that case his Honour Justice Downs found that those, that section 25 applied specifically to the regime in the Terrorism Suppression Act for designation by the Prime Minister of terrorist organisations and associated entities and that was clear from the position of section 25 and it was also clear from the way that that provision interacted with the terrorist – sorry, terrorist organisation designation provisions, and his Honour said that in particular the wholesale importation of principles from section 25 into the definition of "terrorist act" in section 5 risks imposing criminal liability and analogous consequences on the basis of conjecture.

Now a couple of things to say about that. The first one in support of Justice Downs' articulation is that there was a 2021 amendment to the Terrorism Suppression Act to relocate the extended definition to section 5A and

to make it clear that this extended definition now applies to the facilitation of terrorist acts for the purposes of section 5, carrying out and facilitating terrorist acts. So it is not a general application for the purposes of the Act.

The second point to make is that the new, or the updated passports legislation provides at section 27GA for the, that's where the Minister's decision-making power is now located, and you'll note at section 27GA(2) that at (a)(i) the wording is amended to say the person intends to: "Carry out or facilitate a terrorist act (within the meanings of those terms or expressions in sections 5 and 5A of the Terrorism Suppression Act 2002)." Section 5A being the extended definition as relocated.

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So that's the first point, but the second point, which I think reflects what the Chief Justice put to me and which I accept, was that even if this broader definition were applied, I don't accept that the present case would amount to facilitation in any event, because the section only clarifies that no specific terrorist act is required for culpability, which is already specifically – which is already expressly accepted, but even that extended definition wouldn't do away with the need for the alleged facilitator to have a broad notion of the form the Terrorism Act would take, and again potentially calling in that sliding scale of the form of the terrorist act potentially being able to be inferred from the specificity of the person's intention.

WINKELMANN CJ:

Well what about if, as Justice Kós put it, there is, I can't bring myself to say it, that there are a range of known terrorist actions that this organisation takes so, and this is their mode of operation, so you intend to facilitate them in their terrorist activities, but there is a range of them, you don't need to have chosen which particular one, that would be enough, wouldn't it?

MS ALDRED:

I would say it would be enough if, again I think it really depends on, it's impossible to divorce that, I think, from the intention as it's able to be drawn

from the evidence. If there's a clear intention to support acts that are, by their nature, terrorist acts, then yes that will be enough, and I say this case is far from that.

WINKELMANN CJ:

Okay so it doesn't – so enough if you say that you want to support them doing outrageously acts to shock and to terrify people et cetera, that's clear enough, perhaps, it doesn't have to be, intend to support them bombing or poisoning or…

MS ALDRED:

No, not necessarily, I mean I think, yes, I intend to provide $50,000 to ISIL to perpetrate violent jihad in a range of ways, may come close if there's enough specificity of intention.

WINKELMANN CJ:

Well, possibly not since jihad has a particular religious…

MS ALDRED:

No, that's true, yes, sorry your Honour.

WINKELMANN CJ:

But that's something – I understand your submission.

MS ALDRED:

So the final thing that I wanted to just talk about very briefly is relief. I the written submissions it was proposed that if the decisions under review are found to have been made unlawfully, relief should be granted in the form of a declaration that the decision was invalid from the outset, and that the parties should thereafter confer as to appropriate consequential orders, with leave to come back to the Court if agreement couldn't be reached. I just wanted to respond to the Crown submission at paragraph 97, that the second part of the request for relief they say is unusual and unnecessary and the Crown points to the removal of notes in relation to the appellant in the department's persons of interest

database, that's in the Pickard affidavit that the Crown refers to, together with the fact that the appellant has an Australian passport, and is able to travel on that, as indicating that such relief is unnecessary, and the Crown also says it has no control over the records of other governments.

So the relief proposed in the written submissions, and I just wanted to explain this, was that this arose from the series of events that are outlined in the appellant's recent affidavit, and her apprehension of the continuing stigma and ongoing real life consequences of this decision for her, at least as she apprehends it, and on the basis that I've discussed. In the event that this Court upholds the appeal, relief ought to follow that if possible, I say, is appropriately tailored to address the unfortunate downstream consequences of an unlawful and unfair decision. The Court, of course, has pretty much infinite flexibility on judicial review to provide appropriate relief, and I suggest that this is kind of relief that would be appropriate.

Counsel for the appellant and the special advocate don't have a view, presently, about what, if anything, further might be done by the Crown to ameliorate the consequences of the decision for the appellant. But neither the affidavit of Mr Pickard, nor the Crown's submissions, indicate that if the Minister's decision is found to be unlawful, there are no available reasonable official steps that could be taken. So it's my submission that counsel ought least to be able to confer with the Crown about whether such steps may be available, and then to come back to the Court for orders in reliance on that information.

KÓS J:

It's a slight shame she hasn't applied for a New Zealand passport so we would know what, in practice, ameliorating effect of regranting the passport would be. We just don't know.

MS ALDRED:

No, she hasn't made an application.

KÓS J:

And she hasn't explained why she hasn't.

MS ALDRED:

No, she, no. That's not before the Court. Really that's all I have to say. If the appeal is upheld the appellant should have the benefit of a costs award. Unless your Honours have anything else, those are my submissions for the appellant.

WINKELMANN CJ:

And if the appeal is not upheld?

MS ALDRED:

My understanding is that costs haven't been sought against the appellant in the below courts, and I would anticipate that would continue for reasons of public interest in this appeal.

MR KEITH:

If it please your Honours. E ngā mana, e ngā reo, e rau rangatira mā, tēnā koutou. It is my privilege to follow my learned friend Ms Aldred in this significant appeal. As your Honours will have gathered, it involves a number of significant and difficult issues, both to do with this particular statutory scheme, but also with how powers of this kind administered under what, as Ms Aldred has said, are exceptional statutory circumstances, are to be exercised and policed. But as Ms Aldred also said, and I noted from her very early opening, the central issue is that we are dealing with a highly prescriptive statutory regime based in turn on very carefully framed United Nations Security Council Resolutions, and that context, the careful steps taken by Parliament, the conferral of specific responsibility upon the Minister is decision-maker, the need for that decision-maker to be fairly, comprehensively informed, and to turn hi or her mind to each of these criteria, are the central issues in the case. We will hear an awful lot, I suspect, from my learned friends about ISIL's atrocities. We know those. They are not unique. In the statutory regime, though implemented, expanded in relation to the September 11 attacks, not by ISIL but by cognate extremist groups, they apply generally.

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What we have, and this is just by way of general introduction to our statutory scheme and also a caution against too readily drawing on either other jurisdictions' wider provisions as Ms Aldred has already touched on or on wider provisions enacted in the 2021 reforms, what we have, an issue in this case is a very carefully, narrowly drafted statutory regime, and it is that careful and specific interpretation that both Ms Aldred and I urge on the Court.

The related central question within the statute is that of fairness, and I do make the submission here as in the courts below, that in these exceptional circumstances, a conventional test of a candid report or of candour before a reviewing court does not do what I ask the Court to accept under the – following the Canadian jurisprudence is the duty of utmost good faith on those investigating the appellant and informing or advising the Minister. So that duty, it's important in this ex parte and exceptional context.

O'REGAN J:
Does it really make any difference though?

MR KEITH:
I'll come to what –

O'REGAN J:
In a judicial – I mean, if the Minister's not taken into account something relevant or been misled in some way, it doesn't matter whether that's bad faith or not, does it?

MR KEITH:
It's not a question of bad faith, and I should say that my use of the terminology is about the obligation on the advisor, not an imputation that there was any sort of impropriety here. My point, which I'll come to a bit more fully, is that when we look at something like *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 or *Peko-Wallsend*, the cases we all know, that is about the officials making sure they carry over everything that they have in their file.

The point made by *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326 and *Canada (Citizenship and Immigration) v Harkat* 2014 SCC 37; [2014] 2 SCR 33 is to say this actually goes to what's put into the file in the first place. You need to investigate, even-handedly, you need to chase things down. So I agree with your Honour that a decision which failed to reflect what's in the dossier, invalid anyway, but a decision – equally, if the dossier is there but has not gone down a particular path, I'm not sure if it's a rabbit hole, but has not gone down a particular path that is critical in the statutory scheme, then that, too, is a problem, and it's a problem at the point of the ministerial decision and one that the Court can fix.

KÓS J:

We're not subdividing the Crown here, are we? I mean, the SIS and the Minister are indivisible here, are they not?

MR KEITH:

We are in the sense that the Minister in this context is utterly dependent upon advisors that are not his department or agency, and as the learned reviewers of national security legislation observed, a Minister can't be expected to know what they haven't been told or what could've been pursued but wasn't, so no, the Crown is one for the purpose of unlawfulness or liability, but in terms of the operation of the duty that the Canadians have found and that I'm advocating for here, one has to treat the two actors as independent, and so in *Charkaoui*, we have the Minister being described as an independent check on what the security agency has done. The Minister is the one who must be put in the position to decide. The agency merely advises, informs, recommends. And there is a – as I say, it's very much like *Air Nelson* at one level but – or one of those cases, but there is also a further step of following down the other paths of what is or isn't done.

Now, I was saying that these are two simple points. They are two simple points raised in a difficult context. As Ms Aldred says, they have not been considered before. But my last prefatory point is really that the emphasis in the New Zealand scheme is upon ministerial control and responsibility, and that is

my focus. It's not on whether or not – what the facts actually were. We're in no position to make any assessment of that and I come to the point I make about the Court of Appeal because as I – or on my submission, the Court just did not have those paths chased up. We didn't have a full dossier that the Court could then pick up and make its own assessment with. So we are just concerned with, could the Minister act under the statute, was the Minister in a position to do so in a meaningful way, and then the further issue is the question of rights compliance, that is baked into the Passports Act and Terrorism Suppression Act scheme. It's also applicable through the New Zealand Bill of Rights Act 1990 but exceptionally here, and this is a point I'll come to, we have the injunction from the Security Council that measures taken must comply with human rights obligations. So it's not one at the expense of the other. It is that only in member states must act, that they must act consistently with the Bill of Rights Act – oh, with human rights standards, and they must also, and this is another take on the ministerial control, and on the specificity of the statutory regime, when one looks at the Security Council Resolutions the language is that of the rule of law. It is about prescription and compliance with known law. It is not about broad terms or precaution or erring on the side of. It is about operating a legal regime, and there are obvious rights reasons, obvious constitutional reasons, that the Security Council in fact make the pragmatic point that behaving unlawfully or with impunity itself is not conducive to countering terrorism.

To outline, and I'm conscious of what her Honour the Chief Justice has said about time, and I'll look to be as efficient here as I can, and likewise in the closed to come, I will speak to and through my open submissions, and where I can address the Crown points that come up there. Those are principally to do with this term "facilitation". You'll have heard something about it. I have a bit more to say about that. And also about this question of why I say the Court below could not invoke de novo appeal powers which is, it's something on which I've spent a bit of time in the written submissions, so I'll come to those.

I'll also, and this is where I'm open to be guided by the Court as in all things, but particularly open, through, I have to say no small effort on several people's

part, we were able to produce a I think meaningful redacted closed submission. There are big acres of black in there, too, but there are some things that I think actually makes sense, and my reading of the comparative case law is that I should so far as possible address those in open court. If on the other hand, the Court feels at any point whether now or as I try to do that that it's more efficient to do it –

O'REGAN J:
Better to do it closed.

WINKELMANN CJ:
Have we got them?

O'REGAN J:
Yes, we have.

O'REGAN J:
We have got them.

MR KEITH:
– when you don't have the oceans of black, I'll do that.

O'REGAN J:
But yes, I mean I must say, my view is it's probably better to do it when we have the context which we'll get from the closed submission. It seems a bit artificial to me to do a closing submission before you made the opening bits of it.

MR KEITH:
I mean "closed" as in secure. No, yes –

O'REGAN J:
No, no, I realise that –

MR KEITH:
Sorry, Sir.

O'REGAN J:

– but it's, it would be better for us to have the unredacted view once rather than get a redacted view and then later an unredacted view.

MR KEITH:

I was allowed in this case to consult with some UK counterparts and they describe the hearings as having an *Alice in Wonderland* quality and I don't think they meant it in a nice way.

WINKELMANN CJ:

Perhaps we can come back.

MR KEITH:

But I'll take the point, anyway.

WINKELMANN CJ:

No, we might come back to that after lunch after we've had a chance to discuss it.

MR KEITH:

Certainly, Ma'am. I wouldn't want to belabour anything, it would just be hitting points, I think –

WINKELMANN CJ:

Because I wasn't aware that you'd done the redacted thing, so I need to look at it.

MR KEITH:

Oh, sorry.

WINKELMANN CJ:

I don't think it's your fault, I think it's my fault.

GLAZEBROOK J:

Well, the – yes, I wasn't sure that we've…

O'REGAN J:

Yes, I think we have got it.

ELLEN FRANCE J:

Well, I just wasn't sure about that from an efficiency point of view, and I wonder if the better thing might be if there are things subsequently you could say in open court, but…

WINKELMANN CJ:

In other words –

ELLEN FRANCE J:

Because reading it, you just come up against the black.

MR KEITH:

Often, and I wasn't going to say, you know, there's this point, I can't take your Honours any further on it. It was just a few – believe it or not, this is what's called a fairly full redaction.

ELLEN FRANCE J:

Oh, yes, yes. No, I appreciate it. It was just myself, in reading it. I didn't find, with respect, that it was helping.

WINKELMANN CJ:

All right. But it might help the public understand is your point.

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ELLEN FRANCE J:

Yes.

MR KEITH:

Well, that's the sort of unwilling *Alice in Wonderland* component, but I'll –

WINKELMANN CJ:

Yes, and the appellant.

MR KEITH:

Well, that's true, too, yes.

WINKELMANN CJ:

So, we'll discuss it over lunch and come back to you.

MR KEITH:

So, as I say, I'll speak to the opens first in that case and be guided on the latter.

The opening several pages of the submissions really are the points that I've already made, but just to outline, we have these – I have arranged the open submissions under five headings: the prescriptive character of the scheme; the requirements of the Security Council Resolutions; human rights obligations including the safeguards within this specific statutory scheme; the utmost good faith duty, although I may have said almost everything persuasive I can say about that already; and the remedial approach, that's the de novo power in the court below.

The first point in terms of the prescriptive criteria, as you've heard from Ms Aldred and I won't belabour, we watch – and I don't think there's any challenge to this, *Liversidge* which has been mentioned today once already, but I don't think there's a claim that the Minister's subjective belief alone is enough. What we need is an objective, rationally-based belief in the state of affairs and we cite *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 but there are other authorities too outside *Williams*. Others too.

As the outline that has been handed up sets out, we have four distinct statutory criteria within clause 2 and then the safeguards and then other interpretative context, so as I say, it is an intricate, carefully-drafted scheme.

As I say at paragraph 6 starting on page 4, so the Court of Appeal essentially said, well, the Minister had this material, had the statutory criteria, and stated in his subsequent explanatory affidavit that he had formed the view required by the Act. But when one looks at the Minister's decision, one finds something

else. Half way down the page on page 7, I have the excerpt from the Minister's redacted affidavit. They have to make the decision whether material poses a risk, are they a danger, is my understanding in this context and it's the context of the Security Council Resolutions that people travelling to ISIL-held territory with an intention are considered to increase the risk of terrorist acts. But, as I say at 8.1 and as I think Ms Aldred's already touched on, it is not a ban on travel, it is not a ban on joining ISIL, and I think Ms Aldred's already taken the Court to the parliamentary history that I cite at footnote 9. When this was enacted, it was emphasised that this is not the broad legislation, I think it's been called hyper-legislation that has been adopted in Australia, for example.

So we have the Minister, just on the face of his explanatory affidavit, expressing a different test, and likewise in terms of the other two criteria, whether the danger can be averted, whether cancellation will prevent or effectively impede the ability, it's framed in terms of the prospect of travel or adherence to ISIL, not preventing harmful activity or preventing facilitation of harmful activity.

I think Justice Kós brought up, one can say, well, cancellation of a passport is effective in preventing travel, and that's right, but our focus here is, preventing travel is not the objective of the statutory scheme. It has to be travel to an end. It has to be – or conduct, rather, that is impeded or prevented by denying travel.

KÓS J:

Well, you have to get through the first three criteria before you hit the fourth.

MR KEITH:

Yes, and one has to make the connection between the conduct and the travel, yes. So, quite right.

The further point is for the Minister himself, and this is something that we'll go into the detail of tomorrow, but at footnote 10, I've set out what the Court below found, and it's hard to disagree with the statements of principle they set out. The Court said, well a report needed to incorporate materially adverse information, it needed to offer a balanced summary, allow the Minister to

understand the case for and against. I think there was also reference to credibility in there which I haven't quoted, and there should be, and it's generally agreed, draw attention to the various statutory criterion and safeguards. Then crucially the quote at 86: "[T]he Minister, even if experienced… is likely to depend upon," analysis and also the reference to the international law component. This is, my point in this respect is echoing what I think I said to Justice O'Regan. It's that work that the Minister doesn't get if this duty is not imposed, and one can say it's not there and it's enough, but I say one should require it too, as the Canadians do. But the Court below, and this is at the start of footnote, didn't actually go through that exercise. It said, no, we're not going to organise the judgment around these criteria but rather make the assessment ourselves, and I'll come to that too.

Now, and I do say, and the Court of Appeal did not go quite this far, the Court enunciated these standards but then didn't apply them to the Minister's decision. The Minister just had no advice, for example, about the credibility of the information relied upon and no advice about the relevant Security Council Resolutions, and I'll come to the Court's own assessment later. And I'll also address the specific requirements of clause 2(2) there in the redacted closed submissions, but I'll be guided as to whether I do that at all here.

We then come to the Security Council Resolutions. As I say they are highly specific. They are concerned to preserve human rights and they are in particular focused on certain conduct. As I say, Resolutions are adopted under Chapter VII of the United Nations Charter, this is half way down the page, page 7, so they are binding upon Member States. They have been described in this counter-terrorism context as international legislation by virtue of Charter obligations. The operative parts, the parts called decisions, are legally binding and exceptionally take precedence over any other treaty obligation.

Here, this is 12.1, the Resolutions are central. It's not a question of, you know, they're interpretative aids, or one must have regard to them, or something like that, I'm conscious Justice Glazebrook has written an awful lot about domestic regard to international obligations. This is where we have legislation specifically

adopted to implement these very regulations. So as in the *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 case I footnote, the international obligation is central here.

WINKELMANN CJ:

So what would stop Parliament enacting legislation which is broader, more swingeing than the Resolutions?

MR KEITH:

It could do, and there would be nothing to stop it, but where we have, as here, carefully drafted legislation adopted to meet those obligations and not, say, as in Australia, introduce a travel ban, then we shouldn't be reading that in, or reading up legislation that is drafted with these specific purposes.

WINKELMANN CJ:

And you would say we wouldn't read it up anyway, because of Bill of Rights.

MR KEITH:

Well it would depend on what it said. I mean if it were a travel ban there would be next to no way around that, even under section 6 BORA.

WINKELMANN CJ:

Well we wouldn't read it up then.

MR KEITH:

You wouldn't read it up, no, no, sorry Ma'am. Quite right.

WINKELMANN CJ:

Right.

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MR KEITH:

Now over on page 8, it's not in issue the Minister hadn't had any advice about the particular Resolutions, or their application to the appellant. I accept the Minister says he has some knowledge of these. He makes a general reference

to UNSCR 2178 and as I think my learned friend said to her Honour Justice France, of course, the Minister can know those things.

My difficulty is, the Minister's actually said what he knows. He said you've got these obligations and he's talked about it in terms of increasing the risk and trying to stop that risk. But when one looks at 2178, it is very specific.

A further difficulty we have, and this is at footnote 22, same page, the Minister had never dealt with "facilitation" before. There had been no New Zealand application, the Minister says, of this provision before, and the complexity that they've introduced is it's not only what "facilitation" means, although that's complex enough and I'll come to that, but it's also that if one thinks about it, the case being put is completely different. Members of the Court have brought up the example of someone whose intention, as put before the Minister, is to go and become a fighter and do whatever they're going to do. But if the intention is to facilitate, it introduces a new intervening area of evidence and analysis. It is a different thing. We all know what an intention to commit looks like. An intention to facilitate, rather more difficult, both conceptually and in any individual case.

When one looks at the specific terms, so Resolution 2178 was adopted by the Security Council in 2014 and led to the amendment and expansion of the Passports Act scheme to add a provision that a passport could be taken away not only out of danger to New Zealand but also danger to countries other than New Zealand.

At the top of page 9, and it's up on the screen, we have a very specific term. We are preventing "the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents…" So that is exactly what is in issue here. And that focus upon "terrorist and terrorist groups" is carried on. I think it said there's a – this term "decide" in a Security Council Resolution is the critical point. That is the part that binds. You first have that there must be consistency with human rights law, refugee law and humanitarian law, so law of armed conflict. You must "prevent

and suppress the recruiting, organizing, transporting or equipping" individuals who travel to another state for the purpose of perpetrating, planning, preparing or participating in terrorist acts, provide or receive training, finance travel and other activities. So we have a very concrete idea of what is being prohibited.

GLAZEBROOK J:

But that hasn't been brought through into the legislation. I'm just having a slight difficulty in seeing the relevance. Are you saying the Minister should've been advised on this and told to interpret the legislation accordingly? Or what's the submission?

MR KEITH:

Yes.

GLAZEBROOK J:

Well, where's facilitation in that?

