ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S344 of 2011

BETWEEN

THE QUEEN
Appellant

and

BELAL SAADALLAH KHAZAAL
Respondent

APPELLANT'S REPLY

[APP B = application book; AB = appeal book]

10 **Part I: Certification**

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply to contested material facts

2. It is irrelevant that there was a contest as to the nature of the Almaqdese website at the trial. McClellan CJ at CL noted at [19] that Dr Kohlmann, an accepted expert on international terrorism and terrorist organisations including Al-Qaeda gave extensive evidence, inter alia, as to the Almaqdese website. Latham J's summary of the competing evidence is to be found at APP B 18.20, 81.30, 82.20, 83.20, 86.20, 105.40, 106.10, 106.30 (Kohlmann) and 86.40, 109.40, 110.10, 110.30 and 111.10 (Dandan). Her Honour also dealt with the evidence of Dr Gamal (the Crown's Arabic interpreter) who gave, inter alia, evidence of the meaning of certain Arabic words such as *'jihad'*. [APP B 210.40]

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3. The Respondent's submissions appear to imply that a terrorist Islamic website and one that contains *"benign'* material on Islamic issues are mutually exclusive. They are not. When charging the jury as to matters not in dispute Latham J noted that the Respondent's then leading counsel had conceded that the Almaqdese website contained material described as extremist. Her Honour also reminded the jury of Kohlmann's evidence that the book is the type of document employed by Al-Qaeda to reach out to individuals and groups who are looking for ways to contribute to the cause of (violent) jihad and the Al-Nida magazine with which [APP B 22.20]

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the Respondent was strongly connected gave prominence to the views of Al-Qaeda members including Osama bin Laden and Sheikh Al Maqdissy, the namesake of the Almaqdese website.[1] [APP B 82.10-83.10]

Part VI: Reply to respondent's argument

4. *Braysich v R* (2011) 85 ALJR 593 is not inconsistent with this case for the reasons given by McClellan CJ at CL at [131]. Hall J did not discuss *Braysich.* [APP B 244.10] McCallum J touched on *Braysich* by way of addendum at [488]-[489]. Her Honour doubted that there was any difference in substance between the test posed by s.13.3 of the Code and that posed under s.998(6) of the Corporations Law of Western Australia as incorporated into the Corporations Act 2001 (Cth) but found it unnecessary to resolve that question. [APP B 346.10-20]

5. It is submitted that the debate at paras 6.3-6.12 and 6.14-6.26 does not engage the critical question as to whether the evidence pointed to by the Respondent suggested as a reasonable possibility that his intention in making the book was not to facilitate assistance in a terrorist act. Cases such as *Dowe v Commissioner of the NSW Crime Commission* (2006) 206 FLR 1 at 20 [102] and *Gedeon v Commissioner of the NSW Crime Commission* (2008) 236 CLR 120, where the defences under consideration were whether the accused had proved he/she had a reasonable excuse for doing the proscribed act, are distinguishable from this case for the reasons stated by Hall J at [413] [2] (consistent with the position taken by Latham J). [APP B 326.10]

6. Had the defence been engaged the jury, properly instructed, must have been directed that it did not fall for their consideration unless the Crown had first proved all of the elements of the Count 1 offence beyond reasonable doubt (as contemplated by Latham J). It is submitted that this disposes, in particular, of the respondent's arguments of the kind summarised at para 6.14.

Part VII: Reply to respondent's argument on the notice of contention

7. The appellant's submissions in chief are not dispelled by paras 7.3-7.7 (or otherwise). If Hall J's application of *Benbrika* to this case is correct, Latham J should have given the jury directions in relation to the meaning of the phrase *"connected with"* (Ground 3) in the terms identified by his Honour at [370] and

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1 Her Honour also noted that it was not in dispute that the respondent made the book and caused it to be published on the Almaqdese website, having earlier sourced the material described as extremist (including that on assassination) from websites and after undertaking a relatively large number of editorial changes and extensively footnoting the document. In addition the respondent composed some introductory words to the book and to some of its chapters: [APP B 22.10-23.5].

2 *"An offence under s.101.5(1)(b) does not require the Crown to prove as an element of the offence that the person charged intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act. It is only when a person charged with such an offence satisfies the evidential burden under s.101.5(5) that the accused's intention then becomes an issue in the trial."* (per Hall J).

