NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE APPELLANT REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 70/2022
[2024] NZSC 63

BETWEEN	A (SC 70/2022) Appellant
AND	MINISTER OF INTERNAL AFFAIRS Respondent

Hearing:	24-25 July 2023 (open hearing) 25-26 July 2023 (closed hearing)
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ
Counsel: (open hearing)	W L Aldred and T R Molloy for Appellant A L Martin, K Laurenson and A J Carr for Respondent B J R Keith as Special Advocate
Counsel: (closed hearing)	B J R Keith as Special Advocate A L Martin, K Laurenson and A J Carr for Respondent
Judgment:	5 June 2024

OPEN JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **A declaration is made that the Minister's decision to cancel the appellant's passport was unlawful and invalid.**

C **The respondent must pay the appellant costs of $30,000 plus usual disbursements.**

REASONS
(Given by O'Regan J)

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Introduction

[1] On 19 April 2016, the acting Minister of Internal Affairs, the Hon Judith Collins, suspended the New Zealand passport of the appellant for a period of 10 working days. The provision empowering her to do this was cl 7 of sch 2 to the Passports Act 1992.[1] The power to suspend was exercisable if:

> (a) a report was being prepared under other provisions of that schedule regarding the danger that the passport holder presented to the security of New Zealand or another country; and
>
> (b) the passport holder was likely to travel before the report was prepared.

[2] Such a report was then under preparation by Te Pā Whakamarumaru | the New Zealand Security Intelligence Service (NZSIS). The NZSIS completed its report and presented it to the Minister of Internal Affairs, the Hon Peter Dunne (the Minister), along with an oral briefing, on 2 May 2016. The report recommended that the Minister exercise his power under cl 2(2) of sch 2 to the Passports Act to cancel the appellant's New Zealand passport.

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1 As it was at the relevant time. The Act has since been amended.

[3] The recommendation was made on the ground that the appellant intended to travel to Syria to join the Islamic State of Iraq and the Levant (ISIL) for the purpose of engaging in or facilitating a terrorist act.[2] The Minister was satisfied the criteria for cancellation were made out and cancelled the appellant's passport on that day.

[4] The appellant challenged the suspension and cancellation of her passport by way of an application for judicial review. Her application was dismissed by the High Court.[3] She then appealed to the Court of Appeal, but her appeal to that Court also failed.[4] She now appeals to this Court with leave.[5]

Classified information: closed court procedure

[5] As was the case in the Courts below, parts of the evidence and argument before us contained classified security information as defined in s 29AA(5) of the Passports Act (classified information).[6] Special procedures were prescribed by s 29AB of the Passports Act for hearings involving classified information and a protocol for closed material procedures had been agreed between the Chief Justice and the Attorney-General under s 29AC of that Act (the Protocol).[7] Under these processes, a special advocate was appointed to represent the appellant's interests, both in the lower Courts and in this Court; a closed court was used to hear argument that involved reference to the classified information; and separate open and closed judgments were published by the High Court and by the Court of Appeal.[8] Those aspects of the court

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2 ISIL is also known as the Islamic State in Iraq and al Sham (ISIS), and also known as Da'esh: Terrorism Suppression Act 2002, s 4(1) definition of "ISIL (Da'esh)".

3 *A v Minister of Internal Affairs* [2020] NZHC 2782 (Dobson J) [HC judgment]. This is the open judgment.

4 *A (CA677/2020) v The Minister of Internal Affairs* [2022] NZCA 257 (Miller, Clifford and Gilbert JJ) [CA judgment]. This is the open judgment.

5 *A (SC 70/2022) v Minister of Internal Affairs* [2023] NZSC 21 (Glazebrook, Williams and Kós JJ). The approved question was whether the Court of Appeal was correct to dismiss the appeal.

6 For our purposes, it is sufficient to note that "classified security information" means information relevant to whether there are or may be grounds for believing that the grounds for cancelling a passport pursuant to (what was then) sch 2 cl 2 are made out. The definition of "classified security information" now appears in s 2AA of the Passports Act 1992.

7 That Protocol was agreed on 17 January 2017. These processes are now provided for in the Security Information in Proceedings Act 2022 and the Protocol agreed under s 28 of that Act.

8 The High Court Judge made a number of rulings relating to access to material and the conduct of proceedings: *A v Minister of Internal Affairs* [2017] NZHC 746, [2017] 3 NZLR 247; *A v Minister of Internal Affairs* [2017] NZHC 887; *A v Minister of Internal Affairs* [2017] NZHC 965; *A v Minister of Internal Affairs* [2018] NZHC 1328, [2018] 3 NZLR 583 [HC classified security information judgment]; *A v Minister of Internal Affairs* [2018] NZHC 1797; *A v Minister of Internal Affairs* [2018] NZHC 2890; and *A v Minister of Internal Affairs* [2020] NZHC 287. These were not revisited in the Court of Appeal or before us.

record that included classified information were held throughout the process in a secure place.

[6] An open hearing was held in this Court to hear the argument to the extent that it did not involve classified information. Counsel for the appellant, Ms Aldred and Mr Molloy, made submissions on the appellant's behalf at that hearing. The balance of the argument was heard in closed court from which the appellant and her counsel were excluded, but at which the special advocate was present and made submissions advancing the case for the appellant as he understood it to be.

[7] As the lower Courts did, this Court has delivered two sets of reasons. The reasons here are the open reasons, which are publicly available. Before their delivery, they were disclosed to the Safekeeping Agency pursuant to the Protocol so that they could be reviewed to ensure there were no inadvertent disclosures of classified information.[9] The closed reasons, which have been made available to the special advocate and the respondent, but not the appellant or her counsel, are supplementary in nature and do not repeat the content of the open reasons. They address classified information and may not be disclosed to any other person, except in the limited circumstances described in cl 12 of the Protocol.

[8] The High Court Judge made an order for permanent suppression of the appellant's name and identifying particulars.[10] That order remains in force.

Appeal is allowed

[9] We have concluded that the appeal must be allowed. In this open judgment, we address certain legal issues, listed below at [38] and [39], and set out our reasons for allowing the appeal to the extent we can without disclosing classified information. We then consider what remedy is appropriate.

[10] While there was detailed argument before us on the interpretation of the relevant provisions and on the application of s 29AA(3) of the Passports Act

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9 Under the Protocol, the Safekeeping Agency in the present case is the Government Communications Security Bureau.

10 HC judgment, above n 3, at [8].

(discussed below from [82]), we have not needed to address them in detail. That is because, on our view of the case, the outcome would be the same whether we adopted the respondent's position or the appellant's on most of these issues. We note there have been several amendments to the relevant legislation since the events in issue in this appeal, which means that the precedential impact of this judgment is less significant than would otherwise have been the case.

Factual background

[11] The narrative outlined here is based on the publicly available evidence, including a summary of restricted material that has been provided to the appellant. It broadly follows the outline in the Court of Appeal's open judgment. Neither party took issue with that part of the judgment.

[12] The appellant was born in Saudi Arabia in 1986 but has never been a citizen of that country. Her parents were Egyptian citizens, and as a child she travelled on their passports. In 1998, the family emigrated to New Zealand and, in 2001, she became a New Zealand citizen, acquiring her first New Zealand passport. Later the same year the family emigrated to Australia, where she also acquired citizenship.

[13] In August 2015, the appellant was detained by Turkish authorities on suspicion of attempting to enter Syria, allegedly to marry an ISIL fighter. She was said to be in a van of ISIL supporters stopped near the Syrian border. She left Turkey on 4 September 2015 (the parties do not agree whether she was deported or left of her own volition). Her ticketed destination was Australia, but she did not board her intended flight in Kuala Lumpur and instead changed her appearance before travelling, on her New Zealand passport, in the United Arab Emirates, Egypt, Qatar and Oman. Her journey brought her to the attention of the NZSIS. When she returned to New Zealand on 21 September 2015 with her brother, she was interviewed by customs officials. She advised them that the purpose of her travel to Turkey was to visit family members in a refugee camp at the Syrian border.

[14] The appellant said she lost her Australian passport in Turkey. It is not in dispute that thereafter the only travel document she held was her New Zealand passport.

[15] On 3 October 2015, the appellant and her brother left New Zealand for Indonesia but returned when they were denied entry there. They travelled to Australia on 6 October 2015 and returned to New Zealand on 25 October 2015.

[16] On 17 April 2016, the appellant's brother booked flights for himself and the appellant to Australia for 20 April 2016. But, on 19 April 2016, the appellant's New Zealand passport was, as noted earlier, suspended for 10 working days by the acting Minister of Internal Affairs. The suspension was due to lapse on 3 May 2016, so there was some urgency on the part of the NZSIS to pursue the proposed cancellation of the appellant's passport.

[17] On 22 April 2016, however, the appellant travelled from Wellington to Melbourne without a passport, relying on a letter stating that the Australian Entry Operations Centre approved her to travel as she was an Australian citizen awaiting her Australian passport being renewed. Her New Zealand passport was recorded lost by Te Tari Taiwhenua | the Department of Internal Affairs (DIA) on the same day.

[18] On 29 April 2016, the NZSIS wrote a letter to the DIA, recommending the cancellation of the appellant's passport and offering to give a classified briefing to the Minister. The classified briefing took place on 2 May 2016. After the briefing, the Minister cancelled the appellant's passport for a period of 12 months.

[19] On 5 May 2016, the Australian Federal Police served the appellant in Melbourne with notice of cancellation of her New Zealand passport.

The briefing paper to the Minister

[20] As noted earlier, the Minister was presented with a briefing paper and received a 30-minute briefing from NZSIS officials before making the decision to cancel the appellant's passport. Because the briefing paper contained classified information, the Minister did not have an opportunity to read the paper beforehand. The briefing paper was 20 pages long. It cited 33 references to intelligence garnered by the NZSIS, comprising 199 pages (the References). Many of the References comprised or contained classified information.

Minister's affidavit

[21] On 30 August 2017, the Minister swore an affidavit for these proceedings, describing his decision-making process (the Minister's affidavit). The Minister deposed that, during the briefing, he read the briefing paper while NZSIS personnel talked him through, and highlighted relevant information from, the References. He deposed that the process just noted was the usual procedure in cases involving classified information. He said he was well versed in the importance of the decision and the matters of which he needed to be satisfied.