MR KEITH:

We have – I'm coming to the term "facilitation", Ma'am, which is used in other Security Council Resolutions as another cognate term. It's not used here, but there is an interchangeable set of prescribed acts found in the Resolutions over about a 15-year period including these, so when – but, my point, Ma'am, is the legislative history, I don't think it's an issue, says that this specific power was enacted to give effect to 2178, and that is how I say it must be read. One could in isolation read the term "facilitate", "intention to facilitate" in all sorts of ways. One could, as my learned friends for the Minister now seek to do say that it had a common sense meaning or a dictionary meaning, but that's not the context we have. We have a context of Resolutions specifically given effect by this legislation.

ELLEN FRANCE J:

I'm not sure what it is you're saying telling the – what would the Minister have known that – what would it have added to the Minister's knowledge in terms of

saying, you've got to interpret this according to the Resolution? What does that translate into?

MR KEITH:

What that translates into, in my submission Ma'am, is this. We have no advice whatsoever on what facilitate means, given to the Minister.

ELLEN FRANCE J:

Well, that's a different point.

MR KEITH:

So that's problem 1. But the further point, and where I say we know what facilitation must mean under the Passports Act scheme. We can look to this Resolution as defining it, and if the Minister were being advised in terms of this Resolution it would not be, I think your Honour's question is what would the advice essentially say, the advice would say, this is how this term is used. This is what this prohibition is –

GLAZEBROOK J:

But it's not used in the Resolution so I don't see how…

O'REGAN J:

"Facilitate" doesn't appear in the Resolution.

MR KEITH:

No, no, sorry, as I'll come –

WINKELMANN CJ:

You're saying, I think, that the Resolution shows you what the purpose of the provision was, and therefore that assists you in interpreting "facilitation".

MR KEITH:

What the purpose of the amended legislation was.

WINKELMANN CJ:

Yes.

MR KEITH:

Yes.

ELLEN FRANCE J:

Well I understand that, but I don't understand what that then translates to in terms of the definition or the approach to "facilitation" that you say flows from that.

MR KEITH:

Yes, and where I come back to is if one looks at this terminology in the second paragraph, the decisive paragraph that I've quoted, and this decides that, that is the meaning, that informs the meaning to be given to the term "facilitation".

GLAZEBROOK J:

Can you just give us a – so "facilitation" means what?

MR KEITH:

So facilitation means –

GLAZEBROOK J:

Perpetration, planning, preparation or participation.

MR KEITH:

Training, financing. This is what we're looking for.

WINKELMANN CJ:

Well isn't it more likely to be the recruiting, organising, transporting your equipment? If you're talking about facilitation. That sort of…

MR KEITH:

There are two different things being done here. So the line that your Honour has just quoted is to do with stopping people who facilitate travel, who enable travel, who recruit, organise, transport and so on. So you must prevent that, so

that's number 1. But what I'm looking at is what it is the people travelling must do, and that's the focus of the Passports Act scheme, the second part of that paragraph. So preventing and supressing, recruiting, organising, transporting and equipping isn't peculiar to travel restrictions or bars. One could be sitting in New Zealand recruiting or transporting people, or buying tickets, or whatever, and would have nothing to do with the Passports Act scheme. My focus is on the second part, the conduct that is targeted here.

ELLEN FRANCE J:

I suppose what I'm struggling with is how does that take you much beyond saying there's got to be some sort of specific act, and it's obviously got to be an act that then…

MR KEITH:

What I think I'm pushing against Ma'am are two submissions being advanced for the Minister. One is what the Minister himself said in the affidavit which was you would provide material support either as a spouse, I'll come to whether there's any evidence about that, or providing technical ability in terms of IT, uploading things to the web or something like that. My point is, I think one you've traversed with Ms Aldred already, which is there's got to be some concrete contribution to a terrorist act. That those things, enhancing being a spouse, if that's, or putting things online, putting up propaganda, that's not enough because we get a cognate sense of what is enough. You are talking about training people. You are talking about financing people. You are talking about helping plan or prepare acts, and those things, being a spouse, putting up propaganda, that is in general terms, don't fall within this cognate. So that is the first thing I'm pushing against. Sorry Ma'am?

WINKELMANN CJ:

Carry on.

MR KEITH:

The second is the case as now put for the Minister, and it wasn't the Minister's decision, was that simply by going, living in ISIL territory as an ISIL person itself

facilitated terrorism, and that is not the terms of the Passports Act provision. We need to find a facilitative act. A travel ban would be engaged by that. This is not.

1250

WINKELMANN CJ:

So you're saying that when you construe this provision in the light of this, you can see that it's looking at the core terrorist activity, it's not looking at the people who do the peripheral, as it's said in *Khawaja*, who do peripheral things which might be said to assist, like providing an evening meal or marry and provide support.

MR KEITH:

Well, marching in a – I think they give the example of marching in a nonviolent protest advocating for the terrorist entity with that absolute intention, but it's not materially enhancing anything, and I think I have the excerpt from *Khawaja* later in the submissions where the Court says that has to be right in terms of charter terms as well as statutory scheme terms. So I –

KÓS J:

I struggle with this argument, Mr Keith. It seems to me the perpetration, planning, preparation or participation in sounds awfully like "engage in", and the definition is "engage in or facilitate". I mean Parliament's intended something here beyond engagement.

MR KEITH:

Yes.

KÓS J:

When it's put in "facilitation".

MR KEITH:

Yes, and so has the Security Council when it's used that term, and I'll come to that, but the point I'm taking from this but also from the specific references to

facilitation is we are talking about some form of significant contribution, not advocacy, for example.

KÓS J:

Right, well that's probably supported by the fact the person also has to be a danger.

MR KEITH:

That also helps, but I think we have to take your Honour's fore-points. I think we have a problem at point 1 as well which is advocating in general for an entity is not facilitating anything, and that's *Khawaja* too.

Under paragraph 16, so this meaning of "facilitation" point, and this is where I get to the more detailed provisions – detailed references in Security Council Resolutions. I'll start from first in the statutory scheme.

ELLEN FRANCE J:

Just on advocacy, that presumably in some situations can overlap with recruiting.

MR KEITH:

Yes. So, I said what I was pushing against in terms of what is being said for the Minister. 16 is premised that this isn't a criminal offence, and so was this cast more widely, but as I say over the page, the relevant offence provisions are directed at the same overall listing of prescribed acts, and the term "facilitation", this is to pick up on the point that there isn't an express reference here, subsequent UN Security Council Resolutions or, sorry, related to UN Security Council counter-terrorism Resolutions do use the term "facilitation" as part of the group of prescribed activities. So one has to take that set, in my submission.

WINKELMANN CJ:

16, Mr Keith, should that be counter-terrorism offences or terrorism offences?

MR KEITH:

Well, terrorism offences. You're right.

As I say, what I'm pushing against in 18 is that the adoption is also the adoption of an ordinary meaning, making acts easier to accomplish. What we have is a provision adopted, so this is 19 on page 11, adopted to give effect to the first counter-terrorism Resolution of the Security Council 1373, so this was passed weeks, I think, after the September 11 attacks, and first brought in the passports cancellation power, that we, about preventing, and attacks were about preventing, and this is where the term facilitate first comes in, and I said that this is used as part of a cognate set of proscribed activities. So first up at footnote 33, referring to Resolution 1566, one of the other set of these cross-referenced in 2178, we have criminalising acts of planning, preparation, facilitation, support including financial support, conspiracy and the New Zealand legislation is described as meeting that standard of criminalisation. My learned friend says that it doesn't, but this is what UN understood, or was told by the New Zealand government it had done.

But then as at 21 I say that, and I think you've already had some of this from Ms Aldred, we are dealing with international obligations that govern ancillary liability. When one uses the term "facilitation" in this context it's particularly in terms of article 25(3) of the Statute of International Criminal Court, so we are looking at aiding, abetting, otherwise assisting.

GLAZEBROOK J:

Can you just make sure that you are talking into the microphone? Otherwise I suspect the transcription is not going to be able to pick it up.

MR KEITH:

Sorry Ma'am. Ma'am, thank you. I was also thinking while I was talking which probably wasn't a good idea.

WINKELMANN CJ:

Yes, you are almost mumbling.

MR KEITH:

I'll stop.

WINKELMANN CJ:

Because it's actually soporific when you go into that.

MR KEITH:

I'm not sure that's a good thing Ma'am so I'll stop right away.

WINKELMANN CJ:

No, it's not a good thing for you.

ELLEN FRANCE J:

Mr Keith, sorry, but 1566, is that specifically referred to in 2178 or is it just that they're all a group?

MR KEITH:

It is specifically referred to in 2178. So the – I can, we can bring that up.

ELLEN FRANCE J:

Just at some point, thanks.

MR KEITH:

Yes.

WINKELMANN CJ:

So you're saying these are a family of provisions?

MR KEITH:

Well there's – I'm about to use a rugby metaphor, of a rolling maul or something, but I probably shouldn't.

WINKELMANN CJ:

I think a family might be better actually.

MR KEITH:

Well they start off with 1373 which sets up the counter-terrorism regime, and in New Zealand led to the passports ban being introduced in the first place.

WINKELMANN CJ:

They start with 1373?

MR KEITH:

Yes Ma'am.

WINKELMANN CJ:

And that's post-9/11.

MR KEITH:

Immediately post, yes, and it set up two things. One was a series of restrictions on individuals, the other was the designation of terrorist entities, and then what one can see travelling forward, up to 2178 and beyond, is constant reiteration of these obligations, and they are obligations framed in terms of what I say is this cognate set of proscribed conduct, and the term "facilitation" is used. It is not used always, but the terminology, that same set approach is used throughout, and what one can see, and –

WINKELMANN CJ:

So 1566 comes in, what does it do?

MR KEITH:

I'll come back to that after the break if I can.

WINKELMANN CJ:

Okay. It just, actually, I'm finding it helpful to see it as a family and see it's evolution. So if that's of assistance. We have two minutes until the break.

MR KEITH:

Yes, so I'll make a note of that and come back to those after the break with those up. I think the short point that I can make in terms of that, and again I'll,

as – two points. One about the submissions and the discussion that your Honours have had with my learned friend Ms Aldred, and it maybe I'm slower on the uptake and you've already got this point, the analogy of attempt and inchoate offences is apt in this context too because one is looking for cognate conduct. That is the nature of the term facilitation interpreted in the Resolutions, interpreted in article 25 of the ICC Statute. So we are not dealing with some much wider or diffuse concept. We are dealing with something that has been specifically adopted in the Resolutions as connected to the commission of an act. The fact, and we have, we can get there four or five different ways in the statutory scheme and beyond, but our common point, the common end point is there must be some concrete contribution to an act, not a known act but one must be able to say here is facilitative conduct, here is its impact and we are trying to stop it. One can get there by analogy with inchoate offences. One can get there by the fact that cognate terms are used by the Security Council Resolutions. One can get there through article 25 of the Rome Statute. One can also just get there looking at the statutory scheme. What's the Minister trying to do here? The Minister is trying to prevent a form of conduct that will enable or enhance.

GLAZEBROOK J:

But you only have to intend to facilitate, don't you?

MR KEITH:

You do.

GLAZEBROOK J:

So attempts are really just not a good analogy

MR KEITH:

The one point that occurred to me, your Honour, and your Honour and Ms Aldred have gone into this in depth, and I'm not going to – the connection, the useful tool, if you like, in the inchoate offences, jurisprudence is the actus reus, as your Honour said to my learned friend, you haven't carried out the attempt actus reus in this context. You intend to do something, you haven't

done it yet, so the dreadful things in *Harpur* for example. But if you're looking for what is the Minister believing someone to intend, intending an actus of that kind, is the answer. You need something that concrete. I think that's a good point at which to stop, and I'll come back on the Resolutions and then the others.

WINKELMANN CJ:
We'll take the adjournment.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.18 PM

WINKELMANN CJ:
Mr Keith, we've reached no concluded view on your redacted submissions, but I suggest we can proceed on the basis that we're not going to hear from you today on them anyway.

MR KEITH:
I've also conferred with Ms Aldred and with my learned friend both about that and also about timing. If I can briefly speak to those two things.

WINKELMANN CJ:
Yes.

MR KEITH:
I had probably a slightly purist view that as other final appellate courts have said, we should say as much about the closed case as we can here. Ms Aldred has pointed out that her client already knows an awful lot of what I'm allowed to say because she's got the redacted submissions. I've also talked to my learned friend and we – I'll come to that about time. But I think the point, while I – we did put quite a lot of effort into the redaction and now it's got a sort of audience of one. I do also take the point that it's not exactly informative to get to page 3 and start into the oceans of black. There are two or three points really only that I could make in any meaningful way in the redacteds. So if I just do that in the

closed session I think that's as best we can do and otherwise it's going to be more *Alice*-like than it needs to be, I think.
1420

The other point as to time, I'm obviously going to be as efficient as I can be.

WINKELMANN CJ:
Well, we're not going to force you to be – we're not going to push you to be unhelpful.

MR KEITH:
I will try not or…

KÓS J:
What were you thinking of saying?

MR KEITH:
What I was thinking of saying was I talked to my learned friend for the Crown. He doesn't think there's any way however efficient I am now that he'll be done by 3.45. There's also some prospect that either Ms Aldred or I or both of us will have something to reply to in open after the Court's had his submissions and questions.

We had initially thought that we would arrange for sort of half and half between open and closed, so start the closed tomorrow afternoon. I am informed we can start the closed session any time tomorrow, so we may know by first thing tomorrow morning or by morning tea whether we're done and can go across the road.

WINKELMANN CJ:
Yes, okay.

MR KEITH:

Now your Honour, the Chief Justice, had very helpfully, I say, and I'm not being oleaginous about that or indeed anything else, asked me to go to the UN Security Council Resolutions and I think that is exceedingly helpful, not to mention avoiding the soporific effect.

So if we can go first to Resolution 1373, which should be on your click-share screen. So as I was saying, and as your Honours will note, this was adopted just under four weeks after September the 11th. This was the fons et origo, the starting point for United Nations Security Council Resolutions countering terrorism generally, obviously, particularly sparked by the September 11 attacks.

The critical points about 1373 that I was just going to make really start at page 2 of the Resolution. So I have pointed to in the written submissions and mentioned this morning this term "decides" is the designation of an operative part of a Resolution, that the Security Council can urge, it can do various other things, but when it decides, that is binding on the member states, and your Honours will see we have, first up, financing, we have funding and then at 1(c) we have freezing assets of people who commit, attempt to commit, participate in or facilitate, and this is where I say the term "facilitate" acquires a cognate definition and a concrete definition.

We then see facilitation again coming up at 2(d), that is we're preventing people from using territory to "finance, plan, facilitate or commit", and then there's an important point and, as I was saying, not all of the uses of these terms use the term "facilitate" and that's why we have to go to some other Resolutions in a moment. But first up, we have criminalisation under 2(e), any person who participates in financing, planning, preparation or perpetration is brought to justice.

But we also have, at 2(g), and this is the starting point of the Passports Act prohibition that we have here, preventing "the movement of terrorists or terrorist groups".

So I have said at paragraph 19 of my open submissions, that is the touchstone, in my submission, for interpreting the term "commit or" – "engage in, or facilitate". We are not concerned with, and I'll come to more reasons for this, with glorification or advocacy or protest in favour of. It is all about those concrete acts. So that is 1373. That's the first resolution passed.

Then 1566, the other that I had mentioned briefly, and I'll just grab my print copy of that, as far as I can tell, so there is, as you'll see, sorry, there is as you'll see at the very first recital on page 1, there's a recall back to Resolution 1373. Resolution 1267 is a sanctions Resolution, that's another thing, but what we have going down the page first, this is the first mention of this, it wasn't found in 2001. The recital, I think it's six down, reminding States that "they must ensure that any measures to combat terrorism comply with all of their obligations… adopt such measures… in particular international human rights, refugee, and humanitarian law." So that is where we get that obligation being brought in, being emphasised.

Over on page 2 of the Resolution, and this is the part that I mentioned as far as I can see, and you'll see in a moment, that there are let's say a considerable number of these counter-terrorism Resolutions, and I'm not going to go to anything like all of them. Paragraph 2 is the first reference to facilitation as part of this cognate offence. So we had facilitation in 1373, but it was to do with things you might do from another territory, things you might do with funding and so on, or rather requiring asset freezes, but here we have it being brought in as – same term, but now as a component of a category of criminal offending that Member States are called upon to prosecute and pursue.

KÓS J:

Interestingly we also have "supports".

MR KEITH:

Yes.

KÓS J:

Which seems to me to be something lesser on this in-scale, probably.

MR KEITH:

I think so. I think that given the context of criminalisation we're still talking about something concrete, but I think, that's right Sir. The next resolution is Resolution 2178, and I should here correct something that I may have said to her Honour Justice France, and I'm sorry about that. I think your Honour asked if Resolution 2178 cross-referred back to Resolution 1576. It doesn't. The next one does. It does cross-refer back to Resolution 1373 and the couple of points I wanted to take from Resolution 2178, first is your Honours will notice these keep getting longer, and more detailed, and more protective, and more restrictive in various ways. So first up we have this emphasis in the second recital that – first and second recitals – that there is terrorism generally. We are not concerned solely with the evil of the ISIL, or with anything like that. This is about a general law. Second, and in fuller terms, Resolution 1576 referred to compliance with human rights. We now have a very long recital at the foot of the first page reaffirming all of these things and I think I said this morning that the point about "underscoring that respect for human rights, fundamental freedoms and the rule of are complementary and mutually reinforcing with effective counter-terrorism measures".

So when I said very early on that this was a rule of law case, and that this was about a rule of law regime, that is where I bring that from.

Over the page, on page 2 of the Resolution, what this Resolution was particularly directed to was this concept of a foreign terrorist fighter. So this is at recital 1 on that page expressing grave concerns, and these are people who go to another country to perpetrate, plan, prepare, participate, provide or receive training. So that is now the focus, and it is this Resolution 2178 that led to the broadening of the Passports Act power.

The one other thing that I take just from these recitals, and then I'll come to the crunch point briefly, further down the page we have a whole host of

mechanisms, this is the, I think it's sixth recital on this page, "recognising that addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying factors". So there's "preventing radicalisation, stemming recruitment, inhibiting foreign terrorist fighter travel", so that is a very narrow set, and part of the set of measures, disrupt foreign financial support, countering violent extremism, which your Honours will know about, countering incitement, promoting political and religious tolerance and the like.

1430

So the passport cancellation, the restrictions on movement, are very much one subset and they are not directed at, for example, incitement or propaganda. We are very much focused again on the prevention of acts and that does make sense but it's also what the Resolution indicates.

Finally on page 4, so two pages ahead, we get to the decision. So paragraph 5, prevent and suppress the training, recruiting, organising, equipping, and people travelling for the purpose of perpetration, planning, preparation or participation in, or providing or receiving training or financing. So that is the target of this measure. That's that decision.

I think that was everything I wanted to say about that, and there's one more Resolution which is 2395 and we'll just bring that up. As you can see from the first recital, I have given your Honours four Resolutions. We could talk a lot about quite a few of the others but there is a family. The couple of things I just want to mention from that, first up, we have at page 2 this emphasis on human rights and again in the first recital we have at the foot of page 2 reiterating prevention of movement by terrorists or terrorist groups, and over the page in the same recital we have, recalling back to the words of 1566 which is cross-referenced, the concept of bringing to justice, extraditing or prosecuting any person who support, facilitates, participates or attempts to participate in financing, planning, preparation or commission.

So this is a – I acknowledge and I – this is a resolution that followed all of these amendments and the Minister's decision, but the broad point I am looking to make is that there is a consistent line from 1373, the origin of this power, through to 2178, the origin of the extended power, and then in this sort of recapping Resolution in 2017 of the concept of facilitation as part of what I've called a cognate group, and again the emphasis on – I suppose what I'd say is the emphasis on these concepts having a meaning under the Resolutions. It's true there is no definition. No one says: "Well, 'facilitation' means this." But it is used repeatedly in the context of criminalisation and used in that category of proscribed or prescribed, both, I suppose, activities. So I –

GLAZEBROOK J:

So what do you say we take from that as to what it means in a sentence?

MR KEITH:

I think what I'm saying is that this is – well, two things. First, it has a meaning at all in international –

GLAZEBROOK J:

Has a what, sorry?

MR KEITH:

It has a meaning. One must look to this context to interpret this provision. A law dictionary, common sense, is not enough. That's a process point. But my second is that taken in the context of each of these provisions, especially those obligation to criminalise, or provisions for criminalising, 1566 and since, facilitation must take – the meaning must take its colour from the other terms with which it is used. It isn't just a question of in some way enhancing the reputation of a terrorist entity or of engaging in advocacy for a particular viewpoint. Those things might well – and this is where the *Khawaja* case, which I'll just come to quickly too, is useful. If one was so inclined one could be motivated to carry out some terrible act by all sorts of things. But this is about concrete contributions. That, I think, is the short point in answer to your Honour's question.

GLAZEBROOK J:

Concrete contribution to what?

MR KEITH:

To a terrorist act. The fact someone might be inspired, not enough, for example.

GLAZEBROOK J:

Well, an intent to make concrete contribution?

MR KEITH:

Yes, sorry, that was just in terms of what "facilitate" means, yes. You must intend to make a concrete contribution.

GLAZEBROOK J:

But no particular terrorist act? Do you accept what Ms Aldred has accepted or…?

MR KEITH:

Yes, I very much liked Ms Aldred's use of the term "category of conduct". It's really hard to see how otherwise one could say that one is contributing concretely to a terrorist act unless there's some category of act and you can show the causal link between the help, the facilitation and the act. But not as to specifically when, by whom.

Just before I move on from the concept of facilitation, I did want to address a number of points made by my learned friends for the Minister. If I could bring up their submissions, and page 17 first up. So the first and complete paragraph is the premise that facilitation includes, I'm sorry it's over the page on 16, includes the act of travelling to join ISIL by living in its proclaimed caliphate, and for all the reasons that Ms Aldred and I have given, that is not, that cannot amount of facilitation of anything. We don't have a causal connection to an act, and this isn't a travel ban, it isn't a ban on association. So that is, that, we say, cannot be right, and there isn't a basis for it.