[374]. The directions sought from Latham J and those advocated on the respondent's behalf before the CCA were fundamentally different.[3] [APP B 311.20 -312.40]

8. McClellan CJ at CL correctly identified the initial question as whether the trial judge was required to direct the jury that more than a remote or tenuous connection between the book and the relevant assistance was required: at [87]. [APP B 230.50] Having addressed at [89] the significance of the events leading to the enactment of Part 5.3 of the Code[4], his Honour then correctly identified the next question as not whether the words *"connected with"* give rise to ambiguity, but whether the words *"the document is connected with ... assistance in a terrorist act"* give rise to ambiguity: at [91]. His Honour further correctly determined that the words *"connected with"* are ordinary words requiring no judicial gloss: at [93]. [APP B 232.30] [APP B 232.40] Although McCallum J's reasons are differently expressed it is plain that her Honour was of the view that a judicial gloss should not be added to the words of the offence creating provision: at [459] and [465]. [APP B 338.20 & 340.10]

9. McClellan CJ at CL noted the important factual distinction between this case and *Benbrika* at [98]-[101]. Having regard to Latham J's directions as to the elements of the offence[5] his Honour's categorisation of the Crown case at [101] is correct, namely that the connection between the book and assistance in a terrorist act is to be found within the book itself. On the evidence the jury was entitled to conclude beyond reasonable doubt that the book described various terrorist acts, being acts contemplated by the respondent himself; hence the respondent when he made a document connected with assistance in a terrorist act knew of that connection. Proof of a specific terrorist act was not required. As McClellan CJ at CL said at [136], the connection with assistance in a terrorist act was obvious from the book as was the respondent's knowledge of that connection and his intention in publishing. [APP B 234.20-235.20] [APP B 245.40]

10. So far as concerns *Benbrika* the position in the CCA is that McClellan CJ at CL appears broadly to have accepted it except for the placing of a gloss upon the words creating the offence: see [96]-[97] and [104]. Hall J found similar reasoning to that in *Benbrika* was to be applied in the interpretation of s.101.5(1)(b): at [104]. McCallum J disagreed with the conclusion set out at [315] in *Benbrika* for the reasons given by her Honour at [459]-[461]. Both McClellan CJ at CL and McCallum J disagreed with Hall J that a document cannot be said to satisfy the requirement that it be *"connected with ... assistance in a terrorist act"* within the meaning of s.101.5 unless requirements such as those identified in *Benbrika* at [315] are satisfied. The appellant submits that the of the majority in the CCA should be upheld and further that McClellan CJ at CL [APP B 234.10 & 236.10] [APP B 303.50] [APP B 338] [APP B 339.10]

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3 Understandably, as the respondent's position was the trial judge and the CCA should have adopted the meaning of the phrase *"connected with"* as decided in *R v Zafar* [2008] QB 810, a proposition rejected in *Benbrika*. See also McClellan CJ at CL at [64]-[68]: App B 225-6.

4 Including that Part 5.3 was intended to operate expansively.

5 Particularly (e)(i)-(v) reproduced at AB 3-4.

was correct in distinguishing *Benbrika* from this case on its facts. It is also of significance that the offence creating provisions in each case are different.[6]

11. With respect this Court should disregard the respondent's example at para 7.11 regarding the *"Anarchist's Cookbook"*. No such document or any like document is before this Court or was before the courts below. Generally as to paras 7.10-7.13, there can be, and in this case there is, a qualitative difference between the mere possession of someone else's document and making a document with the content and in the manner undertaken here. The respondent's acts in making the book and causing it to be published on the Almaqdese website evidence his purpose (or intention) in doing so.

12. As to paras 7.17-7.18 and 7.21-7.23, the Crown did not have to prove that the respondent made the book *intending* that others carry out terrorist acts; *contemplating* terrorist acts has a much lower threshold. If this Court is persuaded that Latham J's directions concerning *"connected with assistance in a terrorist act"* should have encompassed the concept of *"in contemplation"*, it is submitted that her Honour's directions as a whole render it highly improbable that the jury did not find beyond reasonable doubt that when the respondent made the book he contemplated the commission of one or more of the terrorist acts described in it.

13. In reply to paras 7.24-7.25, and further to the appellant's principal submissions at [52]-[55], McCallum J's remarks at [465] are pertinent in identifying that the test posed by Hall J at [370] and [374][7] is satisfied by Latham J's directions as to the elements of the count 1 offence, incorporating the directions as to the meaning of terrorist act. [APP B 340.10] [AB 2-4 & 8-10]

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Dated: 2 December 2011

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6 *Benbrika*: s.101.4 as to possession of a thing; this case s.101.5 as to making a document.

7 Based on *Benbrika* at [338].