[22] Much of the content of the Minister's affidavit is classified information, but in the unclassified part he made this observation:

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

[23] On 20 February 2018, the Director Intelligence for the NZSIS made an affidavit on behalf of the Minister that contained some further information that was relevant to the cancellation decision, particularly information about ISIL (the Director's affidavit). It also summarised the References. These contained the information on which the recommendation to the Minister to cancel the appellant's passport was based.

Notice of cancellation served on the appellant

[24] The notice of cancellation was served on the appellant in Melbourne by the Australian Federal Police. The notice recorded that the cancellation decision had been made under cl 2(2) of sch 2 to the Passports Act, on grounds of national security and relying on information supplied by the NZSIS. The notice explained that most of that information was classified. But it included the following summary of the basis on which the Minister believed the appellant had been involved in activities of "security concern":

> Specifically that:
>
> a. you previously attempted to travel to Syria to join the Islamic State of Iraq and the Levant (ISIL) in August 2015; and
> b. you intend to engage in, or facilitate, an act of terrorism overseas as defined in section 5(1)(a) of the Terrorism Suppression Act 2002 ("the Act"), with the intended outcomes in section 5(3)(a) and (b) of the Act (and which are not exempt under section 5(4) of the Act). Specifically, that you maintain an intention to travel to Syria to join the Islamic State of Iraq and the Levant (ISIL).

[25] The notice recorded the Minister's belief as follows:

> I therefore believe on reasonable grounds that you are a person who is a danger to the security of another country because you intend to engage in, or facilitate, a terrorist act overseas (within the meaning of Section 5 of the Terrorism Suppression Act 2002), that the danger to security of that country cannot be effectively averted by other means, and that the cancellation will prevent or effectively impede your ability to engage in or facilitate a terrorist act.

[26] The appellant was advised that she would not be entitled to obtain another New Zealand passport for 12 months unless the Minister, or a court, revoked his decision. She was advised of her rights of appeal to the High Court and to complain to the Inspector-General of Intelligence and Security.

[27] The appellant did not travel to Syria, nor did she return to New Zealand. The Minister later abandoned an application to extend the period of cancellation, with the result that the appellant became eligible to apply for a New Zealand passport by at least December 2017.[11] We are advised that if she does so her application will be processed in the ordinary way. She is no longer said to pose a danger of the sort that led to the decisions under review, if only because the situation in respect of the ISIL caliphate in Syria and Iraq has changed. We were told she has not, however, applied for a New Zealand passport.

Respondent's summary of classified information

[28] The appellant filed, but ultimately did not prosecute, an appeal under the Passports Act. Instead, she pursued her application for judicial review and claim for damages. The High Court Judge directed that the respondent provide the appellant with a summary of the classified information said to have been relied upon to justify

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[11] HC judgment, above n 3, at [12].

cancellation. In that summary, which was filed and served in September 2018, the appellant was advised that the classified information was to the effect that:

(a) she had attempted to travel to Syria in 2015 to join ISIL;

(b) she had been planning *hijrah*, which the NZSIS interpreted to mean travelling to live under ISIL, and had referred to marriage, which the NZSIS interpreted to mean marriage to an ISIL fighter;

(c) an open-source inquiry identified her as the user of a Yahoo! Answers account and an online ISIL recruiter, responsible for numerous pro-ISIL posts. She was therefore assessed to have publicly indicated her support for ISIL;

(d) she had been translating and/or disseminating what was thought to be ISIL propaganda and was thought still to be doing so until April 2016; this was characterised as material that could inspire others to travel to Syria or Iraq or to conduct domestic attacks in their own countries;

(e) it was thought that in April 2016 she maintained an intention to travel to Syria to join ISIL; further, that her 2015 attempt would have given her valuable information about getting there;

(f) the Minister considered that while it was not entirely clear what she would do in ISIL-controlled territory, it seemed likely that she would not only provide practical support, were she to marry an ISIL member, but also would likely contribute technical knowledge and capability;

(g) she was not known to hold any other valid travel documents; and

(h) by preventing her from travelling to Syria or Iraq, cancellation of her passport would prevent or effectively impede her ability to facilitate terrorist acts. Her contribution would be more direct and less subject to legal constraints were she to travel to Syria or Iraq.

The background to the enactment of the statutory provisions at issue in this case

The United Nations' response to the 11 September 2001 attacks: UNSCR 1373

[29] The legislative history begins with the 11 September 2001 attacks by Al-Qaida terrorists on United States targets including the World Trade Center in New York. Those attacks led to United Nations Security Council Resolution (UNSCR) 1373, which called on member states "to work together urgently to prevent and suppress terrorist acts".[12]

New Zealand's response: the Terrorism Suppression Act 2002

[30] New Zealand's response included the Terrorism Suppression Act 2002 and, in 2005, amendments to the Passports Act to permit cancellation of a person's passport on grounds including that, because they intend to facilitate a terrorist act, they are a danger to the security of New Zealand.[13]

ISIL and its "caliphate"

[31] ISIL is a terrorist group which formed in Iraq in 1999 and became affiliated with Al-Qaida in 2004. Following a power struggle Al-Qaida officially cut ties with it in February 2014. In June of that year ISIL announced the establishment of a caliphate in territory captured from the Iraqi and Syrian states.

UNSCR 2170

[32] On 15 August 2014, the United Nations Security Council adopted UNSCR 2170, expressing its gravest concerns both that parts of Iraq and Syria were under ISIL control and about the devastating impact of ISIL's presence and violent extremist ideology on civilian populations.[14] The resolution reaffirmed that "terrorism, including the actions of ISIL, cannot and should not be associated with any

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12 SC Res 1373 (2001), preamble.
13 Section 8A(1) of the Passports Act, inserted by s 11 of the Passports Amendment Act 2005.
14 SC Res 2170 (2014), preamble.

religion, nationality, or civilization".[15] It condemned the recruitment of foreign fighters by ISIL and called on member states to suppress the flow of recruits to ISIL.[16]

UNSCR 2178

[33] On 24 September 2014, the United Nations Security Council adopted UNSCR 2178.[17] This resolution reflected the high level of international concern about the activities of terrorist organisations, including ISIL.[18] UNSCR 2178 included the following:[19]

> *The Security Council*,
>
> …
>
> 2. *Reaffirms* that all States shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, …
>
> …
>
> 5. *Decides* that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities;

New Zealand's response: Passports Act amendments

[34] An urgent review of New Zealand's capability to respond to terrorism threats both locally and internationally led to the insertion of a new sch 2 into the Passports Act on 12 December 2014.[20] The new schedule extended the power to cancel a passport, which applied by reference to dangers to the security of New Zealand, to cases in which the Minister believed the person was a danger to the security of a country other than New Zealand.

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15 Preamble.
16 Articles 7–8.
17 SC Res 2178 (2014). The full text of this resolution is annexed to the HC judgment, above n 3.
18 Preamble; and HC judgment, above n 3, at [24].
19 Emphasis in original.
20 The provisions were inserted by the Passports Amendment Act 2014 as a matter of urgency and they were intended to be temporary: (9 December 2014) 702 NZPD 1255–1256. Parliament envisaged a more comprehensive review would follow. Relevant provisions are now found in s 27GA of the Passports Act.

[35] The key provision for present purposes is cl 2(2) of sch 2, which is the provision under which the appellant's passport was cancelled. It provided:

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

Definition of "terrorist act"

[36] The cancellation of the appellant's passport turned on her intention to facilitate a "terrorist act", as defined in s 5 of the Terrorism Suppression Act. At the relevant time, s 5 provided:

> **5 Terrorist act defined**
>
> (1) An act is a **terrorist act** for the purposes of this Act if—
>
> (a) the act falls within subsection (2); or
>
> (b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or
>
> (c) the act is a terrorist act in armed conflict (as defined in section 4(1)).
>
> (2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:

(a) to induce terror in a civilian population; or

(b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.

(3) The outcomes referred to in subsection (2) are—

(a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):

(b) a serious risk to the health or safety of a population:

(c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):

(d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:

(e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

(4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

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

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

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

[37] ISIL was (and remains) a "designated terrorist entity" for the purposes of the Terrorism Suppression Act.[21] That is so because it is a "United Nations listed terrorist entity" as defined in s 4(1).[22] Designation allowed action to be taken in New Zealand against ISIL interests under the Terrorism Suppression Act. Those provisions are not engaged in the present case.

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21 See Terrorism Suppression Act, s 4(1) definition of "designated terrorist entity".

22 The definition of a "United Nations listed terrorist entity" was amended on 5 October 2021 to expressly include ISIL and an ISIL entity. Before this amendment, ISIL was a "United Nations listed terrorist entity" because of it being an "Al-Qaida entity" following SC Res 1267 (1999) and its successor resolutions.

Definitional issues

[38] There are three definitional issues, addressing four phrases appearing in cl 2(2) of sch 2 to the Passports Act. We will deal with these before turning to the substantive issues. They are:

(a) "the Minister believes on reasonable grounds";

(b) "the person is a danger to the security of a country other than New Zealand"; and

(c) "the person intends to … facilitate … a terrorist act".

Substantive issues

[39] The following substantive issues need to be addressed. The second of these contains several sub-issues. They are:

(a) What are the court's powers in a judicial review proceeding challenging a decision to cancel a person's passport?

(b) Did the Minister have reasonable grounds to believe:

(i) the appellant was a danger to the security of Syria or Iraq;

(ii) that danger arose because the appellant intended to facilitate a terrorist act;

(iii) the danger could not be effectively averted by other means; and

(iv) cancellation would prevent or effectively impede the appellant facilitating a terrorist act?

(c) Did the Minister fail to address the proviso in s 5(4) of the Terrorism Suppression Act (lawful armed conflict) or the exception in

s 5(5) of the Terrorism Suppression Act (protest, advocacy or dissent) and, if so, what are the consequences of that?

(d) Did the Minister fail to address whether the cancellation decision was a reasonable limit on the rights of the appellant under the New Zealand Bill of Rights Act 1990 (the Bill of Rights) and, if so, what are the consequences of that?

(e) Was the process adopted by the Minister unfair or unreasonable?

(f) If the Minister's decision was unlawful under any of the above bases, what remedy is appropriate?

Analysis of definitions

[40] We now turn to the definitional issues listed above at [38].