Second, paragraph 55, contribution going well beyond and the caliphate itself had a terrorist purpose. My learned friend and I will address you, for the Crown, will address you more on this in the closed, but I think I can say that it is not consistent with that focus on a terrorist act to say, well these people, this entity had a terrorist purpose. That doesn't get you to individual intention to facilitate an act. I'd also say that isn't any part of the Minister's reasoning.

Next along paragraph 56 the obligation to stem the flow of foreign nationals into ISIL and other terrorist groups. We've been to Resolution 2178 just now. It's about foreign fighters. It's about people going to perpetrate, prepare. It is not a general prohibition or restriction on foreign nationals. The focus, again, is on the individual conduct.

WINKELMANN CJ:

What paragraph was that in the Crown submissions, sorry?

MR KEITH:

So at paragraph 56, final sentence, Ma'am.

WINKELMANN CJ:

You would accept to stem the flow of – what was the Resolution you used?

MR KEITH:

Foreign terrorist fighters is the term, and that isn't, it's not literally meaning that person has to have a gun and a uniform or whatever, gun and not a uniform possibly. It includes people doing training, for example, of fighters, that is caught. But it is not foreign nationals simpliciter.

1440

KÓS J:

Presumably providing some direct support to an organisation that is predominantly terrorist in nature, is what we're looking for?

MR KEITH:

The easiest case, and we get some idea in the *Khawaja* prosecution for example, if you had an entity, a group that is only about terrorist activities, so in *Khawaja* you had a group of people who were just causing to cause mayhem, that was all they were about, then supporting that group, knowing what they are, you're facilitating their acts, because they don't do anything else. Beyond that you get into questions of what the causal link drawn before the Minister is. There are going to be instances where the contribution, coming at it from the other end, is so clearly directed at a terrorist act. Ms Aldred already gave the example. If you provide instructions on how to prepare improvised explosives to an entity like that, it's not as though there's a benign purpose. But where it gets woollier, if we're into advocacy, propaganda, communication then the causal link is going to come under much more scrutiny, or is going to have to be made out rather on the evidence.

Now just going back a page in the Crown submissions, 53, three lines down, same point I've made already. Travelling to ISIL held territory to join ISIL, no, and likewise, foreign nationals travelling to Syria or Iraq to join ISIL, no. "The presence of foreign nationals in the so-called 'Islamic State', may well have been, I don't know whether we've got evidence of this at all, I'd have to check, but the presence of foreign nationals was a critical element of the ISIL project. It doesn't really tell us anything about facilitation of terrorist acts. As Ms Aldred has already touched on, and there are references in the footnotes, ISIL was promoting itself as a proto-state that was theologically pure, advertising itself to families, for example, to go there, and they were not only – they were a proto-state, they were not only engaged, like my group of people in *Khawaja*, in terrorist acts.

Still on the definition of "facilitation" and particularly this argument now made in the Crown hand up this morning, if I can go back to page 12 of the Crown submissions. So the top of the page is an answer to the point made at paragraph 20 of my submissions. The New Zealand government had held out that it had criminalised facilitation. My learned friends said they hadn't used

that term, but I think it comes to the same point. That we are talking about that group of prohibited activities.

The two points, just going down page 12, that if the Government were in possession of evidence of actual criminal activity it would be expected to take more action than cancelling a passport. Well, that's true if the activity had been carried out. No one is arguing that this requires the carrying out. It's focused on intention. But it's what, my submission, not sure if I'm just stating the obvious, but, is that what's intended has to be part of that same category of offences or category of conduct that's prohibited by the Resolutions and so forth. So the fact you couldn't prosecute someone for an intention to facilitate an offence doesn't matter. That's where the intention part comes in. It doesn't change the nature or broaden the nature of the prohibited conduct.

There's also the problem, of course, that it's on reasonable grounds to believe on the Minister's part, so we're not there either. The reference from *Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534, a United Kingdom Supreme Court decision about asset freezing, and that's on page 2, when one reads the excerpt the premise is, well, one can freeze assets to stop terrorist conduct in another jurisdiction, five lines down, four to five lines down: "In all probability the British courts will not have jurisdiction to prosecute an individual for facilitating terrorist acts in Utopia." So we're not talking about whether facilitation is part of this cognate group of prohibited activities. The objection is jurisdictional and that's also clear from the excerpt from 165, lines 2 to 4: "A state should freeze only the funds of individuals whom it could itself charge …" That word "itself" is the critical point. So it is not necessary to freeze assets that the conduct is prosecutable. What I am saying is the conduct must be of the same kind. There is no reason to read it as some kind of outlier, some –

WINKELMANN CJ:

The intention, the conduct the intention is to carry out should be of the same kind?

MR KEITH:

And the facilitation should be of the same kind. So we have –

WINKELMANN CJ:

The conduct facilitated?

MR KEITH:

Well, no, no, the facilitation itself. What you're doing, if you do the facilitation you may well commit a criminal offence. If you intend to do that facilitation you can lose your passport. But the two should have the same meaning "facilitation" in both contexts.

O'REGAN J:

Does that work though when you don't have a criminal offence?

MR KEITH:

I think where I get to is you're going to have a criminal offence.

O'REGAN J:

But you can't construe a statute by what might happen in the future.

MR KEITH:

Well, the Terrorism Suppression Act you can because it doesn't matter whether the act is carried out, for example. You can be prosecuted for preparatory steps.

O'REGAN J:

For doing it but not for facilitating.

MR KEITH:

So facilitate, I'm saying that concept in New Zealand criminal law implementing counterterrorism obligations is caught by these other offence provisions, so the preparing and so on.

O'REGAN J:

Yes, but then in this statute they use a different word, facilitate, which suggests that it's a different concept.

MR KEITH:

They do but it is giving effect to the same obligations. I think that's my – what…

O'REGAN J:

Well, it would be a much stronger argument if a criminal offence –

MR KEITH:

Was called "facilitation", yes.

O'REGAN J:

Yes, exactly.

MR KEITH:

Yes, you're right, your Honour, but what we have underpinning all of this is New Zealand was obliged to make these offences and make these passport restrictions. It's done both, we say, the government has said to the UN and so on, and having done both I'm saying that the concepts can't be different. One doesn't read where they've used the term "facilitation" more widely than in the criminal offences.

O'REGAN J:

But isn't the contrary argument also available, that they chose one language in the criminal offences and a different language in the passport provision and therefore they intended something different?

MR KEITH:

That would be, that is the contrary argument in terms of statutory language, but this is where I come back to the Resolutions being controlling in terms of interpretation. The fact it's been in perfectly – or worded in ways that are different, doesn't alter the underlying content.

WINKELMANN CJ:

And you would say that if they wanted to set off on a completely path, they would have said it far more clearly as did the Australian legislature?

MR KEITH:

Yes, you could, or as New Zealand has since. I mean there are now the post-Christchurch amendments which bring in new preparatory offences and so on. So it is possible to add, and you can bring in, as the Australians have, travel bans, or you can bring in, as several countries have done, a glorification or incitement or advocacy offence over and above what the Resolutions require.

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MR KEITH:

And there are a couple of other passages where my learned friends for the Minister say that one is concerned – that, again, travelling to ISIL is facilitation and the answer's the same that it isn't, and it isn't required to be.

Two other points in the – while we're on facilitation. Page 21 of the Crown submissions. So this is dealing with the Canadian law and I think your Honour Justice O'Regan might have already picked up on this. The Canadian criminal law is another example of this going above and beyond people who are contributing – I'm reassured I don't have to interpret this one for this case, it is "participat[ing] in or contribut[ing] to…any activity…for the purpose of enhancing the ability of a terrorist group" and then we get into "to facilitate or carry out".

So I think "enhancing ability" must be another step beyond. I found the group as it is, with no intention other than supporting it, but I have to know what it is, but I don't know what's going to follow, I may not know the kinds of activity the group undertakes. There, it wouldn't be, in Ms Aldred's term, a category of conduct that I have in mind. I've just enhanced their ability to do whatever it is. So again, we've got wider terminology there.

WINKELMANN CJ:

Sorry, what paragraph were you at on the…

MR KEITH:

Where, I was looking at 72, that excerpt from section 83.18(1).

Over the page, and this is even with the benefit of the wider provision, and this is, I think, very useful from a case called *R v Ahmad* [2009] OJ 6151 (ONCJ) not *Ahmed* as we had. You don't know exactly what particular crime is going to be committed, but you know something bad will be done. The person knows you're helping them. So you do know something bad. You do know that there is a category of activity that you're helping.

I think that's everything I have to say. Oh, sorry, the point that came up with Ms Aldred earlier today in the control orders legislation, this concept of facilitating or supporting materially, and I have – my learned friends' hand-up, the Crown hand-up from this morning, gives the references or gives the terminology and I think there's already been some discussion, but the one thing I would say and if we can provide a –

WINKELMANN CJ:

Sorry, can you just go back over that? What are you talking about, Mr Keith?

MR KEITH:

I'm talking about the 2021 amendments that my learned friends have spoken to.

WINKELMANN CJ:

Yes.

MR KEITH:

Sorry, your Honour. And this concept of material support. I think it may have – and my learned friends Mr Martin's and Ms Laurenson's hand-up does give the provisions or gives the terminology, and I think there was a discussion with the Bench and Ms Aldred about didn't "facilitate or support materially" indicate

two different concepts. The one thing I can say, and it might be, having had the hand-up and focused on it, I might be able to say more tomorrow, but the 2021 amendments and including – and the control orders legislation which may have preceded it, I need to check, is expressed to broaden the scope of counter-terrorism legislation, so whatever "facilitation" does mean, "material support" is being added as something more. If I have anything more on that, I'll come back to it.

O'REGAN J:

When you say "broadening", doesn't that mean making a wider range of behaviour subject to it?

MR KEITH:

Yes. So adding the word –

O'REGAN J:

So materially supporting is presumably a lower test than facilitating, is that what you're saying?

MR KEITH:

That's what I'm saying.

O'REGAN J:

Right. That's it.

MR KEITH:

So as I – yes, I'll leave it at that. That brings me off "facilitation" unless the Court have any further questions on that.

WINKELMANN CJ:

Are you going to take us to *Khawaja* or have you dealt with that, you think?

MR KEITH:

Oh, sorry. I do take you to *Khawaja* under human rights.

WINKELMANN CJ:

Okay, no, that's fine.

MR KEITH:

I mean, one can do it either, but –

WINKELMANN CJ:

No, you take us to it wherever you wish.

MR KEITH:

Shall do. So coming back to my written submissions, page 12, we are at now onto compliance with the Bill of Rights Act, including in light of this Court's decision in *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459. First up, we have specific human rights protections baked into the PA. It's specifically provided in the PA and TSA schemes, and why I say both Acts. We have the exceptions for protest, advocacy and dissent in ground conflict in section 5(4) and 5(5), but we also have, within the four criteria under the Passports Act alone, and this will sound very familiar to the Court in thinking about section 5 of the Bill of Rights Act, the Court – the Minister must be – must believe on reasonable grounds that it's going to be effective and that nothing less will do. So that's in the Passports Act, too.

As I've said and as your Honours have already heard, Resolution 2178, also the preceding Resolutions refer to human rights compliance.

On 13, and I'll just make the point briefly, but it is an important one, Ms Aldred took your Honours to the definition of terrorist act this morning, and one does have a basic difficulty that counter-terrorism powers are directed at what is otherwise – or what is potentially, what is at least in part, I should say, protected conduct, advocacy of an ideological, political or religious cause. Obviously, it adds unacceptable violence to that, but one can engage in the unacceptable violence and not that cause and one just commits some kind of, you know, gross property damage offence or murder or something. It's the ideological cause that makes it terrorism that subjects it to measures of this kind.

So I say in addition to what this Court has already said in *Moncrief-Spittle*, one has to come to counter-terrorism powers. Certainly anything to do with, based on advocacy, based on beliefs or the like, with those rights front and centre, and I do say at the foot of page 13, too, this is again whether the rule of law concept is important, that in the term "prescribed by law", as in reasonable limits prescribed by law, one must be very clear, it must be foreseeable what one can or cannot do before becoming subject to measures such as the passport cancellation here or to prosecution.

I dealt with *Khawaja* on the following page, page 14. We've already touched on the offence, that participation in or contribution to terrorist group. The group there was, as I say, in any not in any way complex. The facts are pretty stark. There was a group of mostly young men engaged in or planning to engage in horrendous acts. But the Court, the Supreme Court did have a charter challenge to the offence rather than find the offences to breach the charter and so void the relevant legislation, one has the statute being read consistently. This is where I've already touched on. One could march in a non-violent rally with the specific intention of lending credibility the group, enhancing its ability to carry out terrorist activities, but that's not enough. It doesn't trigger the statute.

Likewise, 25.3 again from *Khawaja*: "…individuals [must] go….well beyond the legitimate expression of a political, religious or ideological thought, belief or opinion, and…engage in…violence" or threaten it to fall within the statutory scheme, within the statute. So it is more than de minimis. It is protective of expression, even distasteful expression, short of violence.

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I have already touched on at 26.1 on page 15 point that the third and fourth limbs, paragraphs (b) and (c), clause 2(2), echo a rights analysis, that is, is there a less restrictive alternative.

One point I'll come back to too is footnote 43 on that page, that is the premise that – and I think I already mentioned this from several of the Security Council Resolutions – passport restrictions, prosecution, are just two tools. States are expected to, and can, engage in, for example, deradicalization, other interventions short of – and that is where I say clause 2(2)(b) is engaged. Can one do other things?

Foot of page 15 going onto 16, I've dealt with the armed conflict exception. As I say at the top of 16, *Khawaja* was dismissed for good reason. There was no suggestion that anyone's conduct was anywhere near an armed conflict, but it has in other fact scenarios more complex than that, as we have here, been applied to distinguish between permissible and impermissible support. So if you have an entity that is engaged in both, the related support offences may be triggered by support for the impermissible activities but not by the permissible, and I won't take your Honours to it unless your Honours need me to but there's the van Poecke and others article at footnote 44 summarises some very elaborate decisions of the Belgian courts. Belgium has the same exception, not everyone does.

I've talked about utmost good faith already in answer to questions from, I think, Justices O'Regan and Kós this morning. As I say, it drives a couple of things, purposes. First up, as per *Charkaoui*, and this is on page 17, the Minister acts as a check. So does the designated Judge under the Canadian scheme, but they have a co-ordinate role. The Judge is not a judge on judicial review. The Judge is a designated statutory decision-maker under the Canadian scheme, and they need to be able to make this check. They need to be able to, as I've set out at 29.2, effectively perform the critical role of doing these things, including protecting the rights of affected individuals.

And I can give more colour to this in closed, but Professor Roach who as well as being a very eminent criminal lawyer is essentially the most prominent counter-terrorism academic that I know of, his point and the point made in his 2009 article, and this is with the benefit of his having served as counsel assisting, I think, two Royal Commissions involving intelligence decision-

making, he goes into some detail. I've given it a little here but there is more. The transition from providing intelligence assessment, warning about potential threats, identifying risks or lines of inquiry, and actually giving a concluded factual basis for an administrative decision or the like, is fraught, and, as Roach says, well, it's no great surprise that intelligence analysis conducted in secret and without challenge may also be wrong, and that is where this concept of a check, the concept of utmost good faith, is pulled in. Over the page and –

WINKELMANN CJ:

So when you're saying "check", it seems a little unusual because actually the Minister is the decision-maker.

MR KEITH:

Yes.

WINKELMANN CJ:

He's not checking the homework of the security organisation, but what you mean is that they must make – well, tell me if you mean this. They must make their workings plain enough so that the Minister can be satisfied that they have done appropriate work on which he or she can rely.

MR KEITH:

Plain enough and full enough, as in full and balanced. So I think I did use the phrase in a lower court of that the agency can't give a prosecution brief. It can't just give one side of the case. Getting back to my comments to the Bench this morning, that, in my submission, and certainly it's what Roach is getting at here, is it's not simply saying, well, this is the evidence we've gathered, it's actually making sure you've gathered the right evidence or a full and fair – you know, one thing Roach in the article talks about is the difficulty of persuading security people to go and look for exculpatory evidence because if you've identified a threat, well, the job is significantly done. Finding the other side might be a bit much.

O'REGAN J:

You've also got to be realistic about what a Minister can do. I mean, you can't just back a truck up full of paper and say here's our recommendation.

MR KEITH:

No. No, and one would need to explicate out it. I mean, as with all of these cases, it's about providing the salient points, the material points. It's not everything. But if there's no attempt at balance, if the Minister's being given one side of the story but not the other –

GLAZEBROOK J:

Are you saying *Air Nelson* is authority for you just giving what you want to give on one side because –

MR KEITH:

No, no.

GLAZEBROOK J:

– I wouldn't have thought that is at all what it means.

MR KEITH:

No, and I think your Honour was one of the three authors of the judgment, but I think, no, I'm saying that the *Air Nelson* standard in a non-ex parte, non-closed context, the appellant and plaintiff there, could look at what had gone to the Minister and say: "Minister, you were not told of our strong objections to the increase in landing charges and what that would do," and so on. You didn't get everything that was in the Ministry of Transport dossier or working – you didn't even get a hint of it. They were there. And so the decision failed for that reason.

So I'm not saying that *Air Nelson* permits a one-sided thing. I'm saying in this context, the *Charkaoui* and *Harkat* utmost good faith obligation goes beyond that to say because this is ex parte, it's not a participatory process, the advisors have to go further and give the full bill. They may have to go and find out the exculpatory information, because no one else is going to provide it. There's no opportunity to do that. So I'm saying *Air Nelson* entirely appropriate as the

standard in inter partes decision-making if I can – or open decision-making if I can call it that. This is adding something. This is adding this further duty to investigate and enquire and look for the other side if it's not there.

GLAZEBROOK J:

Well, is there anything further than just a few – wanting something ex parte, you've got to put everything in front of somebody?

MR KEITH:

I –

GLAZEBROOK J:

Because that would be the obligation if you're going for an ex parte injunction, wouldn't it? You can't just go and say, well, I've actually just not looked at that because I thought otherwise it might go against me.

MR KEITH:

And the same – I think it does go further in that, but when I look at the ex parte in civil applications, it's very much on you must put everything in your possession whether it supports or hinders. When one looks at it as extended and applied in the warrant cases, notably *Williams*, there's this language of being a devil's advocate as well, and I think that gets used in some of the ex parte civil cases, but I don't think it's expressed in those strong terms. So it's a little beyond –

GLAZEBROOK J:

Well, of course it's difficult in a civil context because you can't really go and say I know Smith Limited has got a whole lot of information, I'm just going to go and grab that.

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MR KEITH:

That's true. So I think that gets to another side of this, too. One can see the utmost good faith obligation as arising from the fact that the applicant or the

advisor to the Minister can in fact go and get more. They have the power to go and get more, and with that power, I say – it sounds slightly cheesy, I'm sorry – but comes the responsibility to do the even-handed job. So –

WINKELMANN CJ:

I'm still not quite clear what actually is this duty then. It's more than a duty of full disclosure so it's not enough that they disclose everything they know and everything contrary that they've come across. They must go further and actively seek out exculpatory –

MR KEITH:

They must seek out the contrary. So you might have everything, but the point of the duty is to make sure that you do.

ELLEN FRANCE J:

Can you just give me, you may have it in your submissions, the paragraph in – I don't know how you say it, *Harkat*, that say that.

MR KEITH:

Well, yes.

WINKELMANN CJ:

Could we go to it?

MR KEITH:

Certainly. *Harkat* is at paragraphs 101 to 102, and we're about to have that – it's in your authorities, I think, yes. Sorry, I don't have the number in front of me. Oh, it's in my bundle at 8. Sorry, that's why we're not finding it. Yes, and if we could go forward to paragraph 101, I don't have a page number but we can get that quite fast. So the particular issue on which the special advocates in that case were not successful, and so 101, duties of candour and utmost good faith required extensive inquiries of foreign intelligence agencies and the Court said no. But then they explain and adopt from *Ruby v Canada (Solicitor-General)* 2002 SCC 75, [2002] 4 SCR 3 which is a warrant case, and

then *Almrei (Re),* 2009 FC 1263, [2011] 1 F.C.R. 163, that you have to conduct a thorough review of the information in possession, make representations including that which is unfavourable, and over the page you have an ongoing effort to update the information and evidence but you have to do various things, and at 103 that you have to seek various… So that's where I'm getting this proactive obligation from, that it's not just what we've got.

ELLEN FRANCE J:

Yes, 101 to 103…

WINKELMANN CJ:

To 103?

MR KEITH:

Yes.

ELLEN FRANCE J:

I hadn't read that as necessarily going as far as you say, as I understand you're saying you've got a duty to investigate, to find the other side, if you like, of the story. I thought this was more about in the context where in fact what they'd done was destroy all the records as they went along; this was more about making sure what you had was up to date and you provided the necessary disclosure, but you're reading it as more than that.

MR KEITH:

So I think the destruction's actually one of the *Charkaoui* decisions that preceded this but they talk about it, yes.

ELLEN FRANCE J:

Yes, although they talk about it – that's true but they do make some reference to that here as well.

MR KEITH:

So first up…

WINKELMANN CJ:

It does look like updating at 103.

GLAZEBROOK J:

And it says no obligation to provide anything beyond their control.

MR KEITH:

Sorry, I was just looking at what my learned friend handed me. So 101 is very much everything you've got and, your Honour, as the starting point and the language of a check is in part about saying don't just give the end product, give the primary result, and that was the language used in *Charkaoui*, don't just give us the assessment, give us how you got there, because you might have misinterpreted it or whatever. But then where I see this going further is it is saying there is a proactive obligation, in this context it's to do with updating, but to continue to get what you can have, this is what I take from 102 to 103.