"the Minister believes on reasonable grounds"

[41] Clause 2(2) requires that the Minister *believes* on reasonable grounds, not *suspects*. Both counsel for the appellant and the special advocate emphasised this. In *R v Williams*, a case dealing with applications for search warrants, the Court of Appeal explained the difference between these standards in these terms:[23]

> [213] Having "reasonable grounds to believe" … is a higher standard to meet than "reasonable ground to suspect" … Belief means that there has to be an objective and credible basis for thinking that a search will turn up the item(s) named in the warrant, while suspicion means thinking that it is likely that a situation exists. The issuing officer must hold the view that the state of affairs the applicant officer is suggesting actually exists.

[42] The Court of Appeal adopted this distinction in the present case.[24] We do so also. The significance of this in the present case is that the Minister needed to have an objective and credible basis for thinking that the criteria in cl 2(2) actually applied in the appellant's case. This is particularly so in relation to the need for the Minister

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23 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 per William Young P and Glazebrook J (citations omitted). Hammond J agreed at [258].

24 CA judgment, above n 4, at [67].

to have reasonable grounds to believe the appellant actually intended to facilitate a terrorist act. It was not sufficient that the Minister suspected this might be the case. Given the nature of the discretion that the Minister was exercising, the importance of this requirement can be readily appreciated.

[43] Having reasonable grounds to believe does not, however, require the decision-maker to be absolutely sure that the relevant criteria applied. The fact that there may be some uncertainties does not necessarily mean there are not reasonable grounds to believe. But where there are uncertainties, it would be advisable for the Minister to keep the passport holder's position under review and revisit the decision if the uncertainties are resolved in a way that calls into question the reasonable belief of the Minister at the time the decision was made.

"the person is a danger to the security of a country other than New Zealand"

[44] The "danger to security" aspect of the cl 2(2) criteria was not a focus of the argument before us. Generally, if a person did intend to engage in or facilitate a terrorist act in another country, then, unless it was clear they would be unable to carry out that intention, they would be a danger to the security of that country.[25] So the more important criterion is whether, in fact, the person did intend to engage in or facilitate terrorist acts.

[45] The appellant emphasised that cl 2(2) requires that a person *is* a danger, not that they potentially may be a danger. We agree. This can be contrasted with the equivalent Australian legislation, which provides for cancellation of a passport where the relevant authority suspects (not believes) on reasonable grounds that the passport holder *would be likely* to engage in conduct that *might* prejudice the security of Australia or another country.[26]

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[25] But there are exceptions. For instance, see below at [66] where we comment on the submission that there is a *de minimis* threshold.

[26] Australian Passports Act 2005 (Cth), s 14(1)(a)(i).

"the person intends to … facilitate … a terrorist act"

[46] This phrase is the key element of cl 2(2). We break it down into its constituent parts.

"the person intends to"

[47] As just noted, the requirement that the Minister's belief must be that the person *is* a danger means that the person must have an actual intention to facilitate a terrorist act. The fact that the person may possibly have or develop such an intention is not sufficient.

"facilitate"

[48] Both the Courts below concluded that "facilitate" had its dictionary meaning (make easy or easier). The High Court expressed it this way:[27]

> [63] Although it contemplates existing conduct rather than a projection of intended conduct, the dictionary definition is still consistent with a conscious commitment to steps that make the future carrying out of terrorist acts easier to accomplish. …

[49] The Court of Appeal agreed with the High Court:[28]

> … that in this setting "facilitate" has its ordinary meaning of making something easier. Facilitation must be more than incidental, but it need not be substantial. It is not necessary that the facilitator intend to contribute to any specific act.

[50] Drawing on wording from UNSCR 2253, the Court of Appeal gave as examples of facilitating terrorist acts: where a person incites such an act, recruits foreign fighters to join ISIL or provides funding for ISIL (because ISIL was engaged in terrorist acts as a matter of policy in its territory and elsewhere).[29]

[51] The appellant and the special advocate argued both Courts erred in their interpretation of "facilitate". They argued it should be interpreted as something akin to the level of connection with a terrorist act as would be required for party liability in

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27 HC judgment, above n 3.
28 CA judgment, above n 4, at [74] (footnote omitted).
29 At [75]–[76].

criminal law. The appellant also argued the Court of Appeal was wrong to draw support for its interpretation from s 25 of the Terrorism Suppression Act.

Section 25(2) of the Terrorism Suppression Act 2002

[52] At the time, s 25(2) of the Terrorism Suppression Act provided:[30]

> (2) For the purposes of this Act, a terrorist act is facilitated only if the facilitator knows that a terrorist act is facilitated, but this does not require that—
>
> (a) the facilitator knows that any specific terrorist act is facilitated:
>
> (b) any specific terrorist act was foreseen or planned at the time it was facilitated:
>
> (c) any terrorist act was actually carried out.

[53] In its judgment, the Court of Appeal relied on this in interpreting the meaning of "facilitate … a terrorist act" in the context of cl 2(2).[31] However, as Ms Aldred pointed out, it is far from clear that s 25 could be called in aid in the interpretation of the definition of "terrorist act" in s 5 of the Terrorism Suppression Act or in the interpretation of "facilitate" in cl 2(2). As Downs J found in *R v S*, s 25 appeared in a different part of the Terrorism Suppression Act from the definition of "terrorist act" in s 5 of the Terrorism Suppression Act.[32] Section 25 appeared within a group of sections dealing with the power of the Prime Minister to designate an entity as a terrorist entity. It appeared under the heading: "Further provisions relating to interim and final designations". It seems clear that s 25 did not have any significance outside this context.[33]

[54] That said, the conclusion that s 25(2) is not relevant to the interpretation of "facilitate" does not have much import because that section provides for propositions

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30 This provision now appears in s 5A(2) of the Terrorism Suppression Act. There is no dispute that, following the relocation of the provision, s 5A does now assist in the interpretation of s 5 of the Terrorism Suppression Act and what is now s 27GA of the Passports Act.

31 CA judgment, above n 4, at [73].

32 *R v S* [2020] NZHC 1710, [2021] 2 NZLR 54 at [39]. See also at [38]–[51].

33 That conclusion is supported by a 2021 departmental report which suggested that s 25 applied only to the designation provisions: Ministry of Justice | Tāhū o te Ture *Departmental Report for the Justice Committee: Counter-Terrorism Legislation Bill* (August 2021) at [320].

that would in our view apply anyway and does not seek to actually define "facilitate"; indeed, it uses the term "facilitate" in its text so any definition would be circular.

Section 8(3) of the Terrorism Suppression (Control Orders) Act 2019

[55] The respondent also argued that s 8(3) of the Terrorism Suppression (Control Orders) Act 2019 assists in the interpretation of "facilitate". Of course, that provision was not in force at the time of the cancellation of the appellant's passport. Section 8(3) is in similar terms to s 25(2) but uses the term "materially support" as well as "facilitate". We do not think it assists in the interpretation of cl 2(2) for the reason just stated in relation to s 25(2).[34] It may be arguable that the inclusion of references to "materially supports" indicates that "facilitate" involves some less direct involvement than material support. But it could also be argued the inclusion of "materially supports" adds colour to "facilitate" and indicates it involves something similar to material support. We do not see either argument as particularly compelling. We will therefore put to one side s 8(3) in this context.

United Nations Security Council Resolutions

[56] The special advocate argued the meaning of "facilitate" can be discerned by reference to the UNSCRs that are the backdrop to the provisions of the Passports Act and the Terrorism Suppression Act that are in issue before us. He said the term "facilitate" has "a prescribed and careful meaning" in the resolutions. He said it was a term designating accessory liability for a criminal act.

[57] We do not think much can be drawn out of the different uses (or non-uses) of "facilitate" in the various UNSCRs. The manner in which the term is used—alongside other words such as: organise, instigate, assist, participate, finance, carry out, provide support (active or passive), plan, commit, prepare, be involved in, be associated with, train, recruit, transport, equip, arm, and incite support—give no hint of an intent to give "facilitate" a prescribed and careful meaning. To the contrary, the term seems to

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[34] See *Commissioner of Police v R* [2021] NZHC 1022, [2021] 2 NZLR 529 for a case applying s 8(3) of the Terrorism Suppression (Control Orders) Act 2019. In that case the High Court made an interim control order under s 15 of that Act in respect of R on the basis that R posed a real risk of engaging in activities that facilitate or materially support the carrying out of terrorism. R was coming to New Zealand, having been associated with ISIL.

describe different levels of involvement in different contexts. Some examples illustrate this:

(a) From UNSCR 1373:[35]

> … participate in or facilitate the commission of terrorist acts …
>
> … providing any form of support, active or passive, to entities or persons involved in terrorist acts …
>
> … finance, plan, support, or commit terrorist acts …
>
> … financing, planning, preparation or perpetration of terrorist acts …
>
> … financing or support of terrorist acts …
>
> … planned, facilitated or participated …
>
> … perpetrators, organizers or facilitators of terrorist acts …

(b) From UNSCR 1566:[36]

> … supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts …
>
> … involved in or associated with terrorist activities …

(c) From UNSCR 2170:[37]

> … perpetrate, organize and sponsor terrorist acts …
>
> … supporting or fighting for ISIL …
>
> … providing any form of support, active or passive, to entities or persons involved in terrorist acts …
>
> … commit or attempt to commit or facilitate or participate in the commission of terrorist acts …
>
> … financing, arming, planning or recruiting for ISIL …

(d) From UNSCR 2178:[38]

> … perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training …

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35 SC Res 1373 (2001), arts 1(c), 2(a), 2(c), 2(e), 2(f), 3(f) and 3(g).
36 SC Res 1566 (2004), arts 2 and 9.
37 SC Res 2170 (2014), arts 5, 9, 11, 12 and 18.
38 SC Res 2178 (2014), arts 5, 6(c), 20 and 23(a).

> … the wilful organization, or other facilitation …
>
> … finance or otherwise facilitate [foreign terrorist fighters'] travel and subsequent activities …
>
> … the threat posed by these foreign terrorist fighters, including their facilitators …

[58] We conclude that the UNSCRs do not materially assist us in interpreting "facilitate" in cl 2(2).

International criminal law: *Tamil X*

[59] The appellant and special advocate argued "facilitate" should be interpreted as something akin to "knowingly assist in the commission of" a terrorist act. They said this would be consistent with the way liability is determined in the International Crimes and International Criminal Court Act 2000, which implements in New Zealand the Rome Statute of the International Criminal Court. The Rome Statute, which is reproduced in the Schedule to the Act, provides for criminal liability for the following conduct:[39]

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

[60] As can be seen, these provisions reflect concepts similar to those applying in domestic criminal law, as provided in s 66 of the Crimes Act 1961. If applied in the present context, they would give a flavour to "facilitate" similar to the concepts applying to party liability in domestic criminal law.

[61] The appellant and special advocate argued this Court's decision in *Attorney-General (Minister of Immigration) v Tamil X* supported this interpretation.[40] *Tamil X* concerned an applicant for refugee status who was said to have been a party to an international crime before coming to New Zealand. Article 1F of the Refugee

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39 International Crimes and International Criminal Court Act 2000, sch art 25(3).

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

Convention[41] disapplies the convention to a person with respect to whom there are serious reasons for considering that they have committed an international crime. This Court applied the approach taken by the United Kingdom Supreme Court in *Regina (JS (Sri Lanka)) v Secretary of State for the Home Department* that art 1F applies to a person:[42]

> … if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.

[62] The special advocate argued "facilitate" should be interpreted as "significantly contribute", consistently with the quotation above. We agree with the Court of Appeal that the different context in which *Tamil X* was decided means it does not assist.[43] *Tamil X* was addressing individual criminal responsibility on joint enterprise liability principles. That is a quite different context from cl 2(2), which concerns the administrative step of cancelling a passport, not criminal liability.

Party liability in domestic criminal law

[63] The appellant argued that "facilitate" should be seen as analogous to conduct that attracts criminal liability. This is a similar argument to that just addressed, but the proposed analogy is to party liability under domestic criminal law rather than liability for an international crime. The substance is essentially the same, however.

[64] The appellant referred us to the Canadian case of *R v Khawaja*.[44] That case involved an appeal to the Supreme Court of Canada against conviction of an offence created by a provision in the Criminal Code outlawing knowing participation in, or contribution to, the activity of a terrorist group for the purpose of enhancing the ability of the terrorist group to facilitate or carry out a terrorist activity.[45] The Supreme Court of Canada gave the provision a narrow interpretation, thus answering an argument that

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41 Convention relating to the Status of Refugees 189 UNTS 137 (signed 28 July 1951, entered into force 22 April 1954).

42 *Regina (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2011] 1 AC 184 at [38] per Lord Brown SCJ (with whom the other Judges agreed) as cited in *Attorney-General (Minister of Immigration) v Tamil X*, above n 40, at [67].

43 CA judgment, above n 4, at [71]–[72].

44 *R v Khawaja* 2012 SCC 69, [2012] 3 SCR 555.

45 Criminal Code RSC 1985 c C-46, s 83.18.

it was overbroad and infringed the Canadian Charter of Rights and Freedoms.[46] It noted an exception for conduct that did not rise beyond a *de minimis* threshold.[47]

[65] The appellant argued a similar approach should be taken here, reading down "facilitate" so it does not expose a larger than necessary class of persons to interference with their rights resulting from passport cancellation. The respondent pointed out that the context in *Khawaja* was a criminal provision under which Mr Khawaja had been imprisoned, in contrast to the comparatively minor impact on a person whose passport is cancelled for 12 months. The respondent did accept, however, the appropriateness of a *de minimis* threshold, albeit he argued the appellant's conduct was well over that threshold.

[66] We are, of course, conscious that cl 2(2) potentially covers a wide range of intended future conduct and exposes a person to infringement of their rights in the event their passport is cancelled. That calls for careful consideration of the scope of the provision, looking through a rights lens. *Khawaja* provides a model for that approach, although it is a case involving a differently worded provision that applies in a different context (criminal conviction and sentence, not passport cancellation). We also note in this context that cl 2(2) is not engaged unless the intended facilitation of a terrorist act endangers the security of a country. That has an inbuilt *de minimis* threshold because it is hard to see how facilitation of a terrorist act of insignificance (if there is such a thing) could lead to such an endangering.

Other sections in the Terrorism Suppression Act

[67] The special advocate argued that the offences created by other sections of the Terrorism Suppression Act use wording that provides guidance on what is meant by "facilitate" in cl 2(2). These provisions are ss 6A (at the time, engaging in a terrorist act), 8 (at the time, financing of terrorism), 9 (dealing with property from a terrorist entity), 12 (recruiting to a terrorist group) and 13 (participating in a terrorist group). The special advocate argued that, while there was no offence in New Zealand of facilitating a terrorist act, these offences in the Act covered conduct similar to

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46 *R v Khawaja*, above n 44, at [62]–[64]; and Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

47 *R v Khawaja*, above n 44, at [51].

facilitating and were enacted in response to UNSCR 1373. So, he argued, to establish an intention to facilitate, it was necessary to show that the appellant intended to commit an act similar in kind to the acts constituting these offences.

[68] We do not think much assistance is to be derived from the offence provisions of the Terrorism Suppression Act. They are in a different statute from cl 2(2). And, more importantly, they all use language other than "facilitate".

Domestic criminal provisions referring to "facilitate"

[69] Section 128(2)(a) of the Sentencing Act 2002 empowers a court to order the confiscation of a vehicle if it is used to facilitate the commission of an offence or flight after the commission of an offence. This derives from the repealed s 84(2) of the Criminal Justice Act 1985. In a case on the interpretation of the earlier provision, the High Court adopted a definition of "facilitate" as "make … easier".[48] A reference to "facilitating" in a similar provision in the Misuse of Drugs Act 1975 (s 32(3), which provides for forfeiture of money held for the purpose of facilitating the commission of a drug offence) was interpreted by the Court of Appeal as meaning "make easy or easier".[49] While these appear to support the interpretation given to "facilitate" in the lower Courts in this case, the different statutory contexts mean they do not provide much guidance in the interpretative exercise in the present case.

Overseas criminal provisions

[70] We have also considered provisions from other jurisdictions using the term "facilitate".[50] The approach in cases interpreting these provisions has been to give the

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48 *Shirley v Police* (1990) 5 CRNZ 491 (HC) at 493–494.

49 *Keen v R* [2015] NZCA 221 at [16].

50 See, for example, in England and Wales, Modern Slavery Act 2015 (UK), s 2: *Regina v Karemera* [2018] EWCA Crim 1432, [2019] 1 WLR 4761 at [46]–[47] (interpreting s 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK), the predecessor to s 2 of the Modern Slavery Act); and Serious Crime Act 2007 (UK), s 2: *National Crime Agency v Hussain* [2020] EWHC 432 (Admin), [2020] 1 WLR 2145 at [54]–[55]. In Australia, see Crimes (Serious Crime Prevention Orders) Act 2016 (NSW), s 4: *Vella v Commissioner of Police for New South Wales* [2019] HCA 38, (2019) 269 CLR 219 at [37] per Bell, Keane, Nettle and Edelman JJ. The majority indicated conduct would not be facilitating if it was done without the intention of assisting the criminal activity, given a provision in the Act allowed the High Court of Australia to take into account whether the conduct was reasonable in all the circumstances: at [38]. See also Migration Act 1958 (Cth), s 233C: *R v Mahendra* [2011] NTSC 57, (2011) 252 FLR 303 at [20]. In Canada, see Criminal Code, ss 467.1 and 467.11: *R v Lindsay* (2004) 70 OR (3d) 131 (ONSC) at [58]; and Criminal Code, s 83.19: *R v Nuttall* 2018 BCCA 479, (2019) 368 CCC (3d) 1 at [468]–[473].

term “facilitate” its ordinary natural meaning of “make easy or easier” or similar expressions.

Conclusion on “facilitate”

[71] The ordinary meaning of “facilitate” is to make easy or make easier. But substituting those terms for the word “facilitate” itself does not take the interpretative exercise anywhere. The word is an ordinary word that does not require any definition by reference to synonyms.

[72] As we see it, the interpretation of “facilitate a terrorist act” is best approached by reference to the phrase as a whole, not by isolating the word “facilitate”. And it is notable that the phrase is “facilitate a terrorist act”, not “facilitate terrorism”, and not “facilitate the operations or existence of an organisation that, from time to time, has engaged in terrorism”.

[73] The context in which the term is used is important. In the terrorism context, if it were being used in conjunction with a specific, identified, terrorist act, it would be sufficient to say any conduct that directly or indirectly enhanced the perpetrator’s ability to engage in the terrorist act would be facilitation of it. But where the conduct is support for the operations of an organisation known for engaging in terrorist acts, but whose activities are not limited to those terrorist acts, the nature of the support will be crucial. Joining such an organisation as a combatant will be facilitating its terrorist activities if they are carried out by its combat force.

[74] Another important aspect of the context is that the word is used in a provision under which a Minister is empowered to cancel a person’s passport, which, as noted earlier, involves a significant interference with the person’s rights. As mentioned above, the respondent accepted that there should be a *de minimis* threshold, below which conduct that, strictly speaking, could be classified as facilitative is treated as outside the scope of cl 2(2). We agree. More generally, we consider the interpretation of “facilitate” must reflect the seriousness of the impact on the passport holder if their passport is cancelled and the fact that the power to do this is enlivened only if the facilitation endangers the security of a country.

"terrorist act"

[75] The definition of "terrorist act" in s 5 of the Terrorism Suppression Act, as it was at the relevant time, is set out above at [36]. In summary, an act is a terrorist act under that definition if:

(a) it is an act;

(b) it is intended to cause any of the outcomes specified in s 5(3);

(c) it is carried out for the purpose of advancing an ideological, political or religious cause;[51]

(d) it is carried out with the intention to induce terror in a civilian population or to unduly compel or to force a government or an international organisation to do or abstain from doing any act;[52] and

(e) it does not come within the proviso for lawful armed conflict[53] or the exception for protest, advocacy or dissent.[54]

[76] The appellant argued that the Minister's summary of reasons needed to, and did not, identify what terrorist act the appellant was said to have intended to facilitate. She argued that it was necessary that a specific and identifiable criminal act or omission be identified by the Minister. She argued that the legislative history emphasised that the power to cancel a passport was seen as significant and one that should only be used in situations of real danger that cannot be otherwise averted.[55] When the 2014 amendments to the Passports Act were under consideration in Parliament, the Hon Christopher Finlayson KC, on behalf of the Minister responsible for the Bill, described the targets for the restrictions in the Bill as "foreign terrorist fighters"; for example, "people who want to go and fight for [ISIL]".[56]

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51 Terrorism Suppression Act, s 5(2).
52 Section 5(2).
53 Section 5(4).
54 Section 5(5).
55 Referring to (12 April 2005) 625 NZPD 20090.
56 (9 December 2014) 702 NZPD 1207.