ELLEN FRANCE J:

Well, I understand it in the context of you can't put it before the decision-maker on the basis of material that's out of date, for example.

MR KEITH:

Yes.

ELLEN FRANCE J:

You've obviously got to provide, as I read this, is as up-to-date material. Otherwise, you're not – that's not fulfilling candour or utmost good faith. Seems to me a bit of a step beyond that to say, and what's more, you've got to go out there and try and find material that doesn't support your case, which is what I – but perhaps I'm wrong, you're not saying, going that far?

MR KEITH:

I think what I am saying, and it is a – I'm trying to think about how to put it in the abstract because we'll talk about it tomorrow –

ELLEN FRANCE J:

I was going to say, and I do find to understand in the absence – yes.

MR KEITH:

Yes. So, we can talk about that, but putting it in terms I know I'm allowed to say because it's in the unredacted bits, if, for example, one has religious material, not ascertaining what that is, is where I say this duty bites, for instance, and I use those terms reasonably if it's and so on in the excerpt from *Harkat* that we've just gone over to carry through to that.

ELLEN FRANCE J:

Right, well, if you've got material and you don't provide that –

MR KEITH:

Then you're out.

ELLEN FRANCE J:

– that might include some explanation of what the significance of that might be. I understand that.

MR KEITH:

And I think that's what I'm driving at.

ELLEN FRANCE J:

All right, all right.

MR KEITH:

I'm conceptually attracted to the idea that if one has very large information gathering powers, you must be under some obligation to use those in an even-handed way to look for the exculpatory as well as not, and the commentary to the utmost good faith duty in Canada, that Roach article to which I referred, very much framed in terms of look for the except this goes the other way. I will look more carefully at that just to see whether there is any further – whether that's just Professor Roach, and he's pretty good, but whether the

Court has endorsed that either here in one way or the others. But I think to take the carefully phrased example that we're talking about, if you have the material and you don't put it up or put it in context, then I think this duty isn't met.

One could say, to come back to Justice Glazebrook's question, I'm not – I think it –

GLAZEBROOK J:

I have a feeling we've looked at this in another context because – and I think said something about the, you have to, you can't just close your eyes to exculpatory evidence, but I'm just trying to – I'm struggling to think in what context it is. You haven't found it?

MR KEITH:

I'll look overnight, though.

WINKELMANN CJ:

Is it that if the material suggests the possibility of exculpatory material, you should follow it through or make clear that you have not? Because it seems –

KÓS J:

Sounds like a search warrant case.

WINKELMANN CJ:

It doesn't – I mean, it does sound like a search warrant case, which I think you refer to *Williams*, but –

MR KEITH:

Yes.

GLAZEBROOK J:

I don't think it was *Williams*.

WINKELMANN CJ:

– it just seems a remarkable thing to oblige the agency to actively go out and seek, in an unspecified way, balancing exculpatory material. Isn't it rather, which is completely consistent with the search warrant material, that if the material before you suggests an innocent explanation, an exculpatory amount of material might be available to you, that you should follow that through, and if you don't, make plain to the decision-maker that you haven't?

MR KEITH:

I think that's right. I don't think it's a general obligation. I think it is – I think your Honour's right. But I will look further for the –

KÓS J:

I wonder if it's enough, though. It seems to me that an intelligence agency just as a law enforcement agency is going to be somewhat invested in the case it's developing. Isn't the Minister's responsibility to ask effectively who's done the black hat exercise here? Who has actually worked out what is wrong with the case you're producing? When you have an agency that has that measure of investment in a project?

MR KEITH:

Yes, and I think it's whether – and this is where I'll look for the case that Justice Glazebrook's mentioned because it is ringing a bell and the words "close your eyes" I think has been used, but beyond that, one has the language of devil's advocate in *Williams*. Whether that – and I think that must go as far as you, the applicant, and bear in mind, in that case, the duty is heightened but it is still subject to subsequent challenge and so on in terms of the evidence or in terms of any prosecution whereas here we're not, but whether – I think it probably does follow from that concept that if there is a line of inquiry to the contrary you either signal that we haven't done it, in which case I'd hope the warrant application gets turned down unless there's some superlative good contrary reason, or you go and do it.

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So, as your Honour says, the black hat is not just analytical, it's not just, you know, we take the same folder and put a sceptical eye to it. It is we look for what's not in the folder already that we know of or that we could look for.

WINKELMANN CJ:

So you pursue obvious lines of inquiry that are either obvious as a matter of human experience, logic, or suggested in the material you have before you and if you fail to do so you identify that for the decision-maker.

MR KEITH:

And I think in this context you have to identify, you have to do it. You can't just say to the decision-maker we only know this much, unless it's just impossible, I think.

O'REGAN J:

What about the exigencies of time if you think someone's about to leave the country?

MR KEITH:

Well, so under this statutory scheme, as Ms Aldred mentioned, it's a two-step. There is a suspension and then there is 10 working days to submit the actual final application. So there – and the suspension is effective immediately. It wasn't in this case because of I think kindly people at Qantas or something, but the passport is no longer usable. So you do have that two weeks of working time to pull all this together.

KÓS J:

Is that renewable? Can you suspend the second time while you continue to –

MR KEITH:

I don't believe so. I'll check, but I think it is just suspend and then –

O'REGAN J:

But that's still only 10 days, isn't it?

MR KEITH:

It's not a short amount of time. I mean it's longer and more informed than we would think of in a warrant context, for example, or you might be seeking a warrant off the back of some very early investigations and we need to search right now or evidence might be lost, for example. Here you do get a fortnight's holding period, a fortnight's grace.

And I suppose too, Sir, yes, there might be a scenario in which someone came to light at the – the suspension is an emergency measure that is taken at this point or it might be that it follows a longer investigation. It would depend on the circumstances.

Just tracking along, page 19, I've talked about why candour is not a substitute either in the sense of, well, in the sense of the Crown in litigation putting forward its full record. That's an after-the-fact step. I also, on page 20, differentiate what I'm saying from the Canadian and from review contexts. There is a special procedure in the United Kingdom. They have a specialised Tribunal, the Special Immigration Appeals Commission, which sits largely in closed session, and there is a positive obligation under UK law and procedural rules to identify and for the intelligence agency to go through its holdings and identify anything to the contrary, and I say that is again not a substitute for the duty that I'm advocating for and the Canadians apply.

Last, and I think this might take us to the Court rising or my learned friend might just stand up for a moment, is this question about the remedial approach of the Court below. As the Court below observed, and they took what was an exceptional – this is on page 21 – "exceptional, if not wholly unprecedented", approach to remedy. They held that the temporary provisions in the Passports Act applied the appeal, the de novo decision-making provision in section 29AA(2), and as a matter of law, this is at pages 22 and following, say that is not correct.

When one looks at sections 29AA to 29AC of the Passports Act, these are concerned with reliance on closed material and corresponding procedure. They

are not a general code for judicial review of passport decisions or anything of the like, and I leave your Honours to look at, unless your Honours have any questions. But the terms of the clause, its legislative history very much directed at saying if there are review proceedings, they will be conducted according to the same closed material procedures. They don't change judicial review remedies. They don't conflate review and appeal. At footnote 66, I say the reference in the legislative history is to applying the special provisions, the classified security information special provisions, to review in other proceedings. One thing that I haven't –

WINKELMANN CJ:
Can I just ask you, if you do conflate them as Court of Appeal did, you suggest there's a prejudicial effect for the applicant who could've been an appellant?

MR KEITH:
Yes.

WINKELMANN CJ:
And what do you say it is?

MR KEITH:
An appeal under the – in the circumstance could allow for the compilation of a complete record if we followed the UK candid disclosure requirements, for example. Not only do discovery in a judicial review as I've done it, the intelligence agency would itself have to look for all of the adverse information that it might hold, so that would be first up. Second, and the –

WINKELMANN CJ:
Where would that obligation come from?

MR KEITH:
So if I were I think, if it were in this context, I would say the UK practice is driven by the same fair hearing obligations.

WINKELMANN CJ:

It would come from discovery, the discovery obligation? On your submission.

MR KEITH:

Well, discovery was – here, I think I owe Justice Dobson rather more than myself on this fairness measure. Judicial review, not normally doing discovery, but it was sort of the best we could do in the circumstances. If it were an appeal, I – with which we never had, I might have been saying not only discovery but this proactive duty that the UK has developed because I need to see the whole story and the Court does too.

WINKELMANN CJ:

Well, I mean, you could say that that would follow from the normal scope of discovery and that it would be – that adverse material would be relevant?

MR KEITH:

It would. I can talk tomorrow about why there's a practical difference between the two. Your Honour's probably right that the discovery process could yield the same sort of thing, but there is an advantage to having the agency and its specialist staff do the task as is in the United Kingdom. But…

WINKELMANN CJ:

Right. I understand the point you're making.

MR KEITH:

And the other thing of course an appeal could do, which would be logistically even worse but doable, I suppose, is one could solicit, for example, expert evidence to the contrary and say to the Court, you have the primary decision-making responsibility now in terms of the appeal jurisdiction. You will hear from, probably in closed session, but you'll hear from witnesses on behalf of, in some way, an excluded person. So what does this material mean? Was there contrary material at the time? It would be a – it would still be I think an uneven proceeding, but it would be more substantial. It would put a court in a better position than it unavoidably was here.

1530

I think beyond that your Honours have the written submissions in terms of the prejudice point that her Honour, the Chief Justice, has just pointed me to, or just raised. The short point is even if the Court had, or coming at it another way, to exercise this sort of remedial approach in a review context you would either have to have *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR1056 or *Fiordland Venison* or depending on how old you are. Absolutely clear result one way or other, or at the very least one would have to have such a comprehensive record that it led only to one – that you were able to make the assessment, and I think, and this is – well, I've said why I don't think that is correct here but also, and this might be one concern one necessarily has doing the role that I have in this proceeding is you have to give the Court, or the approach with discovery and so on, give the Court more material to work with or have to go into the detail of the material. I don't think that's the same though as traversing the merits, as the Court below put it, that the challenge was rather that there was relevant information not put or put out of context or put without necessary balance or interpretation or whatever, so –

WINKELMANN CJ:

Sorry, can you just re-state that submission, Mr Keith?

MR KEITH:

So it's that when the Court below said that we had traversed the merits, that this was really a merits challenge. A merits challenge would be what I just described. This was relevant in the relevant considerations, in part a no evidence submission, in part a fairness submission. It is looking to the substance of the record only to say: "Hang on, the Minister never got this," or the Minister had no evidential basis for this or those advising the Minister failed to act fairly in putting up allegations when there was more to it or when those allegations weren't founded on anything. So this is just the point I made at paragraph 42.1. Yes, there are excerpts from the record and we engage with those, and I'll do more of that with your Honour's leave in the closed submission, but that's not to say that the case is brought as or pursued by me as a merits

argument about what the ultimate result should be. It's rather the Minister couldn't make a lawful decision here, did make an unlawful decision, not that we have the whole answer.

WINKELMANN CJ:

Could there, in this circumstance, be much difference between those two? What kind of argument might you make if you were making a merits argument other than that he didn't have material behind him, for him, on which he could reasonably conclude?

MR KEITH:

Well, if you had a de novo appeal before a court, which you can have, we just didn't here, to take an example that's not this case because we get into difficulties if we try and do that, there have been mistaken identity cases, for example. All the intelligence information is that X is a known associate of these people and was in this place doing, you know, training or something horrendous. A merits case mightn't be as simple then as X saying: "Well, actually, I was in Poland that week," and that's not information that the intelligence agency has. It's not judicial review.

WINKELMANN CJ:

You might have got at the truth of it.

MR KEITH:

Yes. Well, but they may have no reason to doubt it, I mean, but –

KÓS J:

However, A chose the judicial review path.

MR KEITH:

She did, yes.

KÓS J:

It's surely the short point. I mean that's the route she chose. It comes with the limitations and the advantages of that particular course.

MR KEITH:

Yes, and with the limitations on what I was then doing too, Sir.

KÓS J:

Exactly.

MR KEITH:

Yes, and with the remedial constraints, and in that respect I don't think my learned friend – I'll wait to see what's said – the only major discussions from my learned friend for the Minister is page 10 of the respondent's submission. I think this is where we're dealing with this issue. I may have missed something but coming from *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 which I'm – the Special Immigration Appeals Commission, this closed Tribunal that I mentioned, was subject to appeal by the responsible Minister, the Home Secretary, and the very question was what can this appeal body, appeal not review, do? And they had said that the Minister had applied the wrong definition of "national security" and that too low a standard of proof, and the Court of Appeal, I think you go straight from the Commission to the Court of Appeal, it's an upper Tribunal, and then the Supreme Court, sorry, the House of Lords too saying: "Well, no, even though you have an appellate jurisdiction," over the page on 11, quoting from paragraph 69 of the judgment, still applying review principles, so I don't think there's anything dramatically changed there and I didn't see any answer but I'll check, didn't see any answer to the further points that we've made about the statutory scheme and the unfairness.

Conscious of the time of day and my learned friend's patience and the Court's very helpful questions, I don't think I have any further submissions to make in open but I'm happy to answer any questions.

WINKELMANN CJ:

Do you have any questions? No. So, thank you, Mr Keith.

Mr Martin, there's nine minutes. What do you think about it? You can tell us how you're going to proceed.

MR MARTIN:

Yes. Would it be helpful if I started and then perhaps approached it that way?

WINKELMANN CJ:

Yes.

MR MARTIN:

E ngā Kaiwhakawā o Te Kōti Mana Nui, tēnā koutou. The proposal is to –

GLAZEBROOK J:

You will have to speak into the microphone.

MR MARTIN:

The proposal is that Ms Laurenson and I split the argument and broadly it would be me addressing facilitation and perhaps the standard of review points, time permitting. Ms Laurenson was going to address the Bill of Rights and perhaps the exceptions, the section 5 exceptions, dissent, armed conflict and so on. That's the split we have in mind. Obviously, for today's purposes I will start by perhaps recapping what I've heard in the argument today and try to identify points where I think there is reasonable common ground, and so in doing that I'm addressing, first of all, this question of what the scope of facilitation is and it is an intent to facilitate, as you've heard.

The points that arose from discussion from counsel this morning included in one passage her Honour, Justice France, in the passages where we were looking at the UN Security Council Resolutions, identifying those parts that deal with suppress recruiting, organising, transporting, equipping and so forth by way of being the context to the legislation that we'll come to in the Passports

Act, and his Honour, Justice Kós, asked at that point, or pointed out at that point, that "engage in" as opposed to "or facilitate", the words "engage in" would encompass the words "planning", "preparation", "participation", which are in those Resolutions. I will come to the Resolution because I think it is important to spend some time looking at the provisions, but there are two points there. First of all, it is that suppression of recruiting, organising, transporting, that is the context that the respondent says is most germane for interpretative purposes and then, secondly, as Justice Kós identified, it's the respondent's submission that "engaged in" or "facilitate" are two separate concepts. Spend a bit more time on that.

1540

But, as his Honour put it, Parliament intended something beyond "engage in" when it used the word "facilitate". We'll come to what the respondent says that encompasses, but in broad terms, the *Khawaja* case, the respondent says, assists, because it excludes de minimis, inadvertent, unwitting conduct, and it focuses on what was described as material support – sorry, "materially enhancing", I think in that case, but "material support" is the term that comes up in our statute book. That is the purpose of the diagram which I've handed up at the commencement of the day. So it's that one there.

WINKELMANN CJ:

Is that this one?

MR MARTIN:

That's that one there, Ma'am. Thank you. So the purpose of that, and we'll come back to it tomorrow, it's intended to be an overview and to bring together material that you have in other places, acknowledging that not everything that's on there was there in 2015. We tried to identify that clearly. But the point – there's a couple of points, but the main points are that there is a difference between administrative mechanisms for reducing risk, the preventative measures with which we are concerned in this case, and criminal offences. Even though there is some commonality in the language, there is a difference between administrative responses.

Just for introductory purposes, in the bottom right-hand corner of that diagram, under the heading "Administrative responses have in common", this is the respondent's submission summarised, and when I'm talking about that multiple responses here, I'm talking on one hand about the scheme that we're concerned with in this case, "withdrawing travel documents: 'intend[ing] to engage in or facilitate a terrorist act'", but it's equally applicable, it is submitted, to the current control orders regime which was not in operation at the time of the events in this case, but the control orders regime is, if you like, something of a mirror or complementary statutory scheme now in existence.

In either case, you have statutory schemes that are operating prospectively to prevent terrorist acts. So this is the emphasis in the Passports Act, intention to facilitate. We'll come back to this. So it's about what was intended to be facilitated, not necessarily what the appellant may have already done, although from an evidential point of view, obviously, you look at what she may have already done in order to infer an intention for the future, but you're not looking –

WINKELMANN CJ:
No, no. To the present intention.

MR MARTIN:
Present, yes. Indeed. Accept that. Accept that. Present intention, but for things that she may not have yet done by way of facilitation. So that's the prospective element that is important and it's an important difference between the administrative regimes and criminal offending, criminal offences, even the ones that were in existence at that time. So in 2015, "recruiting (s 12)", "participating in terrorist groups (s 13)".

So again, at the bottom right-hand of the diagram, the administrative responses also have in common that they apply this threshold for facilitation or material support. Respondent submits that those are very similar thresholds. There's not a particularly – certainly not on these facts, there's not a distinction there that is significant for present purposes.

Importantly, as you've heard, and which I don't, it's not clear to me that this is any longer in issue, but there is no requirement for knowledge of a specific terrorist act and no requirement to be a party or intention to be a party. That second point, it's not clear to me from listening whether we're all on the same page on that, but it is certainly the respondent's submission that it is not necessary to intend to be a party to an offence, and it is not necessary that there be knowledge of a specific terrorist act. Well, the terrorist acts that are in issue in the Passports Act, in the power, are the acts of ISIL –

WINKELMANN CJ:
I'm going to have to – we're going to have to stop.

MR MARTIN:
Understood.

WINKELMANN CJ:
So do you want to find a good place to stop?

MR MARTIN:
I'm probably just about there because I'll just complete my intro on the diagram by saying, excluded with *Khawaja,* and I probably will still take you the case even though it's a criminal case from Canada, because it does and it is accepted, exclude inadvertent, unwitting and de minimis conduct, and obviously humanitarian activities are excluded. So that gives you the frame around the administrative provisions and we'll return in the morning just to continue to tease that out as long as it's helpful.

WINKELMANN CJ:
No, that's helpful, thank you, Mr Martin. All right. We'll adjourn, then.

COURT ADJOURNS: 3.46 PM

COURT RESUMES ON TUESDAY 25 JULY 2023 AT 10.03 AM

WINKELMANN CJ:
Mōrena.

MS ALDRED:
Mōrena your Honours. I have just a very brief couple of matters I'd like to address, it will take me about 10 seconds before Mr Martin recommences.

WINKELMANN CJ:
Fine, go ahead.

MS ALDRED:
Simply to first of all correct something for the record that I said yesterday that was factually incorrect, but which has been drawn to my attention, which was that I mentioned in the context of describing the appellant's affidavit, that she had attempted to enter Dubai on her way back to New Zealand. What I mean to say, of course, was on her way back to Australia. So I simply wanted the correction to reflect that. I'm sorry if that caused any confusion.

The second thing is, which I imagine the Court doesn't particularly need me to deal with because you'll be aware of this, but just in relation to that affidavit, of course, I just wanted to draw the Court's attention to Justice O'Regan's minute of 28 June 2023 granting leave, and that was all, we had a discussion about admission of that into evidence yesterday.

WINKELMANN CJ:
Okay. Mr Martin?

MR MARTIN:
E ngā Kaiwhakawā. Mōrena koutou. When I commenced yesterday, I indicated that the central focus for these submissions would be on the scope of the power. I also signalled that Ms Laurenson might address questions concerning rights consistency and the –

WINKELMANN CJ:

Can you speak up, Mr Martin? You're doing the mumbling thing.

MR MARTIN:

I'm sorry. I also suggested that Ms Laurenson might address the rights consistency and exceptions. She and I have conferred –

GLAZEBROOK J:

Do you mind just pulling the microphone slightly closer?

MR MARTIN:

That might be better, yes, I'll try and stay closer to it. We conferred overnight and the matters that Ms Laurenson was going to cover are well covered in the written submissions and didn't assume a lot of prominence yesterday. So to make best use of the time available unless there are particular questions which your Honours can signal to me through the course of argument, we propose to leave engagement with those issues for the closed part of the hearing where they don't have to be dealt with in the abstract. So that was a slight change to how we're proposing to proceed.

WINKELMANN CJ:

Can you just remind us what those parts of Mr Martin?

MR MARTIN:

That's the rights consistency, the Bill of Rights, and the exceptions in section 5. So lawful armed conflict, protest, advocacy, dissent. So matters that maybe best addressed in the factual matrix to the extent that that is helpful. So the focus –

ELLEN FRANCE J:

Sorry, will that cover the duty of candour as well, or are you going to deal with that?

MR MARTIN:

I can touch on duty of candour.

ELLEN FRANCE J:

That's fine, I just wanted to be clear.

MR MARTIN:

So the areas I was going to focus on principally the scope of the power, which I commenced yesterday and we'll come back to now, and then standard of review and I can address duty of candour as part of that.

The diagram that I was talking to your Honours about when we concluded yesterday, as I indicated, presents the respondent's outline of terrorism offences as against preventive measures, and the point I just wanted to pick up and develop a bit more this morning is that there are three conceptual elements to the test of intend to facilitate a terrorist act. In one sense they're obvious but it is important as we move through the argument that they not be conflated, and they did emerge from your Honour's questions yesterday I think. You've got the intention, which is the prospective element. Then you have the acts of facilitation, which – so the intention is formed in New Zealand, in this case. The acts of facilitation occur in this case in Syria and Iraq and then you have terrorist acts which also occur in Syria and Iraq, but they are the acts of ISIL, the respondent says. So it is the intention to facilitate, it is that intention that is the focus of the inquiry, and it may be that activities that the appellant has engaged in, or been part of in New Zealand are evidence that assist the Court with the intention. Those are not the acts of facilitation. The acts of facilitation, which I'll come shortly in more detail, may be a crime, but that depends on what has been criminalised in New Zealand and facilitation in New Zealand is not a crime.

GLAZEBROOK J:

Can I just check whether you agree with the submission of the appellant that in order to intend to facilitate what you intend to do must, in fact, be capable of assisting the commission of a terrorist act?

MR MARTIN:

I don't accept that proposition but I'm glad your Honour raised it because I will be coming shortly to just spend a little bit more time just teasing out that difference, because I think it is important and there is a risk that it does get lost sight of, and I don't –

1010

GLAZEBROOK J:

So what do you say that you can – so just an intent, an intent to what?

MR MARTIN:

An intent to make easier – so the question is, are there reasonable grounds to believe the appellant intends to make it easier to do section 5 acts and those acts to be done by ISIL.

WINKELMANN CJ:

Intends to take actions to make it easier for a third party to commit a terrorist act, is that a way of saying it?

MR MARTIN:

Intent –

WINKELMANN CJ:

Because you just eliminated the action there.

MR MARTIN:

And we can come in to closed to specifically the detail of what we're talking about, but the two acts of facilitation to make it more –

WINKELMANN CJ:

Well, can you just answer my question? Because you said "intends to make it easier".

MR MARTIN:

Yes.

WINKELMANN CJ:

It's actually "intends to take an action" –

MR MARTIN:

Yes.

WINKELMANN CJ:

– "which will make it easier".

MR MARTIN:

And the two acts that are of facilitation in this case are the travelling to Syria to join ISIL and contributing, and this is conjunctive, contributing technical knowledge and capability to ISIL and sharing content online. There's more to say about the detail of that, but those are the two acts of facilitation.

WINKELMANN CJ:

So you accept then that the intention's not simply to take the action which will make it easier. You actually have to intend to make it easier.

MR MARTIN:

You do have to –

WINKELMANN CJ:

To take in a terrorist – to undertake a terrorist act.

MR MARTIN:

Yes. So there has to be that connection, and it's useful, I think, to tease out the connection. There has to be obviously a connection between the intention and the acts of facilitation which are those that I've just described, and then there does need to be – the acts of facilitation do need to make easier the terrorist acts of ISIL. But there are – that's why I've broken it into the three steps.

GLAZEBROOK J:

So you do actually accept that the actions have to, in your view, in your submission, make it easier? I think the appellant would have a stronger test than "make it easier".

MR MARTIN:

Yes, I'll come to that, but we say "material support", "make it easier", and I'll develop that a little bit, but –

WINKELMANN CJ:

What you're being asked about is the fantasist hypothesis –

MR MARTIN:

Yes.

WINKELMANN CJ:

– someone who's thinking they're doing something but actually there's no way in the world it assists in any way.

GLAZEBROOK J:

And not necessarily a fantasist. You might think, you might say – well it's hard to give a hypothetical example, I suppose, but you might intend to do something you think that you're actually helping, but you're not.

MR MARTIN:

We are in the hypothetical. I'm not meaning to void the question, it's just both of the powers are important.

GLAZEBROOK J:

Well, I think you just say it has to make it easier?

MR MARTIN:

Yes.

GLAZEBROOK J:

But you accept that it would have to make it easier.

MR MARTIN:

Yes, and I do, as noted in that diagram and as we'll come to perhaps when we touch on *Khawaja*, look, exclude inadvertent, unwitting, de minimis, so that this is your incidental, yes, assistance, trying to use a neutral word, and I'll come onto the knowledge, but what is not required is knowledge of a specific terrorist act or intention to be a party.

GLAZEBROOK J:

Well, I think there's common ground, there's common ground there.

KÓS J:

Why do you omit from your list of criteria the first of them, which is danger? The Minister has to form a view the person's a danger to the security of another country and the fantasist probably isn't.

MR MARTIN:

But that's –

KÓS J:

They're a danger to themself.

MR MARTIN:

There's danger, but is danger the – that's one aspect there, but the other aspect there is just the intention to facilitate.

KÓS J:

Well, that's – you come on to that. But I mean after you've done the three elements you looked at, you then got to stand back and say: "Is that person a danger to the security of another country?" And the fantasist probably gets winnowed out at that point.

MR MARTIN:

It's one part of the test that might winnow that person out, I accept that. There is – there has to still be that link. But the danger is through making the terrorist project easier. I'm going to – that language of "terrorist project" I'll come back to.

GLAZEBROOK J:

Well, then it would have to make it easier rather than it being totally irrelevant, on that hypothesis. Because if it doesn't make it easier, it's hard to see that there's a danger.

MR MARTIN:

As long as we're clear, and I think we are, that we're not talking about specific acts of terrorism, we're talking about –

WINKELMANN CJ:

No one's suggesting that.

MR MARTIN:

No. We're talking about the terrorist projects. I'm sorry to be cautious around that but I think I'm agreeing with the Court –

GLAZEBROOK J:

No, no, well I think that's absolutely common ground on that so…

MR MARTIN:

Yes.

KÓS J:

On that point, would it be sufficient just that the first of those factual elements you identified apply, which is travelling to Syria to join ISIL. Would that be enough? I mean I can see a respectable argument that it might be.

MR MARTIN:

And I – does your Honour mind if I came to that second? I take you to the – and I'll say why. I'm not avoiding it. It's not the facts here, so it's not the case I must meet here, but of course the scope of the power is important independently, and I do want to address it, but it turns on the circumstances, the, it is submitted, quite exceptional circumstances at the time. So I would prefer to start with the contributing of technical knowledge and the capability in this case, but then I will come back to, and particularly the UN Security Council Resolutions because it is submitted that here what the appellant is doing is the thing, you know, that is covered by the, by the…

KÓS J:

I see that argument.

MR MARTIN:

By the legislation.

KÓS J:

And by the Resolutions frankly.

MR MARTIN:

And by the Resolutions. So that's why I say it's exceptional but to answer your question there may well be circumstances where simply travelling, perhaps marrying a foreign terrorist fighter and being involved with ISIL in these circumstances could, yes, facilitate a terrorist act. But I will –

WINKELMANN CJ:

Only if you intended to do so.

MR MARTIN:

Only if you intend to do so. But I will come back to that because as I say it's not the facts of this case, and that is why I deal with it second because it's a part of the scope of the power. I'm just covering off what we've done. I think what I, at this point, might do is take you to the 2015 version of the Terrorism

Suppression Act. So not the Act in which the power arises, but still relevant for our purposes for reasons I'll come onto now.

WINKELMANN CJ:

Where is that in the materials?

MR MARTIN:

So that is at, it's in the appellant's bundle of authorities, volume 1. If you're using hard copy it's at tab 8. You have two versions. You have the current version, which is at tab 9, and you have the 2015 version, or the version as it was at the relevant time, at tab 8, and that's the version that I think we'll have up on the screen. Now what I want to do is take you to section 6A of that legislation as it was at the time. Noting the word "engages" section 6A has been amended and expanded and now says "carries out", and it now has a – so it has "carries out" instead of "engages". But at the relevant time it said "engages". That's the first point.

I want to go now to what was section 25 of the legislation. "Carrying out and facilitating terrorist acts", not relevant for our purposes, but of course there's a disconnect between the offence provision "engages" and "carried out", but we're not concerned with that. What we are interested in is subsection (2), section 25(2), which is how the Terrorism Suppression Act defined "facilitation" at the time. That text is now in section 5A of the Act, which is set out at paragraph 47 of the respondent's submissions.

ELLEN FRANCE J:

So you say that was relevant to this decision?

1020

MR MARTIN:

Yes. Yes, and relevant because we're talking about terrorist acts, which are defined in section 5 of this Act, and the Court is looking to understand what "engage in" and "facilitate" might mean. It is submitted "facilitate" is a different concept to "engage in" in its usage in the Passports Act power, and it is

submitted that this definition, looking across the statute book as we will come onto talk about a bit more, is consistent with what "facilitation" anticipates in the Passports Act power. I accept there's not a direct statutory link between the Passports Act and this provision at that time.

WINKELMANN CJ:

Well, it's not really out of keeping with what Ms Aldred and Mr Keith submitted anyway, is it? Because don't they accept that you don't need to know a specific terrorist act, but you need to intend that to facilitate a terrorist act? Isn't that common ground?

MR MARTIN:

It may have become common ground, I think, through the discussion with your Honours, but – there may not be a lot of controversy about this, but I had understood there might be still some, in terms of the necessary link. I think my friend Mr Keith may have described it as sort of the need for the causal link between facilitation and the terrorist act, a specific terrorist act. But I may be wrong about that. I may be misstating his submission.

WINKELMANN CJ:

He's pulling faces at you.

ELLEN FRANCE J:

But I'm right, aren't I, that the appellant's approach is that section 25(2) doesn't apply? I'm not sure that it makes any difference, but…

WINKELMANN CJ:

They certainly urged caution upon us in taking definitions from elsewhere.

O'REGAN J:

No, they actually said section 25 doesn't apply.

O'REGAN J:

So they must've thought there was some significance to it.

MR MARTIN:

Yes.

WINKELMANN CJ:

It's interesting though, because actually it makes it a little bit harder for you, doesn't it?

GLAZEBROOK J:

That's what I was thinking.

WINKELMANN CJ:

Because only if the facilitator knows that a terrorist act is facilitated, it's not just that they actually have to intend it. It's also that they know that it is facilitated.

GLAZEBROOK J:

Although of course that – I mean, it's odd. Because you don't have to have a terrorist act actually carried out, which makes it odd to have the first part of that.

MR MARTIN:

I don't think it's problematic on these facts –

GLAZEBROOK J:

I know, exactly.

MR MARTIN:

– but I think this definition makes sense in terms of, for example, winnowing out Justice Kós' fantasist and potentially other situations where there simply isn't the underlying factual basis to demonstrate –

GLAZEBROOK J:

Or perhaps they do something not realising that they're facilitating a terrorist act. This would require that knowledge. So it might actually have facilitated it but they thought they were having a romance with somebody or something of that nature but wasn't associated with anything.

MR MARTIN:

There could be a number of factual situations that negate –

GLAZEBROOK J:

I mean, I'm thinking of a funding situation when thinking you're sending it to…

MR MARTIN:

I mean, one of the things, and particularly in open, one of the things is we can come up with various scenarios that are quite some distance from the appellant's situation, but the submission in terms of the scope of the power is that that aptly describes what facilitation should be construed to mean in the power in the Passports Act at the time –

WINKELMANN CJ:

It doesn't really help us out at all, does it? It just addresses that causal link issue.

MR MARTIN:

And that may be – I'm happy to move from there to submit, as we do in the written submissions at 45, that this is consistent with – or, sorry, the approach to "facilitation" in the Act is consistent with the dictionary definition, which is "to make easier". And –

WINKELMANN CJ:

Where do you get that from?

GLAZEBROOK J:

Yes.

MR MARTIN:

Just taking – as the High Court found and this is, we submit this at 66 of our written submissions, "no 'special meaning or gloss'" is required on the ordinary usage of the phrase.

WINKELMANN CJ:

Well, where do you get that from in that, though?

MR MARTIN:

I'm not – sorry, I've moved past that.

WINKELMANN CJ:

Oh, you've moved on. Okay. And what do you say to Mr Keith's submission that it is necessary because we're implementing an international obligation here, so it's sensible to read it in terms of the international obligation we're implementing?

MR MARTIN:

Yes, and he didn't take you to it, but I think I will perhaps illustrate this point, take you to the Rome Statute, which is in the bundle of authorities. It's in volume 1 of the appellant's bundle of authorities. I'm going to take you to article 25(3)(c) of that Statute. It's in Mr Keith's submissions, and it's, I'm bringing it up here really just to tease out this point of connection between the acts of facilitation and the terrorist act, and it's important, it is submitted, to read article 25(3)(c) in its entirety. "For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission…" et cetera. So that is speaking to, as the heading to the article suggests, individual criminal responsibility. But it is submitted that the Passports Act, when it talks about "engaging in" or "facilitating" is not talking about engage in, meaning one part of criminal responsibility, and facilitating, being parties. Let's not separate it in that way, it is submitted. Engaging in encompasses criminal responsibility. Facilitates may involve a crime, but it does depend what has been criminalised.

GLAZEBROOK J:

"Engaging in" sounds very much like doing something directly in relation to a terrorist act, doesn't it?

MR MARTIN:

Yes, and –

GLAZEBROOK J:

And “facilitating” sounds, what I think Mr Keith was saying is that it should be interpreted as intending to do something that would aid, abet or otherwise assist.

MR MARTIN:

That is being a party, and it is submitted that that is engaging in a criminal sense. It’s criminal responsibility for the act.

GLAZEBROOK J:

Well, you’re just trying to say that you don’t read those in a criminal way, so engaging in doesn’t sound like being a party, it sounds like doing it.

KÓS J:

Well, not necessarily. The Resolutions used a whole lot of different expressions. At the least end was “support”. There was then “facilitate”, which seems to be somewhere in the middle, and then there were a whole lot of different expressions. “Engage” was not one of them.

MR MARTIN:

That’s right.

KÓS J:

Preparation, perpetration, and then there was another “P”, I think, word.

MR MARTIN:

I wonder if it’s useful to come onto the and deal with the Resolutions because I think they are important to tease this out further. The point I'm just making here is that the respondent does not accept that facilitates is effectively speaking to the party element of criminal responsibility. It has a broader meaning, it is submitted, and must have been intended to have a broader meaning given the use of the two concepts, and as –

WINKELMANN CJ:

Do you need to make this argument? I mean are you really saying that you don't need to show that they're facilitating by doing something that assists?

MR MARTIN:

No, I'm submitting that –

WINKELMANN CJ:

Because that just seems a remarkably low threshold, given the rights context.

O'REGAN J:

But you can't assist if you don't know what the act is.

WINKELMANN CJ:

Yes, yes you can, if you intend to assist in a category. We've already just established under section 25 that you don't need to know the particular terrorist act, and that's common ground.

KÓS J:

Well, that's a facilitation test though. I mean –

WINKELMANN CJ:

Yes, that's the point I'm making.

KÓS J:

Aiding and abetting tends to have more specificity.

MR MARTIN:

And that's all –

WINKELMANN CJ:

No, no. I'm just talking about the words "aiding", you know, "assisting", "aiding", what's wrong with those? I mean you don't import the entire party concept of intending, you know, the particular crime, the elements et cetera, but what's wrong with the words "aiding" or "assisting"?

MR MARTIN:

I understand your Honour's question and I'm not taking issue with those words. I am taking issue with the term "facilitation" being confined to criminal responsibility as a party.

WINKELMANN CJ:

Okay, right, I understand your submission then.

MR MARTIN:

But I think it may be useful to take you to the UN Resolutions that underlie the legislation.

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The relevant reference to UN Security Council Resolution 2178 – it's in the bundle of authorities and it's up before you now. I'm just going to take you through pages 2, 3, 4 and 5, and I will spend a little bit of time on this because there is quite a bit in here. I don't wish to be selective at all but also conscious of the time. So I acknowledge that there are various references throughout to international human rights law and the like, the international refugee law, for example, towards the bottom of page 3 and elsewhere, those references there. So I'm not going to focus on them but I acknowledge those.

At page 2, the "expressing grave concern" and the "concerned that foreign terrorist fighters increase the intensity, duration and intractability of conflicts," those passages are cited in the respondent's submissions at 58.

Moving down the page, just under half way, you will see: "Expressing particular concern that foreign terrorist fighters are being recruited by and are joining entities such as … ISIL," and it talks then about affiliates, splinter groups or derivatives of Al-Qaida, "recognizing that the foreign terrorist fighter threat includes, among others, individuals supporting acts or activities of Al-Qaida," and its splinter and derivative groups, which is ISIL, "including by recruiting for or otherwise supporting acts or activities of such entities," so just – and I'll take you through other lines like this but just to come back to the Chief Justice's

point. So what I'm pulling out from here is supporting acts. It can be put in different ways. You might call it assistance. There are different ways it can be put, but I am pulling out here, separating, people who are engaged in criminal terrorist activities themselves, or violent terrorist activities themselves, and people who are undertaking those supporting activities. This is part of the very context to the provisions that you are construing in the Passports Act.

GLAZEBROOK J:

Well, when it says "supporting" do you accept that just saying: "I think ISIL's a really good thing," would that be indicated as supporting and enough to be a facilitation or would it depend on the circumstances? Because we do have the freedom of expression.

MR MARTIN:

Yes. Again, long distance from the facts of this case. On its own, the answer is it depends on the circumstances but on its own that is unlikely, I submit, to be able to meet a test of intending to facilitate terrorist acts with those three elements, you know, those three concepts that I've described, because you simply don't have enough connection to make easier the terrorist acts of the ISIL project. So in isolation that sort of statement of broad support isn't enough. If you are in Syria and Iraq, depending on the circumstances, a statement of support for ISIL may assume different characteristics, but that is fact dependent.

On this Resolution, bottom of page 2, you've got the Council expressing concern over the increased use by terrorists and their supporters of communications technology for the purposes set there, including recruiting, inciting, including through the internet, and facilitating the travel and subsequent activities of foreign terrorist fighters. So there are people who are doing the facilitating and there are the foreign terrorist fighters. You can say that this Resolution, others like it, have a focus on foreign terrorist fighters, but they are – it is not a myopic focus and they are not only concerned with the fighters themselves, if you like.

WINKELMANN CJ:

Well isn't it all about recruiting them or supporting them though?

MR MARTIN:

Yes. Well we don’t say all about. What I'm drawing your Honour’s attention to is that within the Resolution there is the, also the focus on people who are supporting, organising, recruiting –

WINKELMANN CJ:

Terrorist fighters?

MR MARTIN:

Yes, terrorists, terrorist fighters, terrorist groups of fighters, and ISIL is not only one of those, it is the named, a named one of those, that is the focus of these Resolutions.

KÓS J:

I mean you can only go so far here though Mr Martin. I mean preambles are much wider than the text of the Resolution that follows.

MR MARTIN:

Yes, and I do want to –

KÓS J:

And we really need to focus on that, because the legislation will, drives from the text to the, not the preambles.

MR MARTIN:

Yes, and I do want to come onto the main text. So just concluding at the top of page 3, these are the provisions talking about the exploiting of technology, communications and so on, which of course were a part of the ISIL terrorist project that I'll have a bit more to say about.

So going over the page to page 4, at 2 you've got, and I am really just taking you through them so you can note, but there is quite a lot in there. The Resolution can't simply be glossed as, well that's all about foreign terrorist fighters, or it's all about particular, the particular people. It is also about the people who are supporting them. Number 2, reaffirming that: "… all the States shall prevent the movement of terrorist of terrorist groups by effect border controls…" et cetera. Then if you come to number 5, the decision there. Prevent and suppress the recruiting, organising et cetera, of "… individuals who travel to a State other than their States of residence or nationality for the purpose of…" those things.

Okay so you've got two things here. You've got people who recruit, organise, support et cetera, and you've got the foreign terrorist fighters. At 6 –

WINKELMANN CJ:

So can I just ask. When they – so "decides" is the operative part of the Resolution. Recalls, is that linking, is that explicitly linking its earlier decision to that decision.

MR MARTIN:

Yes, yes you do, and you have that Resolution at 59 of the appellant's bundle of authorities. I wont' take it to it but it's immediately before this one we're looking at in the bundle of authorities, and it's recalled there, and relevantly for our purposes, shall ensure that any person, et cetera, "… or in supporting terrorist acts is brought to justice…" except that that's about criminalising, but it's the supporting of terrorist acts.

GLAZEBROOK J:

Where are you? Oh okay, thank you.

MR MARTIN:

So that's at 6. Then I take you across to page 5, and it's 6(c), so it's (c) in the top of page 5. Again: "the wilful organisation, or other facilitation, including acts

of recruitment by their nationals… of the travel of individuals who travel to a State… for the purpose of the perpetration, planning…" and so on. But –

GLAZEBROOK J:

You sort of skip over those words, but I think Mr Keith would put a lot of emphasis on those words, as against just skipping over them.

MR MARTIN:

Yes, but that is – what I am emphasising is the other words. The people who are supporting. I accept that there are the people who are doing those things, but there are also the people who are doing the acts of recruitment, organising…

GLAZEBROOK J:

But those are fairly specific acts, aren't they?

MR MARTIN:

In the context of ISIL, they are understood as a set of acts, but there are a lot of them, they are extreme, and they are part of what I am trying, for shorthand, calling the ISIL terrorist project. This is an exceptional episode, or continuing episode of – well the caliphate is not continuing so the episode –

GLAZEBROOK J:

No, we're now looking at the Resolution.

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MR MARTIN:

Yes.

GLAZEBROOK J:

So are you getting this about the caliphate from the Resolution or is this just a submission?

MR MARTIN:

It's a submission about the context in which this Resolution is arising, and from which the legislation arises.

GLAZEBROOK J:

Well the legislation arises from what you're obliged to do. I mean you can go further than that, of course, but what you're obliged to do under the Resolution.

MR MARTIN:

Yes, and I think there's two points. There's what Parliament has enacted in New Zealand, but it needs to be consistent with this Resolution, it is submitted, and it is consistent with – it is consistent with the Resolution that is, it's context.

GLAZEBROOK J:

I'm sorry, I really don't understand that submission.