[77] The appellant argued that an analogy with the criminal law of attempt was appropriate. Thus, she argued, it was necessary that the intended terrorist act be identified along with the intended outcome and the subjective purpose for which the facilitation was to occur.

[78] We do not accept that submission. Rather, we accept the respondent's submission that interpreting cl 2(2) as proposed by the appellant would substantially limit the utility of the power to cancel passports, leaving unaddressed a substantial area of risk that the provision is clearly intended to address. The cancellation power is intended to be preventative, stopping the passport holder from travelling to another country where they intend to facilitate acts of terrorism. The appellant's interpretation would leave unaddressed cases where there is clear evidence of an intention to facilitate terrorist acts, and evidence that the means exist to carry this intention into effect, but inadequate intelligence about the particulars of the terrorist act such as when it is to occur or its intended target or method.

[79] As the respondent pointed out, this means the cancellation power could not be exercised even if the Minister had reasonable grounds to believe the passport holder intended to travel to enlist as a fighter for a terrorist organisation known for frequent commission of terrorist acts, unless the Minister could also establish exactly what type of terrorist act was likely to be engaged in or facilitated.

[80] In short, we do not see any reason to import concepts of criminal law into the interpretation of "terrorist act" in s 5 of the Terrorism Suppression Act or, more generally, the interpretation of cl 2(2) of the Passports Act.

Analysis of substantive issues

[81] We now turn to the substantive issues identified earlier at [39].

Issue 1: What are the court's powers in a judicial review proceeding challenging a decision to cancel a person's passport?

[82] As noted earlier, the fact that parts of the evidence in argument before us contained classified information meant that the special procedures set out in

ss 29AA–29AC of the Passports Act applied in the present case, both in the lower Courts and in this Court.

[83] Section 29AA is also relevant for another purpose because it bears upon the powers of the court in the judicial review proceedings commenced by the appellant (and her subsequent appeals to the Court of Appeal and to this Court).[57]

[84] At the relevant time, s 29AA provided:[58]

> **29AA Proceedings where national security involved**
>
> (1) This section applies to the following proceedings:
>
> …
>
> (b) any appeal … relating to a decision of the Minister … to cancel or retain a New Zealand travel document:[59]
>
> …
>
> (2) In hearing an appeal to which this section applies, the court must determine whether—
>
> (a) the information that led to the decision is credible, having regard to its source or sources; and
>
> (b) the information reasonably supports a finding that—
>
> (i) the person concerned is a danger to the security of New Zealand because the person intends to engage in, or facilitate, an action or matter of a kind referred to in sections 4A(1)(a), 8A(1)(a), 20A(1)(a), 25A(1)(a), 27B(1)(a), and 27E(1)(a); and
>
> (ii) the refusal to issue the New Zealand travel document concerned, or to cancel or retain the New Zealand travel document, will prevent or effectively impede the ability of the person to carry out or facilitate the action or matter concerned; and
>
> (iii) the danger to the security of New Zealand cannot be effectively averted by other means.

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57 As noted earlier, the appellant initially appealed against the cancellation of her passport but later withdrew the appeal and commenced judicial review proceedings.

58 Emphasis added. There appears to be a drafting slip in s 29AA(2)(b)(ii). Presumably, it intended to refer to a *decision* to cancel a New Zealand travel document, not a *refusal* to cancel it. See s 29AA(1)(b).

59 Including a New Zealand passport: s 2 definition of "New Zealand travel document".

> (3) Where the appeal relates to a matter within the discretion of the Minister, *the court may substitute its own discretion for that of the Minister*.
>
> …

[85] As is apparent, those provisions apply to appeals, rather than to judicial review applications. But, at the relevant time, cl 8 of sch 2 to the Passports Act provided that ss 29AA–29AC applied also to "any application for judicial review of a decision made under clause … 2 … or 7". Thus, ss 29AA–29AC applied at the relevant time to applications for judicial review of decisions to suspend or cancel passports. That means they applied in the present case.

[86] The Court of Appeal considered that the fact that s 29AA(2) and (3) applied to judicial review proceedings meant that the standard of review, unusually, incorporated a power of the court to substitute its own discretion for that of the Minister, as stated in s 29AA(3).[60] However, the Court observed that, as the cancellation of the appellant's passport had expired, the power of the Court to substitute its own discretion for that of the Minister in s 29AA(3) was of no relevance in this case.[61] The Court also found that, because s 29AA(2) applied,[62] that meant the Court was required to decide for itself whether the criteria for cancellation were made out.[63] The Court said it was implicit in s 29AA(2) and (3) that if there were information that was not before the Minister but which confirmed the decision was reasonable, that would be a basis for declining to grant relief in a judicial review claim.[64] It was therefore open to the Court to refer to evidence that was not before the Minister.[65]

[87] Neither party had advanced that position in the Court of Appeal, but the Court sought further submissions after the hearing.[66] In this Court the respondent supported the Court of Appeal's approach.

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60 CA judgment, above n 4, at [39].
61 At [41].
62 At [41].
63 At [61] and [90].
64 At [97].
65 At [97].
66 At [33]–[35].

[88] The special advocate argued that cl 8(1) of sch 2 to the Passports Act did not authorise the court to make its own findings in the context of a judicial review case. He argued that this led the Court of Appeal into making a substantive determination on matters that had not been determined at all by the Minister (including assessments of the reliability of material put before the Minister) and making different (and adverse) findings against the appellant that had not been made by the Minister.

[89] The intention of cl 8(1) appeared to be to bring into play the provisions in ss 29AA–29AC to deal with classified information.[67] However, there was no express exclusion in cl 8(1) for s 29AA(2) and (3).

[90] The special advocate pointed out that the explanatory note to the Countering Terrorist Fighters Legislation Bill 2014, which introduced sch 2 (including cl 8) into the Passports Act, said the purpose of cl 8 was to provide a regime to manage and protect classified information in judicial review proceedings.[68] It said nothing about altering the normal judicial review process. He noted that review proceedings are both substantively and procedurally distinct from appeal proceedings and that it is inappropriate to interpret cl 8 in a way that substantively changes the nature of judicial review proceedings.

[91] We accept there is some indication from the legislative materials that the purpose of cl 8(1) of sch 2 to the Passports Act was to carry over to judicial review proceedings only those provisions relating to the treatment of classified documents, and not the more substantive provisions. But having said that, the wording of the legislation is unambiguous as to its effect and is not amenable to such a reading. We therefore agree with the Court of Appeal that there is, indeed, a power for the court under s 29AA(2) to make its own assessment of the information that was before the Minister to determine whether it substantiated the cancellation decision; and a power under s 29AA(3) for the court to substitute its own discretion for that of the Minister.

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67 Countering Terrorist Fighters Legislation Bill 2014 (1-1) (explanatory note) at 7. That Bill was divided by third reading and enacted, among other Acts, as the Passports Amendment Act 2014.

68 At 7.

[92] We have some reservations, however, about the Court of Appeal's view that it is implicit in s 29AA that the court may refuse a remedy where the information before the Minister did not substantiate the cancellation decision but information that was not before the Minister does so. Section 29AA(2) requires the court addressing an appeal against a cancellation decision to determine whether *the information that led to the decision* is credible and reasonably supports a finding that the statutory grounds for cancellation of a passport are met. This makes it arguable that the court must confine the basis for its determination to the information that actually led to the Minister's decision; that is, the information the Minister actually considered when making the decision. We do not see the point arising on the facts of this case and we think it is preferable to leave it for decision in a case where the result would be affected by it.

[93] The existence of a power for the court to substitute its own discretion for that of the Minister (as s 29AA(3) provides) does not necessarily mean that it should be exercised. Given that this is a major modification of the normal approach to judicial review, we consider that the power should be exercised with some caution. This is particularly so where it is proposed to use the power in a manner adverse to the passport holder. As it is not suggested the Court of Appeal did substitute its own discretion for that of the Minister, or that we should do so, we say no more about it.

[94] The special advocate argued the Court of Appeal made substantive determinations on matters not determined by the Minister and, based on that information, made findings against the appellant that were more adverse than the findings made by the Minister. He argued this was inconsistent with the normal judicial review process. We do not need to address that submission directly because, as will become clear, we ourselves approach the case on normal judicial review principles, without recourse to information that was not before the Minister.

Issue 2.1: Did the Minister have reasonable grounds to believe the appellant was a danger to the security of Syria or Iraq?

[95] The Minister deposed that he had the necessary reasonable grounds to believe in these terms:

> I formed the view that there were reasonable grounds to believe [the appellant] … intended to engage in, or facilitate, an act of terrorism overseas as defined in s 5(1)(a) of the Terrorism Suppression Act, with the intended outcomes set out in s 5(3)(a) and (b) of that Act, in that she maintained an intention to travel to Syria to join ISIL.

On its face, though, that merely recites the test on which the Minister needed to be satisfied in relation to intention to facilitate a terrorist act.

[96] As mentioned above at [22], the Minister also said in his affidavit:

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

[97] Some of the language used in this extract ("may contribute" and "possibly be involved") is equivocal. However, there is also language of greater certainty ("would be further indoctrinated" and "would almost certainly"). The closest words to the statutory test are those relating to the appellant's almost certain engagement with people who encourage acts of terrorism: it seems to be assumed that engaging with people who do that is, of itself, facilitating the terrorist acts those other people encourage. But, as counsel for the appellant emphasised, all of this paragraph of the Minister's affidavit is premised on a contingency, namely "should [the appellant] successfully travel to Syria and join a terrorist group".[69] That introduces a conditionality into the assessment of the appellant's intention and the danger she posed to Syria. We consider this falls short of the requirement that she be an actual danger to another country, not just a potential one.[70]

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[69] The contingency was significant because, as we come to, there was evidence that the appellant would have had real difficulty gaining entry to Syria: see below at [122].

[70] See above at [45].

[98] The special advocate noted that the Minister's affidavit indicated he understood people travelling to ISIL-held territory with an intention to join ISIL were considered to increase the risk of terrorist acts being carried out. He argued this misstated the cl 2(2)(a) "danger to security" test. We would agree if that was all the Minister said about this aspect of the cl 2(2) test. But it was not.