MR MARTIN:

The Resolution, this one, is the context to the amendments that were made to the Passports Act that brought in the power that we're concerned with.

GLAZEBROOK J:

No, I understand that, but are you saying that it goes broader than what's actually written in the Resolution? Because Mr Keith would say, or submitted, that it was actually – that if you read it in conjunction with what's here, then it's narrower than you'll make easier.

MR MARTIN:

That's what I'm taking issue with, and all I'm really – and I'm not meaning to pull out selectively, I accept that there are references throughout here to the people who are perpetuating, planning, preparing, participating in terrorist acts. What I'm drawing out of here is there are also the references to other acts. To acts that in our legislation –

GLAZEBROOK J:

Most of them are quite specific. Providing or receiving of terrorist training and helping move terrorists around. So I've just got the number 6 which has a supporting terrorist act. Are there other references to supporting?

MR MARTIN:

The next one I was going to take you to, in fact we can probably take you to finally, is the decision at 8, and I won't necessarily read the whole thing, but I'll read it out to you. So you said you had the one at 6. There's also the 5, the "… prevent and suppress the recruiting, organising, transporting or equipping of individuals…".

GLAZEBROOK J:

They're quite specific acts that are being talked about. I haven't got 6 up but…

MR MARTIN:

So there's 6 and there's 5, and obviously –

GLAZEBROOK J:

We can go back to 5?

MR MARTIN:

So 5, 6 and read in light of 2, particularly the opening part of 2.

GLAZEBROOK J:

So 5 are fairly specific acts, aren't they?

MR MARTIN:

Well I mean I don't think – they're not problematic in terms of the facts of this case. What we're, but they're reasonably specific in terms of deliminating *[sic]* what facilitation encompasses, yes.

WINKELMANN CJ:

Delineating?

MR MARTIN:

Delineating, thank you Ma'am.

KÓS J:

So going back to my question before, is travelling to Syria to join ISIL sufficient to ring any of the bells in this Resolution?

MR MARTIN:

And it is obviously fact-dependent, but I don't say that to avoid the question. Here we have the second part of the act of facilitation going with the travelling. So the question is what else does the person intend to do if they simply travel.

WINKELMANN CJ:

Because ISIL is actually a fighting force, isn't it, as well. It was fighting a civil war in Syria so they might be going to fight the Syrian army. So is it enough to go and fight, to support, to fight in ISIL, is that enough, or do you have to actually intend to travel. To be a terrorist fighter, which is the particular language used here.

MR MARTIN:

I'll address that last bit first and then I'll come to the earlier part of the question. It is not – you don't have to be intending to travel in order to become a terrorist fighter. So that is more around "engage in", it is submitted, so it's not on these facts, but –

WINKELMANN CJ:

In terms of this Resolution it's talking about terrorist fighters though, isn't it?

MR MARTIN:

Well, it has a focus, a focus, on terrorist fighters but it also, in the way that I have taken you to, also has within its ambit those people who support, organise, recruit, people who are not terrorist fighters but are nevertheless supporting in that way.

WINKELMANN CJ:

Recruiting terrorist fighters?

MR MARTIN:

Yes, but that is the link to –

GLAZEBROOK J:

So not civil war fighters I think was the point that the Chief Justice was putting to you.

WINKELMANN CJ:

Yes.

MR MARTIN:

Sure, but –

WINKELMANN CJ:

Because Justice Kós said it's enough to join ISIL but ISIL was not – not everybody in ISIL is committing acts of terror. There is a civil war going on, was a civil war going on, or still is a civil war going on.

MR MARTIN:

This is the armed conflict exception, potentially, comes in here. What there isn't is any basis or any consensus internationally that they are conducting a lawful armed conflict. We're talking about this time, I mean, in this –

WINKELMANN CJ:

Underlying Justice Kós' question is is everybody who wants to join ISIL to be labelled a person who wants to be a terrorist?

MR MARTIN:

No, I wouldn't put it that way, but to unpack the question, it –

KÓS J:

Well, it's not quite my question. The question has to be determined on whether on the statute wording do they thereby intend to facilitate a terrorist act by joining and supporting ISIL by actually being there, not just breathing hate over the internet but actually being physically in the state and joining the body.

MR MARTIN:

Yes, if it requires more, it may not need to require a lot more because of the circumstances that were prevailing at the time on the ground in Syria and Iraq, and that is because, notwithstanding what the Chief Justice was saying, that ISIL may be doing other things other than committing terrorist acts, the terrorist acts were, if you like, a defining characteristic of that organisation and that state at that time. So the caliphate is a terrorist proto-state, it is submitted, and so to come to your question, Justice Kós, is simply going there to the state with the intention of supporting them, is that enough? I think in the abstract you'd really be looking for a bit more about, well, what are they intending to do to support?

WINKELMANN CJ:

Well, won't you be looking for the words that the statute suggests, which is that you're looking for someone who intends to go there to facilitate the commission of a terrorist act?

KÓS J:

I agree.

WINKELMANN CJ:

It's a pretty simple question really.

MR MARTIN:

But what I – well, I think that's right and we're saying to make that, those terrorist acts easier. I think that's all we're saying. I'm not sure we're at issue.

WINKELMANN CJ:

I mean to make those terrorist acts easier is just – it seems like a much lower threshold than facilitating a terrorist act. "Facilitating a terrorist act" sounds so much more direct than "make it easier". It seems to me inappropriate. It just doesn't seem to capture it. So why would we not just use the word?

MR MARTIN:

I appreciate that this is post-dating the time we're talking about, but since 2021 – I've got this in footnote 3 to the bottom of the diagram that I've given you about the outline of terrorism offences and preventive measures – since 2021 – this is footnote 3 of that document – the definition of "material support" – we'll come back to this around *Khawaja* – so that is now in section 4(1) of the Terrorism Suppression Act and the definition is: "Support that does, or may, assist in, contribute to, or make easier, the carrying out of 1 or more terrorist acts."

WINKELMANN CJ:

Where is that on your chart?

MR MARTIN:

It's footnote 3. So I'll just – and obviously, as I say, it's a more recent definition but I'm responding to your question about "make easier". That's actually a definition – talks about "support that does, or may, assist in, contribute to, or make easier, the carrying out of 1 or more terrorist acts;" includes advice or services "derived from acquired skills or knowledge, (for example, …" among other things, "translation…)". So that the words "among other things" are mine not in the definition itself. But the submission is –

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WINKELMANN CJ:

When you say they're your words, Mr Martin, do you mean you're paraphrasing what's there, or is that just your suggestion?

MR MARTIN:

No, no, there is a list of examples and translation is one.

GLAZEBROOK J:

You've just picked a few.

MR MARTIN:

And translation is one, yes. So, and I won't take you to it, but paragraph 74 of the Court of Appeal judgment, the Court of Appeal held that: "Facilitation must be more than incidental, but it need not be substantial." I think this is the territory that we're exploring at this point, and it is the respondent's submission that all that is required in order to facilitate a terrorist act is make easier, and what I'm pointing to here is that words like "assist" and "contribute to" make easier. I'm not sure that there's much daylight between those in the context we're talking about here, and certainly not on the facts that we have.

KÓS J:

But surely it has to mean assist? In an unspecific way.

WINKELMANN CJ:

Yes.

MR MARTIN:

In an unspecific way?

KÓS J:

Yes.

MR MARTIN:

It is submitted that that is a different way of saying "make easier".

WINKELMANN CJ:

Or assist.

MR MARTIN:

Render assistance.

WINKELMANN CJ:

In a specific way, which is the other way of saying it. Or assist in a specific way, so that might be the range of possible meanings, but intent suggests more specificity to me. But that's probably in a range of meanings.

MR MARTIN:

There is a limit to how far I can probably helpfully engage with this, without being able to talk about the specifics.

WINKELMANN CJ:

Yes, quite.

MR MARTIN:

But I accept that for today's purposes we're looking at the scope of the, the ambit of the power.

WINKELMANN CJ:

In some ways –

GLAZEBROOK J:

I suppose all I was suggesting to you, that I don't think that the Resolution would actually require such a wide definition as you're suggesting, because most of it is fairly specific about the types of acts, apart from the general support, which actually comes from the earlier Resolution.

WINKELMANN CJ:

Yes.

MR MARTIN:

Can I just say bear in mind that there isn't the criminalising of facilitation in New Zealand. So we are talking about a power that is limited to preventing travel for the purposes that we're concerned with. So when you are looking at the Resolution –

GLAZEBROOK J:

Well does the Resolution, I don't know that the Resolution suggests that there's a lower standard necessarily, does it? The preventing travel. Or do you say it does?

MR MARTIN:

No, it's not so much that, what I'm saying is it supplies the, it does supply the context in which Parliament is legislating. For example, in 2 of the Resolution, paragraph 2, "…State shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents…" et cetera. Then it goes on at 5 to talk about "… prevent and suppress the recruiting organising, transporting…" et cetera. Again I'm not wanting to, I'm not avoiding the references to what perpetration et cetera, but they're not, but it is the focus for our purposes of facilitation it is submitted. Then at 6, people supporting the acts of terrorists – sorry, "supporting terrorist acts". So I mean I don't want to labour the point, but the Resolution is speaking to – as you would expect, it is submitted, it is speaking to how a terrorist organisation like ISIL is able to perpetrate its terrorist acts, which is broadly about people, weapons and funds are required as well, and there's a limit to probably how much further I can helpfully take that without starting to get into the actual activities in the closed part. But here we do have the activities that, I'll just go back to my notes to be clear…

WINKELMANN CJ:

In these submissions, it just strikes me that the very water that these provisions are swimming in is the Bill of Rights Act and it seems strange to be divorcing our discussion about what the provisions mean from the Bill of Rights Act context, as our starting point.

MR MARTIN:

I'm not saying that it should be divorced. What we're doing though is seeing a provision that…

WINKELMANN CJ:

So what are you – you're placing it in the context of when it was passed, are you?

MR MARTIN:

Yes, exactly.

WINKELMANN CJ:

So what I'm really asking you is what are we doing at the moment?

MR MARTIN:

Right, yes. We're looking – we went to the context for the provision because it was coming up with Justice Kós' question around, well, what about someone who travels, simply travels, and so I wanted to look at what is within the ambit of the Resolution. I was looking to begin with at the contributing technical knowledge and capability to ISIL and sharing content online which are the – is one of the two related acts of facilitation.

WINKELMANN CJ:

So what you're doing is placing us in the context of when this was enacted and what it was intending to achieve and that's what we've been talking about?

MR MARTIN:

Yes, yes.

WINKELMANN CJ:

So what are we moving onto now then, Mr Martin?

MR MARTIN:

If I may just continue, while we've been speaking about it, about the travelling to Syria to join ISIL.

WINKELMANN CJ:

Yes.

MR MARTIN:

And it's really just completing what I was saying around Justice Kós' question. So the ISIL propaganda and recruitment was designed to advance the terrorist project of ISIL and at paragraphs 63 to 65 of the written submissions we set out some passages about ISIL's control at that time, and there are the quotes there about the extent of in-flows, population, so on, in the caliphate at that time. I'll pause while you have a look at those.

WINKELMANN CJ:

What paragraph?

MR MARTIN:

63, 64, 65, of the respondent's submissions.

So on the fact in this case, marrying a fighter, living in the caliphate, are incidental to the acts of facilitation that are in issue. However, it is submitted that marrying or associating with a particular person or going to a particular place where there are terrorists would not normally be sufficient on its own, but there were exceptional circumstances prevailing here at the relevant time and so my response to Justice Kós' question was simply going to the caliphate, marrying a fighter and living there might be sufficient in these circumstances because of the control of territory and population by a designated terrorist group, including a large number of foreigners who went there, men and women, surrendered their passports and became part of, it is submitted, a very different construct characterised by the exemplary violence and so on that you know.

WINKELMANN CJ:

So that does, however, involve conflating the type of life that they were hoping to achieve through terrorist acts, et cetera, with the terrorist acts, doesn't it?

MR MARTIN:

I think that's about intention, your Honour. That's about the intention. So if you have –

WINKELMANN CJ:

No, no, you're saying it makes it easier because it's helping them achieve the world that they want to achieve, or is it something else?

MR MARTIN:

No, that's why –

WINKELMANN CJ:

How is it making it easier?

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MR MARTIN:

That's why it isn't possible to say outright "yes" to Justice Kós' question, that would it be enough to simply travel to the ISIL caliphate. For example, if you went there for genuine, good faith, humanitarian reasons, that would not be sufficient, and even going there and marrying a particular person who is engaged in – is a fighter, even that may not be sufficient on its own. It really does depend on what you are intending and the circumstances surrounding the people.

KÓS J:

I think the joining of –

WINKELMANN CJ:

Can I just ask, I just don't think you've answered my question. How does it make it easier? And to use your extremely low threshold, the Court of Appeal's threshold, how does it make it easier, by marrying someone and going and living in the caliphate, for a terrorist act to be committed, leaving to one side intent. So as a matter of fact how does it make it easier?

MR MARTIN:

Because it is part of the building of the terrorist state. What the project was, was building a terrorist proto-state, populating it. Not only –

WINKELMANN CJ:

So that's my point. You're conflating what they were trying to achieve, which was a, in their mind, a perfect world which, particularly the form of Islam prevailed in, so they're building a state. You're conflating that with committing terrorist acts.

MR MARTIN:

I am still saying there would have to be an intention to make those acts easier in doing it. So I'm accepting that we're at the margins of the scope of the power here, that it does depend on –

WINKELMANN CJ:

Yes, but how does enabling them to build their dream state make…

GLAZEBROOK J:

Which wasn't a terrorist state by the way. In terms of their dream state.

MR MARTIN:

But by 2014/2015 it was clearly understood that this was a state that did not have any respect for what we would call rule of law.

GLAZEBROOK J:

That's a different – well they would say they did have respect for it, like the Taliban would say they have respect for Sharia law.

MR MARTIN:

I certainly don't want to –

GLAZEBROOK J:

And just have an extreme view of what Sharia law requires, which is not shared by most of the Islam world.

MR MARTIN:

But in terms of international law and the United Nations what you had was – and these are exceptional circumstances that the world is responding to

through these Resolutions in the legislation. But what you have is a group that has seized territorial control, and has within it a population, people who are already living there, as well as people who have come from other places, in order to use terrorism as a policy, as a tool of policy.

WINKELMANN CJ:

Yes but what you're saying is if – you're saying just going and living there and accepting their authorities, so helping them build their society, could be seen as an act facilitating a terrorist act?

MR MARTIN:

It's making the – it is supporting and making easier, assisting, if you like, the terrorist project. Knowing, assuming you intend to advance that project –

WINKELMANN CJ:

Well, I mean this is a whole new concept, terrorist project.

MR MARTIN:

I'm trying to just use that as a shorthand for the terrorist acts that ISIL are using.

WINKELMANN CJ:

Okay, so you mean assisting the terrorist acts. That's, I mean, I'm testing you on this because it seems to me it's one of the things that lies at the heart of the case, isn't it, really. One of the things really lies at the heart of the case.

MR MARTIN:

Well I think it's understandable that the Court would want to test the scope of the power. It's submitted that once we get into closed we're some distance from the margins of the power actually, and that is particularly because of the contributing technical knowledge and capability to ISIL, and the sharing the content online. Not just speaking – not focusing on what the appellant had been doing, because what we're actually focused on is what she intended to do if she had travelled to Syria and Iraq. So the acts of facilitation, the contributing technical knowledge and capability to ISIL, and sharing content online, is what

she would do in Syria and Iraq, what she intended to do in Syria and Iraq had she got there.

So those are the, that is why the two are together. The travelling to this place where these terrorist acts are being perpetuated as a matter of policy in these exceptional circumstances, and contributing in that way. So when we're talking about the appellant, we're talking about something that is submitted is some distance from the margins that we're talking about here, but I was being asked would it be sufficient simply to travel and I've accepted that you are out at the margins at that point. You would have to know more about what is the person intending to do once there. What are they supportive of –

WINKELMANN CJ:
So you're not really making that case?

MR MARTIN:
I don't need to make that case, and I think it's –

WINKELMANN CJ:
I just think it's a difficult case to make but you're saying really it's the travelling there combined with those acts.

MR MARTIN:
It's travelling to that place at that time, so the caliphate, and importantly the making, the contribution, providing the assistance, making that easier through technical knowledge and capability for ISIL, and sharing content online. So those are the acts of facilitation in the case that we're concerned with.

KÓS J:
If you join any organisation, a bridge club, a political party, anything, and you join it, you pay your membership fee, you support it, you offer to work for it, then it seems to me that you make it easier, or you assist the ordinary activities of that organisation, whatever they might be. If it's a bridge club, it's having bridge

nights. If it's a political party, it's gaining power. It's no different for this. But you have to do something that's more than simply, I think, joining.

MR MARTIN:

Yes.

KÓS J:

I think you have, I mean you can join and just do nothing. I don't think that assists it particularly. All it means is it's got another member. But if you actually offer to work for it or fund it, then you start to, I think, make easier or assist the ordinary activities, and here the ordinary activities of ISIL, despite the fact they probably had some higher purposes that might possibly be commendable, but the ordinary activities consisted of a great deal of terrorism. That's a point for you.

MR MARTIN:

Yes, and because we are focused on the acts of facilitation, I'll deal with this perhaps, since your Honour's asked, about what it would involve to be part of or join ISIL. There is a question that comes up and is touched on in the open Court of Appeal judgment at 77, and I won't take you to this paragraphs, but 77 around agency, and I just want to be clear what the respondent is saying around agency because at a different place, it's 104 of the Court of Appeal judgment, they also talk about her acts of facilitation, as I'm calling them, would be more overt if she was in, or could be more overt if she was in Syria or Iraq.

WINKELMANN CJ:

So where's the part in the Court of Appeal judgment that talks about agency, sorry?

MR MARTIN:

I think it's at 77.

WINKELMANN CJ:

Thank you.

MR MARTIN:

I will now take you to the paragraph just so we get it clear. So it's at the end of 77, the last long sentence. What I was wanting to be clear is that it's not, the submission isn't that you attribute the authority figures and ISIL's intentions to the person who has gone there. The intention does have to be, in this case, the appellant's.

GLAZEBROOK J:

I'm sorry, whereabouts are you?

MR MARTIN:

The second – paragraph 77, it's the last part of paragraph 77 of the Court of Appeal judgment. It begins with: "It may be that once in ISIL-controlled territory A would enjoy limited autonomy, but it does not follow that the intentions of male ISIL authority figures who might dictate her actions should be attributed to her. The legislation focuses on her own intentions at the time of cancellation." Accept that.

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Then what I was going to add is at 104, or picking up what the Court of Appeal says at 104, and this is again about the difference that being in the caliphate makes: "Her activities once in ISIL-held territory could be overt." And if I can put the submission this way, sort of having three parts almost, there's no reason to think she would do less than what she had been doing, secondly, she would be less constrained in terms of the acts of facilitation, and the rule of law, if you like, if I can use that as the shorthand for what we were talking about before, and, thirdly, it is submitted personal autonomy, for men and women, would be more limited, in short, ability to stop and leave, stop or leave, more limited.

KÓS J:

Does that follow from the fact she was marrying someone who was clearly directly connected with ISIL? What do you make of the marriage, and intended marriage, if there was one?

MR MARTIN:

If there was one. If she were to be married when she went there then that provides a link to the – to a fighter, obviously, is what we're really talking about here, marrying an ISIL fighter, and I think it does depend who that person is, but it provides one way or another some form of linkage to ISIL, to, if you like, the terrorist acts by ISIL and the people carrying them out. I don't –

KÓS J:

Well, there's no evidence as to how that affected her autonomy or would likely have affected her autonomy, is there?

MR MARTIN:

It's not – marriage and its impacts and so on are not part of the acts of facilitation in this case, so they're not a focus.

I wasn't going to spend more time on this because I wanted to return, I guess, to the technical knowledge and capability contribution side, but it was probably all I was going to say on this question of the travelling to the caliphate and what that means.

I'm not sure how much time to spend or to take with *Khawaja* which is dealt with at 52 of the respondent's submissions. Again, the legislative context is different to the Passports Act, not least because it involves criminal responsibility which we are not concerned with, but it is conceptually more analogous than the refugee status case *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 which is discussed in the written submissions. It didn't arise in argument yesterday, but – *Tamil X* being a decision of this Court, but concerned with the – it's a refugee status case and concerned with criminal responsibility as part of the test for revoking refugee status. It is submitted that *Khawaja* is more on all-fours with what we are concerned with even though it is still a criminal case. You have the Canadian Criminal Code. I won't take you to it but it's in the appellant's bundle of authorities. It has the relevant provisions, and the – it has within it the definition which has become section 25 and now section 5A of our Terrorism Suppression Act, so the one

that we were looking at earlier around what facilitation excludes in terms of knowledge of a specific terrorist act.

It's probably unnecessary to take you to *Khawaja* unless that would be helpful. It's in the bundle of authorities. The relevant paragraphs, it is submitted, are 46 to 47, 49 to 51, and in summary, I'll take you to the case if it'll be helpful, but in summary, those paragraphs use the word "enhancing" because it's in the relevant statue, and the Court speaks of "materially enhancing", which it is submitted is essentially the same idea as "materially supporting", and it excludes inadvertent, unwitting, de minimis, negligible risk of harm that is essentially harmless, those sort of incidental contributions, if you like. And this is in the criminal context, not the administrative one, but at 62, 63 of that judgment, the Court considers the scope of the provision in the context of the devastating harm that may result from terrorist activity, and concludes that criminalising is not grossly disproportionate or overbroad, obviously in relation to preventing terrorism in their constitutional framework.

Now, since – as I had touched on, and I took it to you earlier as part of our exchanges, but since 2021, there is the provision for "material support" or that definition. That is at footnote 3 of my outline document, and I read that out to you. That is now in our legislation, and so you have "material support" being criminalised in New Zealand in sections 8(1A) and 8(2B) of the Terrorism Suppression Act, excludes good faith humanitarian activity.

WINKELMANN CJ:

Is this on your chart again?

MR MARTIN:

This is on the chart. All I'm really doing is pointing out that you have "material support" now, not at the time that we're concerned with in this case, but now, since 2021. You have "material support" as part of the provision at section 8, and that is in the context of a criminal offence.

Now, there's obvious differences there in terms of, you're not there concerned purely with an intention. But nevertheless, the point I'm drawing the Court's attention to is that an approach similar to that adopted in *Khawaja* is now reflected in criminal offences in this country.

Another place that "material support" appears in our legislation is in the Terrorism Suppression (Control Orders) Act, where it is used in conjunction with the word "facilitates" and I did want to come onto that for that reason. Just checking the time. I think I've got time to touch on this before assuming we break at 11.30.

WINKELMANN CJ:
Well, yes. What is your timeframe for yourself, Mr Martin?

MR MARTIN:
Well, I'm in your Honour's hands. I probably can –

WINKELMANN CJ:
I'm not stopping you. I'm just trying to get an idea, because you've got to deal with your third topic, haven't you, which is –

MR MARTIN:
The standard of review –

WINKELMANN CJ:
Oh, the second and third topics, standard of review and duty of candour.

MR MARTIN:
I deal with those fairly briefly and together if I may.

WINKELMANN CJ:
Okay.

MR MARTIN:

So I think I can probably be concluded in about 40 minutes. Half an hour, 40 minutes.

WINKELMANN CJ:

All right.

MR MARTIN:

Is that – what I was going to do, we're at 48 of the written submissions, where we talk about control orders. At 49, we refer there to – well, so control orders are another administrative mechanism to reduce risk, and it's more recent legislation obviously than the passport cancellation provisions. It is submitted there is some symmetry in the statutory schemes; statutory language is similar, and in particular, as we'll touch on, "terrorism-related activities" includes "facilitat[ing] and support[ing] materially the carrying out of terrorism". So for that reason, I'd like to very briefly illustrate this by taking you to a recent High Court judgment under the control orders legislation concerning previous and prospective risk of involvement with ISIL. So previous involvement…

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WINKELMANN CJ:

How's this relevant?

MR MARTIN:

It is again just looking at the statute book as a whole and in particular where these terms that are of interest to us, including "facilitate" –

WINKELMANN CJ:

This is post-statute.

MR MARTIN:

I'm sorry?

WINKELMANN CJ:

These are post-statutory provisions.

MR MARTIN:

These ones are, accept that.

WINKELMANN CJ:

Seems quite a long bow to draw.

MR MARTIN:

Well, that's all I was going to say about the statutory scheme except to take you through the *Commissioner of Police v R* case which – I suppose in order to indicate how these concepts are deployed or are able to be applied in that statute in what is almost sort of mirror circumstances. I mean it's about a person becoming subject to control orders and I can step you through the way in which those provisions have been applied. I can do that reasonably quickly if it will assist. It's covered in the written subs at 49. Now there's some relevant content that is subject to a non-publication order, but you have now as a hand-up the full version unredacted. It's in the bundle redacted.

WINKELMANN CJ:

Will we be clear as to what's redacted from this full version?

MR MARTIN:

I'll tell you which bits are if that would assist.

WINKELMANN CJ:

All right, it might be a good idea for us to mark them on our copies.

MR MARTIN:

I will take you to them and show you what they are. I'll do that reasonably quickly. So I'll start at page 531 of the case.

ELLEN FRANCE J:

Could you just give us the paragraph numbers, Mr Martin, because –

WINKELMANN CJ:

Well, we don't have the – we've got the non-reported version.

MR MARTIN:

I see. You can use that one. Yes, all right, paragraph 5, 6. I'm really just noting those there in terms of the definitional requirements. There's several orders. The main purposes are protective and preventative.

If you come to paragraph 10, you have a "relevant person" and you'll see (a) engaged in terrorism-related activities, travelled, or attempted to travel, (d) deported from, or had a passport, citizenship. or nationality revoked.

Going over the page to 11, "terrorism" is defined in section 5 of the Act, "a terrorist act as defined in s 5 of the Terrorism Suppression Act," as here in the Passports Act.

At 13, "a person engages in 'terrorism-related activities'", (b), so if the person "facilitates or supports materially the carrying out of terrorism", and then section 8(3) you have this definition of "facilitated or materially supported" which does not require knowledge of the terrorist act. So again on all fours with what we have been discussing in terms of the Terrorism Suppression Act and *Khawaja*.

At 15: "The Court may make a control order only if satisfied the relevant person poses a real risk of engaging in terrorism-related activities," and "the requirements that the order imposes are only those that are necessary and appropriate".

Now we come to the material that is suppressed, and it is in paragraph 24. Sorry, my attention has been drawn to the fact that there is some material suppressed at 4 as well. That's paragraph 4 is suppressed, and then at 24…

WINKELMANN CJ:

So what parts are –

KÓS J:

I've just found the case on Lexis and I'll send it to my colleagues with the…

MR MARTIN:

It is in the bundle of authorities as well.

KÓS J:

It's in the bundle? Well, where is it?

MR MARTIN:

You have that in the bundle of authorities. What you –

WINKELMANN CJ:

This one's got some redacted –

O'REGAN J:

No, but he handed it up.

GLAZEBROOK J:

No, we've got to use the reported version if we're doing that, if we're referring to it.

MR MARTIN:

So the reported version is in the bundle of authorities. It's in the respondent's bundle of authorities at – sorry to have created that confusion, Sir – at tab 8, but that has the redactions in it of the – it's the reported version so it doesn't have the bits that I'm taking you to now.

Paragraph 24, much of (a) has been redacted, but that says: "R is the over the age of 18" is not, but the next part is redacted. (b), there are some references to places that have been redacted. (c), again, reference to a place, redacted. Then 24(c)(i) has been, is not published, is suppressed. The places in (ii), (c)(ii) have been redacted.

Just finally on this, I now take you to 29. So 29(a) and (b) are suppressed. 29(c)(i) and (ii) are suppressed. And 29(c)(iii), the first word has been changed in order to mask it. As you'll see, the principal risk is not suppressed. 29(c)(iii) and (iv) are not suppressed. I won't read them out, but they're talking about the principal risk that arose in this case, and you'll see at 36(d) that there was nothing before her Honour in that case to suggest a risk that "R would themselves engage in acts of terror or violence". 36(g) is also suppressed.

I wonder if that might be good place for the break, your Honour.

WINKELMANN CJ:
I don't know what we should take from it though, Mr Martin.

MR MARTIN:
What I was doing is simply drawing to your Honour's attention that those facts that are set out in that judgment, it is submitted, also satisfy definitions, took you to, that are similar to the ones that the respondent says apply in this case.

WINKELMANN CJ:
Right, thank you. We'll take the adjournment.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.47 AM

MR MARTIN:
Your Honours, I propose to now touch on fairly briefly the standard of review, and I say briefly because it is submitted, and the standard of review really makes no difference on the facts, and the adequacy of the report, which is the *Air Nelson* test, is a flexible standard. There is this question about the appeal correctness standard adopted by the Court of Appeal, and the respondent submits that the Court in judicial review is concerned with the scope of the power, and will come into close particularly with whether the decision-maker acted in accordance with the power. What the Court of Appeal did, starting at

31 and then through 33 of the Court of Appeal judgment, is that it used section 29AA(2) and (3), or (2) in particular, as establishing a standard of review that it described as orthodox in an appeal but exceptional if not wholly unprecedented in judicial review.

Now at paragraph 38 of the Court of Appeal judgement you have the respondent's position in the Court of Appeal, but as we record at paragraph 36 of our submissions, the respondent no longer takes this point. It's submitted that the decision needs to be one that's reasonably open to the Minister on the basis of sufficient and relevant evidence, and it is submitted that the standard of review may not make a difference. So the –

WINKELMANN CJ:

Just pause for a moment. I'm just trying to recall what the position was then. What was your position at –

MR MARTIN:

So the, this is at Court of Appeal at 38, the –

WINKELMANN CJ:

Right, so you were arguing the same position as Mr Keith.

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MR MARTIN:

As Mr Keith. We're arguing Mr Keith that essentially judicial review is the appropriate approach. And the Court of Appeal took the approach it did, but really when you look at the – if you look at section 29AA(2) the additional piece is paragraph (a) that there's credible, "the information that led to the decision is credible, having regard to its source or sources".

WINKELMANN CJ:

There's also the relief to…

MR MARTIN:

Yes, potentially. You mean in subsection (3)?

WINKELMANN CJ:

That they substitute their own view. They might form the view the Minister has erred in his approach, but they have done the exercise themselves, and they're satisfied the test is met, which is quite a different thing. So the application of section 29, are you coming to that?

MR MARTIN:

I wasn't going to say much more on it. The approach the Court took here, of course, was to say that it didn't arise, subsection (3) didn't arise because the decision was already spent. The effect of the cancellation was already spent. But I take your Honours point that it leaves open, I suppose, a different question of, you know, in a different case.

If the Court of Appeal were wrong, they addressed this at 39 of the respondent's written submissions, if the Court of Appeal were wrong it makes no difference. I mean what has happened, if that is the case, it simply caused the Court of Appeal to scrutinise more closely than would ordinarily be the case in judicial review the decision. The Minister's decision.

Turning then to the adequacy of the report being a flexible standard. In the Court of Appeal judgment at 82 they say that "… adequacy is a flexible standard capable of accommodating a wider range of statutory decisions." And it is submitted that that is right, and in a way I'm coming here, I'll come separately to it but only really very briefly, to Justice France question around duty of candour, because the submission in response to what particularly the special advocate has argued, is that the *Air Nelson* standard, which I can take you to, but I think it will be well known to the Court, the *Air Nelson* standard is a flexible one, and there is no significant difference between the two approaches, certainly not in this case. It doesn't make any difference on these facts.

WINKELMANN CJ:

Can I just ask, is it really appropriate to apply the *Air Nelson* standard to a situation which is ex parte and where fundamental rights are at issue?

MR MARTIN:

Well I think, yes, it is submitted, because in the end, and I can go into the more detail piece of this, but both boil down to a question of materiality and context. So you have the flexibility within that standard to look at the actual context in which the decision is being made, and then look at whether any errors are material.

WINKELMANN CJ:

But doesn't *Air Nelson* bear upon what the obligation is on the public servants to disclose material?

MR MARTIN:

It bears on both. So there must be a fair and accurate report, so that's *Air Nelson* at pages 151, 153. So they say at paragraph 56 of the *Air Nelson* decision that it must be taken on the basis of an official's report – sorry in that case the decision was taken on the basis of an official's report without "cognisance of significant matters". So in other words it didn't take into account relevant considerations.

WINKELMANN CJ:

Just having difficulty following your submission sorry. What paragraph in *Air Nelson*?

MR MARTIN:

So *Air Nelson* at paragraph 56 is the decision of the Court in that case.

O'REGAN J:

Can you make the print a little bit bigger on the screen.

WINKELMANN CJ:

I'm struggling.

MR MARTIN:

So at paragraph 56, I can take you through it.

WINKELMANN CJ:

No, it's all right. I've got a recollection of it.

MR MARTIN:

Yes, I was going to say I can take you through it in more detail.

WINKELMANN CJ:

So you're saying that *Air Nelson* requires a fair and accurate report?

MR MARTIN:

Yes. So –

O'REGAN J:

And comprehensive I think.

MR MARTIN:

And it follows on from what was said in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA), so this is at 49 of the judgment. So in CREEDNZ, the previous page, and I won't take you to it, talks about the *Carltona* principle, and then *Bushell v Secretary of State for the Environment* [1981] AC 75, (HL) as being a sort of hybrid, and you'll see, if we just back up and take in the text above 49, you'll see there, quoting Professor Joseph, the Court noting that *Bushell* established a half way house solution in preference to the *Carltona* principle, greater accountability's attained, the Minister personally must decide and any flaw in the departmental fact-finding or report will open the decision to review. So *Bushell*'s adopted by the Court in *CREEDNZ*, that's at 49 of this judgment we're looking at, and then you have various ways in which the test is stated, but at 50, you have his Honour Justice Cooke approving Lord Diplock's

statement that the collective knowledge of the Minister's office is to be treated as the Minister's own knowledge, and then the phrase that is often quoted, "matters so obviously material to a decision that anything short of direct consideration of them by Ministers collectively", or Ministers, "would not be in accordance with the intention of the Act."

And it's put slightly differently at 51 by his Honour Justice Richardson. So: "…the inference that Ministers had not addressed their minds to relevant considerations should not be lightly drawn", and: "He also approved Lord Diplock's remarks in *Bushell*, saying they reflected the 'realities of decision-making'". So this is all talking about *CREEDNZ* at this point, and his Honour Justice Richardson said in *CREEDNZ* that "the decision-maker should not be misinformed as to established and material facts". So a mistake of fact based on an inadequate report was the subject of the Court's consideration in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA), at 52 here.

WINKELMANN CJ:

So the gap between what you're saying then and Mr Keith is saying is that he would say it's not enough that you're not giving an account or misrepresenting that which you know, it's actually identifying lines of enquiry and pursuing them or relevant enquiry and pursuing them or else identifying that you haven't done so. So that's the gap, isn't it?

GLAZEBROOK J:

Because it's always secret here. It's not just that it's ex parte and then you get to look at it afterwards and put forward your interpretation or other facts that mightn't been known. It's that it remains secret. So it's always ex parte, in another words.

MR MARTIN:

With the assistance of a special advocate to –

GLAZEBROOK J:

Well, a special advocate who can't talk about it with the person to get an explanation.

WINKELMANN CJ:

And only if it's challenged.

KÓS J:

But that's a point going both ways. I mean Justice O'Regan –

WINKELMANN CJ:

Could I just – I was just going to –

KÓS J:

Sorry?

WINKELMANN CJ:

I was just going to ask a question.

KÓS J:

Oh.

WINKELMANN CJ:

Because what we're concerned with here is the quality of the decision-making, so the law should support good quality decision-making.

MR MARTIN:

Yes.

WINKELMANN CJ:

And I think what Mr Keith's submission is, well, certainly was, was that good quality decision-making requires that the Minister can satisfy themselves that appropriate enquiries have been made and since they don't have the technical knowledge, that should be disclosed in the material.

MR MARTIN:

I know – the submission for the respondent is that this test, what is a "fair, accurate and adequate report", is sufficient to accommodate that, allowing for the context, which is unusual and has the limitations that you've mentioned. So you're not in practice adding anything to your analysis.

GLAZEBROOK J:

Where's that in – can you take us to where that is in *Air Nelson*?

MR MARTIN:

So "fair, accurate and adequate" was accepted at 53.

KÓS J:

But that's the point I wanted to raise. It's picking up on the point that Justice O'Regan made yesterday. These are regular Minister decision-making cases where time is not of the essence. This is very different. There's a very short statutory timeframe. The Minister and the authorities can only do so much in that time to produce such a report. So how does that factor in? I mean, there may be deficiencies, but isn't that then to be addressed by the Minister either reconsidering his decision if material is put in front of him or through the statutory appellate process?

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MR MARTIN:

Yes, and that's what that appeal process is designed for. I'll come back to it if it's going to be helpful. I don't accept that the differences between appeal and judicial review as process are as marked as was submitted by Mr Keith yesterday and certainly not here, and without detaining the Court if it's not helpful, I mean I think there are a number of judgments of Justice Dobson around procedure here and discovery, and so there's no question that there was much process, but putting that to one side, to your question, Justice Kós, there is going to be a context that may well involve limited ability to make a decision, sorry, limited time to make a decision. There's also the ex parte nature of it which the Court of Appeal acknowledged, and what the Court needs

to do is take into account the various aspects of the context and decide whether or not the report was fair, accurate and adequate having regard to the power that's being exercised, and so it's submitted that whether you call that a duty of candour, the scope of the duty in practice is the same.

WINKELMANN CJ:

So can I ask you a point of clarification then? You say that it's enough that we just adopt the *Air Nelson* test which is "a fair, accurate, and adequate report", I think, or some version of that, and that's context responsive. That doesn't really answer the question then whether the context actually requires the candour that Mr Keith has submitted it does.

MR MARTIN:

It's submitted that it should respond to that because you are – the Court needs to determine whether or not the report that the Minister got in the circumstances under which it was being prepared and the decision-making was occurring was omitting something, for example, that was so obviously material to the decision that it needed to be taken into account otherwise the decision is invalid.

WINKELMANN CJ:

So you would accept then that sometimes there is – that there wasn't – should the report therefore say: "Well, there is an avenue of inquiry which might provide more information as to context of these communications but we haven't had time to pursue it," or – yes, it should disclose paths not taken.

MR MARTIN:

I mean we really are into questions now that have to be answered probably properly factually but – on actual facts – but yes, your scrutiny of the report can take into account – in assessing whether or not it's fair, accurate, and adequate, and has it taken into account of relevant considerations, it can ask those questions. But we're obviously not talking about red herrings that were not followed because that's the materiality aspect and –

KÓS J:

Should there be a black hat exercise undertaken? After all, these officials are not the Minister's officials. They're from another department.

MR MARTIN:

I think the – I'm doing this off memory and I can go to the passage, but thinking about this, this Court's decision in *R v Reti* in a search warrant context, I mean even there there's the balance – and I will look at it properly for you and give you the reference – there's that balance between, you know, not every document can be put to a decision-maker. That's not practical. So you are always striking a balance. But to answer your question, yes, this test allows that, allows the assessment or whether or not there was sufficient balance, whether or not there was enough black hatting.

KÓS J:

Well, of course it does. My question was whether that was required, not whether it's allowed.

MR MARTIN:

Well, required. I mean it requires balance. It does require balance, and so that will involve, if you like the black hatting or the what are the other things that can be said here, it may not be described in that way, it may not be a list of "these are all the things that go the other way" set out one by one, but they should be in the report to the extent that they are material.

KÓS J:

So if I note down: "Balance requires material adverse considerations to be identified," would you agree?

MR MARTIN:

Yes, I think balance has to be assessed in the round but yes, it includes material adverse considerations that the Minister needs to consider in order not to be, to go back to those paragraphs that we looked at, what Justice Richardson was

talking about in order for the decision-maker not to be misinformed in order to establish the material facts. That's at 51 of *Air Nelson*.

ELLEN FRANCE J:

So if you take the exclusions, would you accept that there's some duty in enquire into and provide information about whether or not the exclusions might apply?

MR MARTIN:

This is where the materiality question arises, because it really depends on whether or not there is – it depends on whether those are material considerations for the Minister. If you're in a situation where they are not engaged, I don't –

GLAZEBROOK J:

It's hard to see –

MR MARTIN:

It's not necessary to be discussing matters that are not engaged.

ELLEN FRANCE J:

I'm not talking about discussing, I'm talking about – because candour follows from having made some enquiry. So what I'm wanting to understand is what your position is on the obligations to make enquiries in relation to those sorts of things.

MR MARTIN:

Enquiries of the person themselves, or enquiries…

ELLEN FRANCE J:

No, no, I'm talking about the agency making enquiries in order to be able to provide the information to the decision-maker. I just want to understand how far you say the obligation goes if you're accepting a duty of candour.

MR MARTIN:

Well I'm not accepting that at duty of candour is necessary, but I'll put that to one side, because what I am saying is that this test, the fair, accurate and adequate report and achieving a balance that the Courts with the *Air Nelson* case, would require you to make enquiries that a reasonable decision-maker needs to be appraised of in order to make this decision.

WINKELMANN CJ:

So what you're really being asked is, in a variety of different ways, is whether the context requires these enquiries. So what is reported at the end is responsive to the context, and I think you've accepted that this is an exceptional context. So, for instance, it is necessary to identify lines of inquiry that could have been undertaken, but have not been undertaken, possibly that applies to any kind of ex parte situation. But – and what Justice France is asking you is would that extend to an obligation to make enquiries about the applicability of the exclusions because of the exceptional circumstance. Because the answer about what you have to report is kind of like the last question, but the prior question is about what you have to do to make the report.

MR MARTIN:

I mean on – in this case they weren't engaged in that material way, so I think on the facts, and probably better argued in the closed court, I don't think more was needing to be said in this report. I accept the proposition that there might be matters that need to be enquired into in order to furnish a decision-maker with a fair, accurate and adequate report, but I think the detail of what might be said to be shortcomings in this report are best discussed in closed.

WINKELMANN CJ:

I suppose what might be said in response to you is that you're never going – it may be that, it appears on the face of it they don't apply but a legal inquiry finds that they do.

MR MARTIN:

I think in this open context I am perhaps not understanding what your Honours have in mind in terms of exactly what those inquiries would look like, and that's

why, perhaps, I'm being a bit cautious in how I'm responding, because I accept that if there are material matters that needed to have been gone into, then that is part of the test.

WINKELMANN CJ:

Can we go to the exclusions? Can we go to the exclusions on the screen? So it's…

1210

GLAZEBROOK J:

It also probably comes up in relation to the human rights obligations.

WINKELMANN CJ:

I suppose what it might suggest is the possibility of the need for expert advice on, for instance, subsection (4), section 5(4), which might be an in-house expert advice, but, addressing that kind of issue, enquiring about that kind of issue. If we can scroll down onto the… Right. Yes.

MR MARTIN:

So in terms of subsection (4), the armed conflict, the briefing at 301.0018 paragraph 53, so this is the open part of the briefing.