[99] The focus of argument before us was on the intention-to-facilitate point. We will engage with that in some detail. We do not think it is necessary to engage with the present point in such detail because, as noted above, if the intention-to-facilitate point is satisfied, it is unlikely the danger-to-security point will not also be satisfied.[71]

Issue 2.2: Did the Minister have reasonable grounds to believe the appellant intended to facilitate a terrorist act?

[100] As noted above, the Minister had to believe on reasonable grounds that the appellant was a danger to the security of Syria (or Iraq) because she intended to engage in, or facilitate, a terrorist act. There was no suggestion she was intending to *engage in* a terrorist act herself, so the focus of attention was on whether she intended to *facilitate* one. The briefing to the Minister did not provide him with any guidance on what "facilitate" meant in the context of cl 2(2). This was seen as unexceptional in the Courts below because the word has a common meaning ("make easy" or "make easier") so no guidance was required.[72] That common meaning is reflected in the definition of "facilitate" in *Black's Law Dictionary* ("[t]o make the occurrence of (something) easier; to render less difficult").[73]

[101] At the outset, we emphasise two aspects of cl 2(2). The first is that, unlike many other countries' responses to the UNSCRs discussed above, New Zealand did not create an offence of facilitating (as opposed to engaging in) a terrorist act. Clause 2(2) is not a criminal provision, but rather a provision empowering the Minister to take the administrative step of cancelling a passport. In saying that, we do not underestimate the potentially serious consequences for a person whose passport is

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71 See above at [44].

72 HC judgment, above n 3, at [62]–[64]; and CA judgment, above n 4, at [74].

73 Bryan A Garner (ed) *Black's Law Dictionary* (11th ed, Thomson Reuters, St Paul (Minnesota), 2019) at 734.

cancelled. But we see a need for caution about deriving assistance in the interpretation of the term "facilitate" from criminal provisions in overseas jurisdictions.

[102] The second is that cl 2(2) refers to an intention to facilitate, not actual facilitation. So the assessment is prospective, in contrast to criminal provisions, which involve assessing actual conduct.

[103] The context in which the Minister's decision was made is important. As noted earlier, ISIL was designated as a "terrorist entity" for the purposes of the Terrorism Suppression Act.[74] That reflects the fact that ISIL was regarded as an entity that routinely committed terrorists acts. That recognition by Parliament followed on from a similar recognition by the United Nations Security Council, as reflected in the resolutions we have highlighted earlier.[75]

[104] In this context, it was open to the Minister to form the view that there was reason to believe the appellant would facilitate a terrorist act if there was reason to believe that she was intending to provide assistance to ISIL in carrying out acts of terror in the course of its campaign of terrorist activity, without the necessity to identify the precise nature of the terrorist act.

[105] The respondent argued that travelling to ISIL-held territory to join ISIL and assist ISIL's communications operation comes within the concept of facilitating a terrorist act, given the nature of ISIL's activities. He argued that in some circumstances merely travelling to ISIL-held territory to join ISIL would be sufficient, though, as we understood his argument, he was not suggesting this case constituted such a circumstance. He said this proposition is supported by the fact that cl 2(2) was inserted into the Passports Act as part of the efforts by the international community to prevent foreign nationals travelling to Syria or Iraq to join ISIL. He emphasised that, by travelling to Syria or Iraq to join ISIL, a person would become a resident of the ISIL caliphate which he described as a "terrorist proto-state actively perpetrating terrorist acts on an ongoing basis". The caliphate itself had, he argued, a terrorist purpose.

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74 Above at [37].
75 Above at [29], [32]–[33] and [37].

[106] The respondent argued that cl 2(2) gave effect to UNSCR 2178, relevant parts of which we have quoted above at [33].[76] He argued that the cancellation power should be read as enabling the Minister to cancel a passport to prevent travel in the manner directed in UNSCR 2178, which refers to an obligation on Member States to "prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents".[77]

[107] The Director Intelligence for the NZSIS deposed that, at the relevant time, the territory occupied by ISIL had a population of approximately six million people and included major cities such as Mosul, Iraq and Raqqa, Syria. He said although the circumstances of the caliphate had deteriorated by the time of the cancellation decision, ISIL's leadership "continued to encourage foreign nationals to travel to, establish, expand upon and defend the caliphate".

[108] The respondent argued that simply travelling to Syria to join ISIL would have the effect of increasing the population of active supporters of the caliphate, contribute to the overall achievement of ISIL's objectives and make easier, assist or facilitate the terrorist acts ISIL perpetrated both within the caliphate and abroad.

[109] That submission reflects the following statement in the Minister's affidavit:

> I have to make a decision about whether the material presented to me sufficiently supports an assessment that the subject poses a risk of the sort the statutory framework is designed to prevent, namely they are a danger to the security of New Zealand or another country.
>
> …
>
> It was my understanding that, in this context, people travelling to ISIL-held territory with an intention to join ISIL were considered to increase the risk of terrorist acts being carried out …

[110] The Minister's approach (that travelling to ISIL-held territory to join ISIL would strengthen ISIL and thereby increase the risk of terrorist acts being carried out

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76 The explanatory note to the Countering Terrorist Fighters Legislation Bill suggested that the purpose of the Bill was to take into account SC Res 2178 (2014): Countering Terrorist Fighters Legislation Bill 2014 (1-1) (explanatory note) at 5.

77 SC Res 2178 (2014), art 2.

by ISIL) needs to be evaluated against the background of the speeches made during the passage of the Bill that inserted cl 2(2) into the Passports Act.

[111] At the second reading of the Countering Terrorist Fighters Legislation Bill, which, when enacted, introduced cl 2(2) into the Passports Act, Mr Finlayson (then the Minister in charge of the NZSIS, speaking on behalf of the Minister for National Security and Intelligence) stated that "any person whose passport was to be cancelled would need to be intending to carry out, or assist in, one of the terrorist acts specified in section 5".[78] He later indicated in the committee of the whole House:[79]

> What we seek to achieve under the amended proposal is to clarify and make it explicit that a passport or travel document can be cancelled on the grounds that a person is a danger to a country other than New Zealand because they intend to engage in or facilitate a terrorist act. I say this immediately—I thought I had said it in my second reading speech—and I emphasise to Mr Goff, who asked some questions of me, that those of his constituents who want to go and defend or provide help to their families in the circumstances he outlined would not engage the cancellation proposals here, provided, of course, that they are not engaging in terrorist acts. From the way he described it, they certainly would not come under that category. What we are not seeking to do is what the Australian legislation does—that is, declare an entire region of the Earth off limits to our citizens. But it comes back time and time again to that definition of a "terrorist act".

[112] Mr Finlayson commented that "the test to be satisfied before a passport can be cancelled has a very high threshold".[80] And later, he said:[81]

> The only people who will be caught are those who intend to carry out or facilitate the terrorist act. Again—and it must be emphasised—when one looks at the ingredients of the clauses, sufficient information would be required to satisfy the Minister on reasonable grounds that the elements of that definition have been met. So, clearly, take this hypothetical: if someone from the Assyrian Christian community in Wellington wants to go to Mosul to see their family and to provide whatever support they can in a horrific situation, one could advise them against going but clearly there are no grounds to stop them going. Humanitarian workers and those who go to help their families in a dangerous environment will obviously not meet the test. If they join a group engaged in conflict, they will not be caught simply because of that fact—in fact, one could classify them in moral terms as freedom fighters. They must intend to commit or facilitate a terrorist act before their passport can be cancelled.

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78 (9 December 2014) 702 NZPD 1208.
79 (9 December 2014) 702 NZPD 1227–1228.
80 (9 December 2014) 702 NZPD 1248.
81 (9 December 2014) 702 NZPD 1248.

[113] These extracts confirm what is clear from the plain wording of cl 2(2): that Parliament did not intend to enact a travel ban. So it is clear that merely travelling to the ISIL caliphate at the relevant time would not make the traveller subject to cl 2(2). If the Minister's decision had been based on that approach to cl 2(2), it would have been based on an error of law. Clause 2(2) was carefully crafted so as not to be overbroad and subject New Zealand citizens to the risk of having their passport cancelled merely because they intended to travel to a territory in which a terrorist organisation operated. Even if the person travelling to such a territory intended to join the terrorist organisation, that would not necessarily establish a basis for a reasonable belief that the person intended to facilitate a terrorist act; for example, where the terrorist organisation also undertakes other non-terrorist activities.

[114] As we see it, cl 2(2) required that, in the present case, there be evidence that the person intended not only to travel to the caliphate but also to act in a way that facilitated the commission by ISIL of one or more acts that would come within the definition of terrorist acts. While it was not necessary to identify such intended acts with precision, it was necessary that the Minister be satisfied that the person's intention was not just to travel to the caliphate and/or to join ISIL. However, ISIL was the governing entity for its self-declared caliphate, a large area with a large population.

[115] As already noted, while the respondent made the submission that an intention to travel to the caliphate to join ISIL was sufficient to establish grounds for cancellation, he did not rely on this alone. On the respondent's case, the appellant intended to do much more than just travel to the caliphate, and the Minister's decision was made on the basis that she was not only intending to travel to Syria but that she was intending to assist ISIL in practical ways.

[116] We evaluate that aspect of the respondent's case in the closed reasons. We conclude that the Minister did not have reasonable grounds to believe the appellant intended to facilitate a terrorist act. That makes his decision unlawful. Nevertheless, we will go on to address the other criteria in cl 2(2).

Issue 2.3: Did the Minister have reasonable grounds to believe the danger could not be effectively averted by other means?

[117] The special advocate argued in the High Court and Court of Appeal that the NZSIS should have engaged with the appellant and tried to convince her not to travel to Syria, emphasising to her the dangers of doing so. He argued that had she been spoken to, she may have been persuaded to abandon her plans. In that event, it would not have been necessary to cancel her passport. The NZSIS said in the briefing paper that it did not try to dissuade the appellant because it did not consider she had engaged honestly with authorities, so any assurance she gave would have been unreliable. Both lower Courts rejected the special advocate's submission and it was not pursued before us.[82] There is no reason to question the assessment of the NZSIS or of the Courts below.

[118] In this Court, the special advocate argued that the Minister did not adequately address this aspect of cl 2(2). However, the Minister did confirm in his affidavit that he formed the view that the danger to the security of Syria could not be averted by other means, albeit without any analysis of his reasons for that conclusion. While the Minister could have been clearer about this criterion, we do not consider the decision made by the Minister is compromised as he has deposed to having reasonable grounds to believe, and objectively there were reasonable grounds to believe, based on the information provided to the Minister in the briefing paper.