MR MARTIN:

So the acts…

WINKELMANN CJ:

Yes. So you're saying, I can see your point. No enquiry apart from a query about subsection (4), but can I just ask this, then? What about the – and I can't recollect that report does do this, but to draw the Minister's attention to those carveouts and then say – and show that the agency has turned their minds to it and they do not apply for XYZ reasons. Because they're so important in terms of the balancing that goes on, really, in terms of human rights. Particularly freedom of speech part.

KÓS J:

I mean I think structuring – this is why the black hat exercise is so important.

MR MARTIN:

So paragraph 53 on the screen now, going to the lawful armed conflict question. The section was appended to the report, but there wasn't otherwise specific discussion of the matters that you're talking about in the report. So two things in terms of the submission at this point. One, that I'm not sure the duty of candour assists or a duty of candour would assist if there were one in relation to that question, because what you're really doing is still looking at whether the report is fair, accurate, adequate, and allows the Minister to make a lawful decision in terms of the power.

Then there is this question of materiality that arises in terms of on the particular facts, if things are not addressed in the report, the things you're talking about, but potentially any other issue that might be raised or could've been gone into in the period that they had to prepare the report. There's this question of whether it is so obviously material that it needed to be addressed, and it is submitted that it provides a good workable standard to apply, albeit in quite an unusual context. And it's not really sure – it's not clear to me what the duty of candour that is contended for adds, except to impress upon the Court the unusualness of the context and the need for careful scrutiny and so on of the quality of the decision-making and of the report. In terms of the legal test, there is the scope to consider these matters, but it does require assessment of that context and materiality. I'm conscious that it feels as though we're sort of leaving that part of the conversation on a slightly hanging note and it may be possible to –

WINKELMANN CJ:

No. I think you've been thoroughly interrogated, Mr Martin.

MR MARTIN:

No, no, it may be possible to return to it in a less abstract way. I'm conscious of that, as I know you all are as well. But that was probably all I was proposing

to say around the standard of review and the duty of candour, and so that was all I was proposing to say in the open part of the hearing.

WINKELMANN CJ:

Thank you, Mr Martin. So in terms of reply, Ms Aldred, are you going to reply?

MS ALDRED:

Yes, I am, your Honour. Mr Keith and I have conferred about the topics that we are going to reply on. Neither of us is going to be very long but we've agreed that it makes sense that Mr Keith go first due to the division of those topics.

WINKELMANN CJ:

Thank you.

MR KEITH:

May it please the Court, and very grateful to my learned friends. As Ms Aldred has said, we have a few specific points to make. The first is just picking up on the references to this, if it is or isn't an offence provision, is facilitation covered or not, and my learned friend, Mr Martin, took the Court to section 6A, the offence of engaging in a terrorist act.

The two points – and there was also discussion, I think, particularly from Justice Glazebrook, of the specific terms of the UN Security Council Resolutions. So just following on through the 2002 Act, and this is as at the time of the Minister's decision but also in large part as at the time of the first Security Council Resolution 1373.

If we go down a page, we then have – and this was, well, is what we say informs the term "facilitation" in terms of the specific categories of activity. We have financing in section 8, dealing with property in section 9, making property, financial or other services available to a terrorist entity in 10, and then we skip past the authorisation which is a sort of exemption you can get from the Prime Minister, recruiting, and then last and most widely, participation, and this is picking up the bowls club example, that one is doing certain things.

The one caveat in terms of participation is one must – or two caveats – one about knowledge or recklessness but the real caveat in terms of the bowls club point is one must participate for the prescribed purpose in section (2), that is enhancing, and the Court will also note that that is the wider terminology, wider than "facilitation", that is an issue in *Khawaja*. So the offence there was participating in a group in a way that enhanced its ability. So we really are on all fours there.

The particular significance of that point here is, first up, it's just not right to say, well, there is engaging in terrorism and then there's facilitation which isn't an offence and doesn't have that same content that I was going through in some detail yesterday about cognate terms in the Security Council Resolutions, but also picking up on a point that the Court has made this morning to my learned friend, if we can go to Resolution 2178.

1220

So there is the first point that the Court's already made, that the recitals, the preambular paragraphs, very much aren't where the decision comes in. They are the context. They are not referring to something and a preamble does not make it a prohibited activity, for example.

Now, if we go forward a page. Sorry, another page from there. It's long. Here we are. So going into the operative paragraphs on page 4 onwards which is now up on the screen. Can we make that slightly bigger? So the specific decisions are referenced here. One is at paragraph 5. That is the decision to prevent or suppress travelling, recruiting and so on. So that is the specific and new point about not the conduct of people who themselves travel, but people who are enabling travel, who are carrying out travel activities.

But the critical point, and this is where I think my learned friend disagrees with me and Ms Aldred, and this is where the specificity point comes in, if one looks at paragraph 6, it's a recalling. So I think the Chief Justice might've asked, is that a reference back, and it is. It's going back to the obligations in 1373, the

original counter-terrorism Resolution. And my learned friend picked up the word "supporting terrorist acts" in line 3, but the next words and the following subparagraphs are important. Those people are to be "brought to justice", so it is not "support" in any nebulous sense. It is a "support" in terms of criminal offences the Member States are required to adopt, and those offences are, as you set out – as your Honours can see it in 6(a), for example, people travelling to go and carry out, participate or train, funding, and this is why I took your Honours to the funding and related offences in the Terrorism Suppression Act, and then this offence, or partly new offence, including recruiting.

I'm not sure whether I went to the recruiting offence in the Terrorism Suppression Act, but there is one there, too. So there is this "set", to pick up on language members of the Court were using. There is this set of carefully defined prescribed activities. I think the Court call them "careful categories". I think I used the word "prescribed categories" yesterday. So that was the first and I think broadest point arising from my learned friend.

Second, I don't think I need to say much about the 2019 and 2021 new legislation. As I said yesterday, and it's in the legislative history, my learned friend I think did accept the point from the Court, that the concept of "material support" is new, it is wider, it is expressed to and be intentionally wider in the history, and so we now have – there's now an offence of material support, there are control orders around material support and the like. So that wider concept is, again, newer. It doesn't assist us here except to emphasise, as I think I said yesterday, that "facilitation" is something narrower and as I've said, more concrete.

The one further point in terms of the difference that it makes, and I do agree with the Chief Justice's characterisation of what I was saying, which was the point here – of utmost good faith or candour, and I'm not sure the label is significant except that "candour" can mean a whole lot of other things in a judicial review context and we don't want that here, but – we don't want that confusion here, but the point is simply about within the time constraints that Justice O'Regan and Justice Kós this morning have adverted to, but of doing at

least a quick if balanced job or perhaps saying, look, we cannot possibly investigate this, Minister, there is a line of inquiry. I'm not attracted to that last, because I suspect there's always something one can do, and the kinds of things that the Court has brought up and the kinds of things we will talk about in closed are not in that category of nuance. It's not, conduct some vast further or subtle investigation.

If I can bring up – and sorry, I'm just going to have to grab it. I brought the wrong folder to the lectern. The Court asked yesterday, I think it was Justice France, about this duty to enquire concept, how far did it go, and I think that the straightforward answer is it must – it is an extension of natural justice, it will depend upon the circumstances, it will depend upon – and some of those circumstances here are particularly extreme. But the two references I was able to find, and one of them does explain things, but if you can bear with me for a moment, I'll just grab the right folder.

So I'd already referred the Court yesterday to Professor Roach's very good article on the problems of intelligence becoming evidence and there are references in the submissions to the pitfalls of that, that intelligence thinking can be risk-averse, can be subject to tunnel vision and that sort of thing, but in terms of this point following from *Charkaoui* and the inquiry and putting the Minister in the driving seat – that's not a terrible metaphor. Can we go forward to page 204 in the small print in the corner? So about another 30 pages on. So this paragraph beginning "although", second full paragraph on the page. There's this concern first in the first paragraph, that you might collect and retain more raw intelligence, and as Justice France had said, part of the driver in *Charkaoui* was that the Canadian Security Intelligence Service provided its briefing paper to the Minister but didn't provide the raw materials. In fact, they systematically destroyed them, and I think it's since been suggested that might not have been quite true, but I won't go into that. But in any case, there is this concern about collecting a lot of stuff.

But then they say, then Professor Roach drawing on his background in intelligence failures and the like, says "its potential benefits are great", "work

better with law enforcement", "benefit…society through more effective". But then this last sentence, and this is what I thought was useful in terms of Justice France's question: "CSIS like police must be reminded that it has a duty to look for and collect exculpatory as well as incriminatory material and it should follow the best thinking within intelligence agencies which recognizes the dangers of confirmation bias or tunnel vision in the collection and analysis of intelligence."

So it is very much, it is, I think, driven by the particular complications of intelligence-based, of covertly-based decisions. So that was the first of those references, and the second was Professor Hudson, Hudson and Alati, that's tab 20, and the relevant passages, and this is coming into the *Harkat* decision. So first was following *Charkaoui*, this is now with *Harkat*. On page 47, so one has the *Almrei* case, failure "to disclose material unfavourable…including [material] impinging the credibility of…sources". The Security Intelligence Service in Canada was "also found to have consistently failed to explore, assess, or share new information that challenged the original basis for the" administrative certificate, and that was defended, and onto the next page, unsuccessfully.

1230

And the one sentence here, other than Justice Mosley rejecting the analysis in *Almrei* and then that was picked up in *Harkat* by the Supreme Court: "If accepted," say Hudson and Alati, "this kind of 'tunnel vision' would allow the government to shirk its responsibility to disclose exculpatory information by failing to collect it in the first place." It's rightly rejected. So I think that's – sorry, one other point, and this explains why they're rather thin references, Hudson and Alati go on to explain that in response, I think it was immediately the following year after *Harkat*, very controversial Intelligence Reform Bill C-51 essentially did away with this. Special advocates in Canada get far less than I've been able to get here now. There is a provision essentially saying you provide the relevant material to the allegations, not the exculpatory. So…

KÓS J:

Sorry, I don't understand the distinction. Exculpatory is relevant.

MR KEITH:

Sorry, I should slow down. The paragraph that's up on the screen is the new reform. The government, Alati and Hudson are saying in their summary, and I think it is right, the Minister has discretion and then the Minister does not need to share relevant information that it has not filed with the Judge. So if it's not in the dossier put to the designated Judge, it doesn't have to go to the special advocates unless there's an order, and it's been suggested that the SAs, the special advocates there, would now be not entitled to access exculpatory material of the kind relied upon in *Almrei*.

So I think that there's probably a constitutional challenge coming to this sooner or later although all of these cases you'll note in a slightly depressing way are about a quite small number of people who have taken a very long time to work their way through the Canadian courts, but for now that's why I can't find, or why I take it I can't find anything more on the mechanics of this because it's been shut down by legislation.

I think that was everything I was going to address and Ms Aldred has a couple of further points.

I just refer – Ms Aldred could probably do this but I've got it in my notes – paragraph 62.2 of the appellant's submissions is the reference to the New Zealand Government communication to the Security Council about what it's done to give effect to the Resolution 1373 obligation, so 62.2 up on the screen, taken these various things through legislating for conspiracy, aiding and abetting, concealing terrorists and so on. So this is where we're saying the word "facilitation" hasn't been used but the offences have been adopted.

I think those are all the points that I have to make unless the Court has any questions, otherwise Ms Aldred will also reply.

ELLEN FRANCE J:

Sorry, could I just ask one thing about 29AA(2)?

MR KEITH:

Of course, Ma'am, yes.

ELLEN FRANCE J:

Unless Ms Aldred is addressing that?

MR KEITH:

No, no, I think I've done the running on that.

ELLEN FRANCE J:

It was just the Court of Appeal make the observation that the natural meaning, which is that 29AA(2) applies here, is the more rights friendly meaning, and just thinking about that in the context of *Moncrief-Spittle* and the idea that the Bill of Rights provides some substantive constraint, is it your submission that the Court got that wrong in terms of that being the more rights-friendly approach?

MR KEITH:

It is and I'll explain why in I think three points. First, I've set out in the writtens, and I don't have them in front of me, but I – why I say all the statutory indicia are the other way.

ELLEN FRANCE J:

Yes, yes. No, I understand that.

MR KEITH:

So not the natural meaning. The rights friendly point in two respects – and this is also, I should say, picking up on a point that I think Justice Kós made about appeals as well, it's a good reminder to say something quickly about that too, I think, if I can. On the substantive decision as distinct from rights compliance which I'll deal with as my third point, on the substantive decision itself an appeal could be a fairer process if one could be run, and I do say that qualification with some knowledge of this, it has been hard enough to run this as a judicial review, but an appeal could be a fairer process if the issues were fully joined and the Court was properly in a position and had, for example, not only the in-house

expert advisers about the exclusions but also a contest on that, so that could all be done and it would be fairer. Where that hasn't happened, what I say, where I'm critical of the Court of Appeal's approach is that pre-condition is just not there. The last point in terms of rights consistency, and *Moncrief-Spittle*, the two things, one which I think is a separate point but I think we've said this, right, so this – the holding in *Moncrief-Spittle*, the idea of the decision-maker having addressed these matters here is I think for reasons the Chief Justice alluded to with the language of the water of rights, I think it was…

WINKELMANN CJ:

Swimming in the water of rights.

MR KEITH:

Sorry, Ma'am. But it really is critical to a good decision and it's not a substitute to say, well, a subsequent decision-maker can come and check for accuracy on the *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 and so on things, and I think – but the upshot of – and this is getting into other Bill of Rights cases the Court currently has and whether we're going to follow *Doré* and those sorts of things – whether rights review imports substantive compliance I don't think is a question we need to deal with here.

ELLEN FRANCE J:

No, no.

MR KEITH:

But I do say – I think the rights friendly thing is to insist on the Minister being fully informed here, at least in this sort of context, and the Court is then in a position to review that, possibly set it aside on correctness grounds, but you have to have the first step.

WINKELMANN CJ:

So is your point, your fundamental point, the notion that it's more rights friendly to basically bring judicial review up to the level of appeal to enable the Court to look at the merits and make their own decision?

MR KEITH:

Mmm.

WINKELMANN CJ:

That sounds like it's a rights-promoting approach but the reality is that the litigant in front of them is – it's like being invited to a game of golf but having to play without the golf clubs. So in that format it's not actually particularly rights consistent. It's a very compromised right of appeal.

MR KEITH:

It's a very compromised right of appeal and one has this – the Act doesn't require only appeals that it – it refers to review. I don't think it applies the scheme to review for the reasons I've given. So one has the two options, and we do have the specific choice in this case of pursuing review, not appeal, but I do say too, yes, a substantive appeal approach like this may not even be possible in some cases but it would only be more rights friendly if it is, if it has those preconditions met, if the Court is put in the position that a de novo Court would need to be in.

WINKELMANN CJ:

And the parties are put in a position to argue the merits perhaps, maybe?
1240

MR KEITH:

Yes, well, I mean the excluded person – this is part of why I'm saying it would be exceptionally hard. The reason why, to come back to a point Ms Aldred made in opening, and Justice Dobson also made, the reason why everyone is so critical of special advocate procedures, they're the worst – they're the best of an extremely bad lot, is simply because one can't communicate as the

excluded person. There isn't an opportunity to say, well, actually, this, in any effective or safe way. So I think the appeal right is there. I was told of, I have been told of special advocate cases where it is so specific that it is possible for the excluded person to actually make full defence, but they very much are reliant on being that specific. You know, you were in this place at this time, well, I can show you, you know, I was at work on the other side of the city or something. But, yes. I hope that helps. Thank you.

MS ALDRED:

I just have three brief points to make, and the first two, I'll speed through at the risk of repeating myself, although I don't think I quite am doing that. The first one is just a very brief point in relation to the decision in *Commissioner of Police v R*, that decision of Justice Ellis that was referred to by my friend this morning.

My primary submission is, as I did make yesterday, is that it's simply not helpful, and it addresses a much later and different statutory context and a wider range of conduct, but the other thing – but I was a little bit alarmed this morning when I heard Mr Martin suggest that in that case, the evidence mirrored the circumstances of the appellant in this case. It certainly didn't mirror it, and really, aside from – I don't want to take your Honours through the evidence which I did refer to specifically in my submissions yesterday, but the crucial point in that regard to make which I didn't specifically touch on yesterday is that at paragraph 29, which summarises the Court's findings on the evidence, you'll see the first few reasons are redacted, but if you go over the page to 29(c)(iv), the Court says there: "In R's case, the principal risk is assessed as being that they will provide financial support to ISIL and promote its agenda to others." So there was no suggestion of anything like that here that certainly I've seen. On top of that, it's made clear in the judgment that that specific finding was based on expert evidence that the Court was given. The final point I just wanted to make in relation to that case is that it wasn't argued or it wasn't fully argued, as far as I can see from the judgment, it appears not to have been opposed.

The second point I wanted to make, which, again, I touched on a little yesterday, but I just thought I would explore this a little bit more in relation to the

discussions we've had or the Court has had with various counsel about identifying an intention to travel to ISIL-held territory and/or expressions of support for that organisation with an intention to facilitate its terrorist activities. Whilst I would certainly accept Justice Kós' statement about the extent and seriousness of ISIL's terrorist conduct and activities, I'm a bit concerned, and as I think the Chief Justice has articulated this as well, about the Crown's characterisation of ISIL having a terrorist project, and that seems to me to be an attempt to fudge the circumstances, automatically attribute an intention to further terrorist acts in a way that, as I spoke about yesterday, has been dismissed as wrong by the European courts and the UK courts in the context of administrative decision-making, which calls terrorist-related activities or brings terrorist-related activities into the relevant assessment. And I spoke in my submissions yesterday specifically about the case of *JS v Home Secretary*, that was the Tamil Tigers case, where the Court specifically rejected a suggestion that by voluntary membership of the Tamil Tigers and holding a senior rank in that organisation, therefore the appellant could be seen to be complicit in its terrorist activities.

In the case of *Federal Republic of Germany v B* [2012] 1 WLR 1076 (CJEU), which I've just had brought up on the screen, that very similar consideration of issues by the European court there, and I just wanted to briefly go, to give the Court reference to paragraphs specifically 94 and 97 of that judgment. The main thing I wanted to say about that was at 94, after traversing a range of considerations, the Court said that "the exclusion from refugee status", which was the decision-making power at issue here, is "conditional on an individual assessment of the specific facts, making it possible to determine", effectively to paraphrase, whether there's complicity. At 96: "That individual responsibility must be assessed in the light of both objective and subjective criteria," and at 97: "To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct."

So obviously, it's a different statutory setting here in some ways, although again, administrative decision-making. We're not talking – we can't talk here about the extent to which the person has been involved in acts because we're talking about incomplete acts in this present statutory setting, but I would say that the Court ought to be very cautious as the European and English courts have been about making that automatic attribution which I say can't be made.

The Crown in this regard says, in its written submissions and as I understood Mr Martin this morning, that the fact of ISIL holding territory and establishing itself as a proto-state somehow strengthens the case for attribution of intent to the appellant in this case. In short, my submission is that actually, the more diffuse the activities of an organisation, the greater the requirement for evidence specific to the appellant in terms of what they might have done and the connection of that conduct with forecast terrorist acts, must be on the evidence. So rather than agreeing that the holding of territory in the proto-state situation makes the Crown's job easier in terms of attribution, I say it actually makes it more difficult.

Also, there's been a series of claims that this is a unique geopolitical context. Whilst there are features of the ISIL regime that evidently are really striking and unusual, of course, you know, we have situations that could at least be analogous in terms – internationally that could be in some way analogous in terms of the kinds of considerations for the Court, and I'm thinking here about, for example, the taking of Kabul by the Taliban which, you know, an organisation that has committed a wide range of terrorist activity and crimes against humanity and yet is governing a country. So I just would urge caution in saying that this is somehow a unique situation that must somehow influence the Court's interpretation of the legislation because I beg to differ on that.
1250

KÓS J:

Well, the other obvious one is the IRA and Sinn Féin.

MS ALDRED:

Absolutely. The IRA had a political wing which, you know, there would be many members of who wouldn't identify with the terrorist, the widespread and terrible terrorist activities of the IRA.

So finally, I just wanted to make one further point, which really arose from my learned friend Mr Martin's submissions this morning where he, I recorded him as saying, and I think it's clear, that the Crown are not – he said that the potential for the appellant marrying someone in ISIL, he said, is not a part of the acts of facilitation here, and he, in my submission, rightly, accepted that could not be capable of meeting the test of facilitation, potential intention to marry someone in ISIL.

But what concerns me, I suppose, about that concession or acknowledgement, however you want to characterise it, is that, I have on the screen here the Minister's – this is the clearest articulation that is available to the appellant of the Minister's reasons for finding that she met the statutory test. That specifically says that: "It seemed likely you would not only provide practical support to that organisation, especially if you were to become married to a member of it," and then goes on to say what other things she was going to do.

So my learned friend this morning has said that the Crown's – the decision in this case hinged on the technical assistance she might provide and the capability she might have, and the other aspect he said was relevant was sharing content online. Yet, it seems clear to me, as counsel for the appellant without access to the closed record, from this statement, which is I said is the high point as far as we're concerned, that the potential for her to marry a person in ISIL and therefore provide practical support, whatever form that might take to that organisation, was a factor that the Minister took into account.

So my submission in short which won't come as a surprise, I suppose, is that given the Crown's acknowledgement that this could not be facilitation, the Minister's decision is clearly being made pursuant to an irrelevant consideration.

Those are my submissions unless your Honours have any questions for me.

WINKELMANN CJ:

We'll adjourn now but we'll resume at 2.15 or 2. 2 o'clock? 2 or 2.15? 2, it's up the road.

KÓS J:

Mhm.

WINKELMANN CJ:

So I think we're going to adjourn now and we're going to resume in our other hearing place at 2 o'clock so we can make a bit more headway. Thank you.

COURT ADJOURNS: 12.54 PM