[119] We do not see this criterion as problematic. If there had been reasonable grounds to believe the appellant intended to facilitate a terrorist act after travelling to ISIL-held territory, then it would have been open to the Minister to conclude that there was no measure other than passport cancellation that would avert this.

Issue 2.4: Did the Minister have reasonable grounds to believe the cancellation would prevent or effectively impede the ability of the appellant to carry out the intended facilitation?

[120] The Minister's decision to cancel the appellant's passport involved his acceptance that this would effectively impede the appellant's ability to undertake her

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82 HC judgment, above n 3, at [93]; and CA judgment, above n 4, at [105].

actions supporting ISIL by stopping her travelling to join ISIL. He deposed in his affidavit that he was satisfied of this.

[121] The Minister was told the appellant was no longer able to use her Australian passport and that her New Zealand passport would expire in less than six months. Although the appellant was able to travel from New Zealand to Australia without a passport after her New Zealand passport was suspended, the Minister was satisfied she would not be able to travel beyond Australia without it. Many countries do not allow entry on a passport that has less than six months left until expiry, so it was argued there was no need to cancel the passport to prevent travel to Syria. But there is no evidence that this is so in relation to all countries. Overall, we do not consider there is any basis to question the Minister's assessment that cancellation of the passport was an effective way of preventing the appellant travelling to Syria.

[122] It was also argued that the appellant would have had great difficulty getting into Syria, if she had attempted to do so, because neighbouring countries had tightened their border controls to impede entry for those seeking to travel to the caliphate. It was suggested this meant cancelling her passport was unnecessary. We accept there would have been impediments in the path of the appellant if she tried to enter Syria, but we do not consider it was unreasonable for the NZSIS and the Minister to reach the view that this could not be ruled out and that, therefore, cancelling her passport was necessary to prevent her from doing so.

[123] As the Court of Appeal noted, the appellant could contribute to ISIL's activities from New Zealand.[83] Cancellation of her passport (preventing her from travelling to Syria) did not impede that potential contribution. While that may be true, the advice the Minister received was that, should the appellant travel to Syria, she would be further indoctrinated into an extreme interpretation of Islam and engage with individuals who encourage terrorism, based on that extreme interpretation and commitment to violent jihad. He was also advised she may contribute to radicalising others. So, while stopping the appellant travelling to Syria would not have stopped

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83 CA judgment, above n 4, at [104].

her from undertaking activities relating to ISIL from New Zealand, it would have prevented greater involvement with ISIL and its terrorist activities.

[124] Again, if there had been reasonable grounds to believe the appellant intended to facilitate one or more terrorist acts after travelling to ISIL-held territory, there would also have been reasonable grounds to believe cancellation of the appellant's passport would effectively impede her from carrying out that intention.

Issue 3: Did the Minister fail to address the proviso in s 5(4) of the Terrorism Suppression Act (lawful armed conflict) or the exception in s 5(5) (protest, advocacy or dissent)?

[125] As noted earlier, the definition of "terrorist act" in s 5 of the Terrorism Suppression Act has a proviso in s 5(4) to the effect that an act that occurs in armed conflict under the international law applying to such conflict is not a terrorist act as defined. Section 5(5) makes it clear that the fact a person engages in various forms of protest, advocacy or dissent is not a basis for inferring that the person is doing so with the intention of facilitating or engaging in a terrorist act. Both are important qualifications in the definition of "terrorist act".

[126] The special advocate argued the briefing paper provided no advice or information about s 5(4) and (5). Nor did the Minister mention either provision in his affidavit. The notice of cancellation of passport given to the appellant included a parenthetical statement that her intended facilitation of a terrorist act with the outcomes set out in s 5(3)(a) and (b) "are not exempt under section 5(4)".[84] But there was no amplification of that assertion. There was therefore nothing before the lower Courts or this Court to indicate the Minister addressed his mind to whether either subsection applied in the present case, apart from the reference in the cancellation notice just referred to.

[127] The High Court accepted the briefing paper did not address s 5(4). But the High Court Judge found that the prospect that the appellant's intended acts were within the lawful armed conflict exception was "entirely theoretical".[85] In a similar vein, he

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84 This part of the notice is quoted above at [24].
85 HC judgment, above n 3, at [103].

was not satisfied that the prospect of the protest, advocacy or dissent exception applying was sufficiently credible to mean that the Minister's omission to consider it amounted to a failure to have regard to a mandatory relevant consideration.[86]

[128] The Court of Appeal accepted that the briefing paper should have drawn the Minister's attention to s 5(4) and (5).[87] But it found the Minister's failure to address the lawful armed conflict proviso did not matter because there was no reason to think it did, in fact, apply.[88] The Court did not specifically address the protest, advocacy or dissent exception, but it can be inferred its approach to that exception was the same.[89]

[129] The briefing paper should have addressed s 5(4) and (5) and provided clear advice to the Minister on those provisions. In that respect, we agree with the Court of Appeal. However, both Courts below found there was nothing before them to indicate that s 5(4) or (5) could have applied in the present case, so the failure to address those subsections did not matter. The respondent argued the lower Courts were clearly correct that there was nothing to indicate either subsection applied in this case. We acknowledge the force of the respondent's argument, but we are not as sure as the lower Courts were that the failure to address s 5(4) and (5) did not matter. It may be that, if this were the only failing in relation to the decision, no remedy would be granted. But we do not think it can be said that the failure by the decision-maker to address important aspects of the statutory definition simply does not matter. We should emphasise that this is not a criticism of the Minister; the failure arose from the absence of advice in the briefing paper.

[130] Ultimately it is not necessary for us to come to a firm view on this aspect of the appeal because we consider that the decision was made unlawfully for other reasons.

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86 At [105].
87 CA judgment, above n 4, at [88].
88 At [110]–[112].
89 See its comments about this exception at a generic level at [88].

Issue 4: Did the Minister fail to address whether the cancellation decision was a reasonable limit on the rights of the appellant under the Bill of Rights?

[131] In his affidavit, the Minister deposed as follows:

> I was acutely aware of the significant impact that cancellation of a passport may have on a person's freedom of movement between countries. As a result of any cancellation a person's freedom to travel for business, educational, family, religious or other personal reasons may be curtailed. Understandably decisions of this nature attract public interest and potentially involve some public concern that the process was as robust as possible, and I was mindful of this when I went into this meeting.

[132] The briefing paper was silent on the Bill of Rights and, apart from the short reference to the effect of passport cancellation on the appellant's freedom of movement just quoted,[90] there was nothing in the Minister's affidavit to indicate the Minister considered the effect of the decision on the appellant's rights. Rights such as freedom of expression, freedom of thought, conscience and religion, or freedom of association were not mentioned at all in either the briefing paper or the Minister's affidavit.[91]

[133] The High Court Judge considered it would have been preferable if the briefing paper had addressed these Bill of Rights questions so the Minister could assess them.[92] But he considered the failure to do so could not vitiate the Minister's decision to cancel the appellant's passport unless the decision did, in fact, infringe the appellant's rights to an extent greater than reasonably justified under s 5 of the Bill of Rights.[93] He found it did not.[94]

[134] The Court of Appeal also accepted the briefing paper should have referred to the effect of cancellation on the appellant's rights.[95] But it said it was a separate question as to whether the failure to do so would lead to the briefing paper being found to be inadequate.[96]

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90 New Zealand Bill of Rights Act 1990, s 18.
91 Sections 14, 13 and 17 respectively.
92 HC judgment, above n 3, at [113].
93 At [113].
94 At [119].
95 CA judgment, above n 4, at [88].
96 At [88].

[135] The appellant argued the Minister was obliged to consider the Bill of Rights and engage with the question of whether the limitations resulting from the decision were reasonable and proportionate. She argued there was no evidence that the Minister considered whether cancellation of the appellant's passport accorded with proportionate limitations on the protected rights of expression, religious faith and observance, and association.

[136] The special advocate also argued the Minister failed to address these issues, though he accepted the Minister did refer in his affidavit to having considered the appellant's freedom of movement. He noted that the UNSCRs referred to earlier all emphasise the need to ensure counter-terrorism measures are consistent with human rights. He also noted the fact that the closed procedure involves elements of unfairness to the passport holder and the fact that the assessments required are complex. These factors meant that a fulsome consideration of rights and the question of reasonable justification was required, he argued.

[137] The respondent referred to this Court's decision in *Moncrief-Spittle v Regional Facilities Auckland Ltd*.[97] In that case, the Court endorsed the approach it had taken in an earlier decision to the effect that rights under the Bill of Rights constrain the outcome a decision-maker may reach, rather than being a mandatory relevant consideration.[98] The Court noted similar approaches have been taken in Canada[99] and the United Kingdom.[100] The respondent argued this approach appropriately focused on substantive compliance, not formalism. He noted this observation by Lord Hoffmann in *Belfast City Council v Miss Behavin' Ltd*:[101]

> Either the refusal infringed the applicant's Convention [for the Protection of Human Rights and Fundamental Freedoms] rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol.

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97 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459.

98 At [82] citing *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

99 At [82] citing *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395.

100 At [82] citing *Regina (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420; and *Regina (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945.

101 *Belfast City Council v Miss Behavin' Ltd*, above n 100, at [13].

[138] While we agree substantive compliance with the Bill of Rights is a legal issue for the court to resolve, that does not mean the decision-maker (in this case, a Cabinet Minister) does not need to engage with the Bill of Rights. As noted in *Moncrief-Spittle*, the fact that the Bill of Rights is a substantive constraint on the decision-maker means they must turn their mind to and engage with the question of whether it was reasonable to limit the affected rights by their decision.[102]

[139] We do not consider that happened in this case. The Minister's assertion that he was "acutely aware of the significant impact that cancellation of a passport may have on a person's freedom of movement" and mindful of the need for a robust process did not engage with the right in the way contemplated by *Moncrief-Spittle*. There was, in fact, nothing to indicate the Minister was advised to, or did, address the reasonableness of the limit on that right arising from a cancellation decision and conclude that the limit on the appellant's freedom of movement was justified, given the circumstances. Mindfulness of the need for a robust process addresses a different concern from the reasonableness of the limit on the passport holder's rights.

[140] The respondent argued that, if the appellant intended to use her passport to travel to Syria and, once there, intended to facilitate a terrorist act, it was obvious that cancelling her passport would be a justified limit on her affected rights under the Bill of Rights. So, by definition, the cancellation decision would be compliant with the Bill of Rights, even if the briefing paper does not explicitly address it. We agree that, if the statutory grounds for cancellation are made out, it is likely a decision to cancel would be a justified limit on rights. In that event, a failure to address the issue would not be fatal to the validity of the decision. But that does not mean those advising the Minister should feel free not to address the issue.

[141] *Moncrief-Spittle* also contemplated that a court dealing with a judicial review challenge to a public law decision would be required to satisfy itself of the reasonableness of the limit on rights resulting from the decision.[103] That would have been a live issue if we had found the cancellation decision was otherwise lawful. But as we have found it was not lawful, the issue no longer arises.

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102 *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 97, at [83].
103 At [84]–[86].

Issue 5: Was the process adopted by the Minister unfair or unreasonable?

[142] There are obvious issues of fairness in a process that requires classified information to be withheld from the person subject to a proposed cancellation decision. There was agreement that, at the least, the briefing paper to the Minister had to be "fair, accurate and adequate", the standard posited by the Court of Appeal in a different context in *Air Nelson Ltd v Minister of Transport*.[104] But the appellant and the special advocate argued that the required standard was higher than this: they said the officials who briefed the Minister had a duty of candour and utmost good faith, given the *ex parte* nature of the decision. The respondent accepted there was a duty of candour to the court on the part of the Minister in review proceedings, but argued that such a duty, owed to the Minister by the officials briefing them but effectively enforceable on review by the person affected by the Minister's decision, was both novel and unworkable.

[143] The special advocate cited the decision of the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Harkat* in support of his argument that a duty of candour and utmost good faith applied to officials briefing the Minister.[105] However, that case concerned the duty of candour and good faith owed by the responsible Minister to the court in *ex parte* proceedings where classified information is not able to be disclosed to the subject of the proposed court decision. We do not see it as applicable to the present situation.

[144] The special advocate also cited another decision of the Supreme Court of Canada, *Charkaoui v Canada (Citizenship and Immigration)*.[106] He highlighted the following findings from that decision:

(a) Those briefing the decision-makers should retain all information in their possession and disclose a complete and objective version.[107] This

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104 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [43]–[53] citing *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL) at 96–97 per Lord Diplock.

105 *Canada (Citizenship and Immigration) v Harkat* 2014 SCC 37, [2014] 2 SCR 33 at [100]–[103] per McLachlin CJ, LeBel, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

106 *Charkaoui v Canada (Citizenship and Immigration)* 2008 SCC 38, [2008] 2 SCR 326.

107 At [42] and [62].

is so that others can verify the fullness and correctness of the agency's analysis and conclusions.

(b) The decision-makers, including the Minister, are responsible for verifying the information they are given.[108] They are to ensure that the evidence presented is full and balanced.

[145] We agree the first of these applies in the present context, but we do not see any need to go beyond *Air Nelson* to reach that view. We do not see the second as practical in cases of this type. The Minister is the decision-maker and is entitled to rely on the veracity, accuracy and comprehensiveness of the information provided to them.

[146] In an interlocutory decision made before the substantive hearing, the High Court Judge rejected the argument that officials briefing the Minister owed a duty of candour and utmost good faith to the person subject to the proposed decision.[109] The Court of Appeal upheld that finding.[110] It concluded that the "fair, accurate and adequate" standard sufficed: if the briefing failed to meet that standard, the decision of the Minister would be vulnerable to judicial review on illegality grounds.[111]

[147] What is "fair, accurate and adequate" will depend on the context. In the present case, the significant consequences for the passport holder of a decision to cancel their passport, and the fact the passport holder subject to the proposed decision would not be notified and informed of the grounds before the decision is made and would never be allowed to see the classified information on which a decision would be based, are important aspects of that context. We see that as requiring those briefing the Minister to take care to verify the information included in the briefing, to disclose information known to the officials that tells against the need for cancellation of the passport, to inform the Minister of any gaps in the information they have and to include in the briefing all material information. We emphasise "material": there is no need to provide the Minister with a tome containing all information, no matter how limited its

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108 At [62].
109 HC classified security information judgment, above n 8, at [44].
110 CA judgment, above n 4, at [82].
111 At [82].

relevance. But the inclusion of unverified information, without disclosing to the Minister its limitations, or of inaccurate information will undermine the ultimate decision and may provide grounds for the decision to be quashed on review.

[148] We see the "fair, accurate and adequate" standard, adjusted to the context, as the appropriate standard in this case. This provides protection for the passport holder and allows the court on review an adequate basis for evaluating the lawfulness of the decision. We do not think adding a duty of candour owed by officials to the Minister, but enforceable in the courts by the passport holder, is necessary or desirable.[112] We agree with the High Court Judge that a failure to meet the fair, accurate and adequate standard makes the Minister's decision vulnerable to judicial review.

[149] The appellant and the special advocate also cited *R v Williams* in support of their position.[113] As already discussed, that case related to an application by the police for a search warrant. The Court of Appeal in that case said the applicant officer must provide all the facts that may be relevant to the issuing officer's decision, must not present only selected facts or leave out things the applicant thinks may mean the issuing officer is less likely to issue the warrant, and must give the issuing officer the full picture.[114] The Court added:[115]

> [222] As a general check, an applicant should scrutinise the grounds on which he or she applies for a warrant and consider, taking the role of devil's advocate, whether the grounds provide a sufficient basis for a warrant to be issued. Unless not practical, as a matter of best practice, applicants should also have the application checked by a superior officer or a legal adviser to ensure that it meets the statutory criteria for the issue of a warrant.

[150] We consider this requirement for careful scrutiny as described in *Williams* applies in the present context. Those preparing the briefing paper for the Minister in relation to a proposed passport cancellation need to ensure that there is a clear focus

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112 See *B v Secretary of State for the Home Department* [2018] EWHC 2651 (Admin), a case involving the cancellation of British passports, where Nicol J described as "not controversial" the principle that officials briefing the Minister must prepare their briefing "in a fair and balanced way" and should tell the Minister of any matters counting against cancellation: at [84] citing *R (Khatib) v Secretary of State for Justice* [2015] EWHC 606 (Admin) at [56] per Elias LJ and [78] per Simon J; and *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB) at [73]–[74].

113 *R v Williams*, above n 23.

114 At [214].

115 Citation omitted.

on the statutory criteria that must be applied by the Minister. It would be sensible for one of the team involved in the preparation of the briefing paper to take responsibility for checking the accuracy of the paper and that its contents substantiate the recommendation contained in it. This is not just a matter of checking the briefing paper after it is completed but being actively involved in its preparation and having input into it where necessary.

[151] We have not overlooked the fact that there was some urgency involved in getting the briefing paper prepared and presented to the Minister, given the concern the appellant would travel to Syria imminently and the fact that the interim suspension of the appellant's passport was about to expire. That may have meant that there was insufficient time to check all details in the briefing paper. But, if that was so, the Minister should have been told what frailties there were in the intelligence on which the briefing paper was based and what aspects of it had not been checked for accuracy. And, if, after the cancellation decision was made, checks revealed that the information on which it was based was incorrect, the Minister should have been told so that he could consider whether the cancellation of the passport should be brought to an end.

[152] To summarise:

(a) The briefing paper for a Minister considering a proposed cancellation of a passport must be fair, accurate and adequate.

(b) In the present context, where the passport holder will not be able to see the confidential information relied upon in coming to the decision, the information included in the briefing paper must be verified, comprehensive and include all material information known to the officials briefing the Minister, including information that tells against the need for cancellation of the passport in question.

(c) The information in the possession of the NZSIS in relation to the proposed decision should be retained in its possession.

(d) The Minister is entitled to rely on the veracity, accuracy and comprehensiveness of the information provided to the Minister.

(e) If the briefing paper is not fair, accurate and adequate, the Minister's decision will be vulnerable to judicial review.

(f) The process of careful scrutiny described above at [150]–[151] should be followed.

(g) If urgency prevents verification of material information, the Minister should be informed of that.

[153] For reasons we address in the closed judgment, we consider the briefing paper in this case was not "fair, accurate and adequate".

Disposition

[154] We conclude that the briefing paper to the Minister not only failed to meet the "fair, accurate and adequate" requirement, it also did not provide an adequate basis for the Minister to form the necessary belief on reasonable grounds that the appellant was a danger to the security of Syria because she intended to facilitate a terrorist act.

[155] We therefore allow the appeal.

[156] We have considered whether we should consider evidence that was not before the Minister in order to determine whether the new material is of such significance that it justifies the Minister's decision. We do not believe it would be appropriate to do so, given the flaws in the process we have highlighted. And we would be required to make findings on matters that are now subject to the doubts expressed by the special advocate,[116] as well as findings about what the appellant intended in 2016, based on the intelligence available at that time, some of which is now disputed.

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116 See above at [88] and [94].

What remedy is appropriate?

[157] In her submissions in this Court, counsel for the appellant sought the following remedies:

(a) A declaration that the cancellation decision was invalid from the date it was made; and

(b) A direction that the parties confer as to the terms of consequential relief, such as rectification of New Zealand records and notification to overseas agencies of this decision with a view to having their records rectified.

[158] The respondent accepted the former of those would be appropriate if the appellant succeeded in her appeal but said the latter would not be. He pointed to the evidence that the notes relating to the cancellation were removed from the domestic record in early 2018 and said the New Zealand authorities have no control over the records of other countries. We accept that submission.

[159] We therefore declare that the Minister's decision to cancel the appellant's passport was unlawful and invalid. We decline to make the direction sought by the appellant in relation to consequential relief.

[160] Although the appellant also challenged the decision to suspend her passport prior to its cancellation, this aspect of the case was not pursued before us.

Costs

[161] The appellant also sought costs in the event that her appeal succeeded. We agree that an award for costs is appropriate. The appellant was represented by two counsel at the open hearing, which ran for one and a half days. We consider an award of $30,000 is appropriate. We therefore order the respondent to pay the appellant costs of $30,000 plus usual disbursements.

[162] If there are issues relating to costs in the lower Courts, those Courts should resolve them.

Solicitors:
Woods Fletcher, Wellington for Appellant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent