Neutral Citation Number: [2012] EWCA Crim 2820

Case No: 201200251 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE
CROWN COURT at KINGSTON UPON THAMES (The Hon Mr Justice Calvert-Smith)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2012

Before :

LORD JUSTICE PITCHFORD
MR JUSTICE KENNETH PARKER
and
HIS HONOUR JUDGE GILBERT QC

- -

Between :

AHMED RAZA FARAZ	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

J Bennathan QC and D Friedman (instructed by **Birnberg Pierce - Solicitors**) for the **Appellant**
M Hill QC and D Atkinson (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: December 11 2012

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Approved Judgment

Lord Justice Pitchford :

The trial

1. On 4 October 2011, at Kingston-upon-Thames Crown Court before Calvert- Smith J, the appellant faced an indictment containing 30 counts. In counts 1 - 10 the appellant was charged with dissemination of a "terrorist publication", contrary to section 2(1)(a) and (2) of the Terrorism Act 2006, by distribution. In counts 11 – 19 the appellant was charged with dissemination of a terrorist publication, contrary to section 2(1)(a) and (2), by possession with a view to distribution. In counts 20 – 30 the appellant was charged with possession of information likely to be useful to a person committing or preparing an act of terrorism, contrary to section 58 (1) (b) of the Terrorism Act 2000. Each of counts 20 – 30 charged the appellant with possession of a separate computer file containing the material alleged to be useful to such a person. During the course of the trial the judge directed formal verdicts of not guilty in respect of counts 11, 12, 13, 18, 20, 26, 27, and 29. He discharged the jury from reaching verdicts in respect of counts 3, 9, 16, 19, 25, 28 and 30.

2. On 12 December 2011 the jury returned verdicts of guilty by a majority of 10:2 in respect of count 1, and unanimous verdicts of guilty in respect of counts 2, 4, 5, 6, 7, 8, 21, 22, 23 and 24. The jury returned not guilty verdicts upon counts 10, 14, 15 and 17.

3. On 13 December 2011 the judge imposed the following sentences:

> Counts 1 and 8, 12 months and on counts 5 to 7, 9 months, all concurrent with one another but consecutive to the other sentences.
>
> Counts 2 and 4, 12 months concurrent with one another, but consecutive to the other sentences.
>
> Counts 21 to 24, 12 months concurrent with one another, but consecutive to the other sentences.

Under sections 240 and 240A Criminal Justice Act 2003, 56 days were ordered to count towards the total sentence of 3 years imprisonment. The appellant was required to comply with the notification requirement under the Counter Terrorism Act 2008 for a period of 10 years. An order was made under section 143 Powers of Criminal Courts (Sentencing) Act 2000 for the forfeiture of exhibits.

Grounds of appeal

4. The appellant has leave from the single judge to appeal against conviction upon counts 1, 2, and 4 – 8 inclusive upon a single ground, namely that the judge permitted the prosecution to adduce in evidence the possession by named terrorist offenders of material similar or identical to that allegedly disseminated by the appellant, for the purpose of considering whether the material comprised "a terrorist publication" for the purposes of section 2 of the 2006 Act.

5. The appellant seeks to renew his application for leave to appeal against his conviction upon count 1 only on a second ground, namely that the learned judge failed to leave to the jury the constituent parts of the offence created by section 2 of the 2006 Act in terms which were compatible with the appellant's right of freedom of expression under Article 10 European Convention on Human Rights ("ECHR").

The evidence

6. In or about September 2004 the appellant became the manager of the Maktabah Islamic bookshop in Birmingham. The firm traded both from the bookshop and by means of a website, and published for sale books, articles, videos and DVDs which, the prosecution contended, supported the case for militant Islam.

7. The indictment period was 13 April 2006 (when the Terrorism Act 2006 came into force) and 26 January 2010 (when the appellant was arrested for a second time). The dissemination counts of which the appellant was convicted were founded upon "terrorist publications" in the form of books and DVDs sold in the shop and/or offered for sale on the website.

8. It is necessary, in summary form, to describe the nature of the publications in respect of which the appellant was charged and convicted in the dissemination counts. The centrepiece of *Milestones – special edition* (count 1) was the work of Sayyid Qutb, a leading member of the Muslim Brotherhood, who was executed in Egypt in 1966 in consequence of his opposition to President Nasser and his suspected involvement in a plot to bring down his Government. The special edition was edited by the appellant in his pen name A. B. Al-Mehri. It contained a biography of the author of *Milestones*, and nine appendices containing works by various authors. The book was offered for sale in the form in which it was indicted in or about April 2006, some months after the Underground and bus bombings in London on 7 July 2005. The special edition was alleged by the prosecution to be a polemic in favour of the Jihadist movement encouraging violence towards non-believers. *Malcolm X, Bonus Disc* (count 2) was a DVD containing a film about the life of the deceased Muslim leader. It included a number of trailers and other recordings of interviews with the families of men who had died "fighting" US forces in Afghanistan and Israeli forces in the occupied Palestinian territory. It included footage of a suicide bomber driving to his death in Iraq. *21st Century Crusaders* (count 4) was a DVD. It purported to be a documentary focused upon the suffering of Muslims around the world. It included an interview with a masked man who defended terrorist attacks by or on behalf of Al-Qaeda. *The Lofty Mountain* (count 5) included a text written by Abdullah Azzam justifying the expulsion of the Russian occupation of Afghanistan in the 1980s. The work included a biography of Azzam, accounts of the Battle of the Lion's Den in 1987, in which Osama Bin Laden was a volunteer, the biography of a journalist who died while working as a medic in support of the fighters against US forces in Afghanistan in December 2001, and Azzam's account of Bin Laden's role in expelling the Russian army from Aghanistan. *Join the Caravan* (count 6) was a book founded upon a text by Sheikh Azzam. The translator's foreword praised his work and writing. *Defence of the Muslim Lands* (count 7) was also founded upon a text by Sheikh Azzam. Its appendices included a discussion upon the justification for suicide operations in Chechnya. Finally, *The Absent Obligation* (count 8) was a book whose central text was written in the 1970s by Mohammed Abdus Faraj, an Egyptian Muslim, who was

implicated in the death of President Anwar Sadat of Egypt and was executed. The text argued for the need for jihad in defence of the Islamic faith against a corrupt ruler.

9. Between 13 April 2006 and January 2007 Maktabah invoice records demonstrated that 653 copies of *Milestones*, 424 copies of *Malcolm X*, 56 copies of *21st Century Crusader*, 9 copies of *The Lofty Mountain*, 11 copies of *Join the Caravan*, 27 copies of *Defence of the Muslim Lands*, and 16 copies of *The Absent Obligation* were sold.

10. The jury heard that in 2007 Maktabah's premises in Birmingham were raided during an operation to foil a plot to kidnap and kill a member of the armed forces living in Birmingham. The appellant was arrested on 31 January 2007. At trial the prosecution accepted that there was no link between the appellant and the plot which formed the basis for his original arrest. While the bookshop ceased business, sales through the website continued in 2007 and 2008. From 1 April 2008 the appellant entered into email correspondence with Anwar Al-Awlaki a United States citizen who became the leader of Al-Qaeda in the Arabian Peninsula.

11. The appellant was arrested for a second time in January 2010. The appellant gave a prepared statement but was not prepared to be interviewed without an explanation for the three year delay between his first and second arrests. The material was, it emerged at trial, in the process of analysis during this period. At one point a computer crash prolonged the delay.

12. The indicted material was examined by the jury both in summary and by quotations read into evidence. They were assisted in judging the material by two experts. Dr Wilkinson was an expert in Islamic education and gave evidence about the mainstream religion, its social and religious obligations and the corruption of the Islamic concept of "jihad of the sword" for modern political purposes. Professor Hoffman, also an academic, was an expert on terrorism. He gave evidence about the radicalisation of young Muslims, the development of Al-Qaeda and the relationship between Abdullah Azzam, Osama Bin Laden and Ayman Al-Zawahiri (all disciples of Qutb). He plotted for the jury the rise of Al-Awlaki. Both experts were permitted to give their opinion upon the likely effect of the indicted publications in the context (i.e. the historical climate) in which they were disseminated.

13. The defence case was that the jury should not rely upon the opinion of the experts called by the prosecution. Their expertise and independence were challenged in cross-examination. The argument was, in general, that none of the publications disseminated by the appellant encouraged acts of terrorism. They placed into the market for interested readers and viewers material whose content was and encouraged only intelligent discussion of religious and political theory. The appellant elected not to give evidence. It followed that the requirements of section 2 were to be judged by the jury solely upon a consideration of the indicted material assisted, to the extent they considered appropriate, by the evidence of the experts.

The statutory offence

14. Section 2, Terrorism Act 2006, in its relevant parts, provides as follows:

> "2(1) A person commits an offence if he engages in conduct falling within sub-section (2) and, at the time he does so –

(a) he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism;

(b) he intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts; or

(c) he is reckless as to whether his conduct has in effect mentioned in paragraph (a) or (b).

(2) For the purposes of this section persons engages in conduct falling within this sub-section if he –

(a) distributes or circulates a terrorist publication;

(b) …

(c) …

(d) … or

(e) has such a publication in his possession with a view to its becoming the subject of conduct falling within any of paragraphs (a) to (e).

(3) For the purposes of this section a publication is a terrorist publication, in relation to conduct falling within sub-section (2) if matter contained in it is likely –

(a) to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism; or

(b) to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them.

(4) For the purposes of this section matter that is likely to be understood by a person as indirectly encouraging the commission or preparation of acts of terrorism includes any matter which –

(a) glorifies the commission or preparation (whether in past, in the future or generally) of such acts; and

(b) is matter from which that person could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by him in existing circumstances.

(5) For the purposes of this section the question whether a publication is a terrorist publication in relation to particular conduct must be determined –

(a) as at the time of that conduct; and

(b) having regard both to the contents of the publication as a whole and to the circumstances in which that conduct occurs.

(6) In sub-section (1) references to the effect of a person's conduct in relation to a terrorist publication include references to an effect of the publication on one or more persons to whom it is or may become available as a consequence of that conduct.

(7) It is irrelevant for the purposes of this section whether anything mentioned in sub-sections (1) to (4) is in relation to the commission, preparation or instigation of one or more particular acts of terrorism, of acts of terrorism of a particular description or of acts of terrorism generally.

(8) For the purposes of this section it is also irrelevant, in relation to matter contained in any article, whether any person –

(a) is in fact encouraged or induced by that matter to commit, prepare or instigate acts of terrorism; or

(b) in fact makes use of it in the commission or preparation of such acts.

(9) In proceedings for an offence under this section against a person in respect of conduct to which sub-section (10) applies it is a defence for him to show –

(a) that the matter by reference to which the publication in question was a terrorist publication, neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and

(b) that it was clear in all the circumstances of the conduct, that that matter did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under sub-section (3) of that section) did not have his endorsement;

(10) This sub-section applies to the conduct of a person to the extent that –

(a) the publication to which his conduct related contained matter by reference to which it was a terrorist publication by virtue of sub-section (3) (a); and

(b) that person is not proved to have engaged in that conduct with the intention specified in sub-section (1) (a).

(11) …

(12) …

(13) … "publication" means an article or record of any description that contains any of the following, or any combination of them –

(a) matter to be read;

(b) matter to be listened to;

(c) matter to be looked at or watched."

The prosecution case

15. The prosecution contended (section 2(2)) that the appellant's qualifying conduct was the distribution or circulation of the publications respectively charged in counts 1 - 10. That contention was not in issue at trial. The prosecution alleged that it could be inferred either (section 2(1)(a)) that the appellant intended his conduct to be a direct or indirect encouragement of acts of terrorism or (section 2(1)(c)) that he was reckless as to whether his conduct would have that effect. Both contentions were in dispute but the appellant did not give evidence to challenge the inference. The prosecution case was (section 2(3)) that each of the publications indicted was "likely" to be understood by at least some of the persons to whom it was available as a direct or indirect encouragement to commit acts of terrorism. The appellant did not give evidence to raise the statutory defence (section 2(9)) that the publications did not represent his views. His defence was that upon a proper reading or viewing they did not encourage acts of terrorism.

16. By section 20 expressions used in the Terrorism Act 2006 have the same meanings as in the Terrorism Act 2000. Terrorism is defined in section 1(1) of the 2000 Act as one or more of a number of actions involving serious violence or damage, endangerment of life, serious risk to the health or safety of the public, or a section of it, or is designed seriously to interfere with or disrupt an electronic system when the use or threat of such action is designed to influence government, to intimidate the public, or a section of the public, and is made for the purpose of advancing a political, religious, racial or ideological cause. In section 20(2) of the Terrorism Act 2006 "glorification" from which encouragement may be inferred includes any form of praise or celebration and cognate expressions are to be construed accordingly.

Encouragement to commit terrorist acts

17. In bare summary, the prosecution case was that the publications sought to encourage the followers of Islam to attack unbelievers and to seek martyrdom in the pursuit of jihad. They sought to achieve that encouragement by providing a purported theological justification for attacks on unbelievers, particularly, but not exclusively, on those who occupied Islamic lands, and by celebrating the achievements of militant and terrorist followers of Islam. The judge ruled that the jury could not, when considering the capacity of any one publication indicted as an encouragement to terrorist acts, examine the publications as a whole. They must consider each in turn. But when considering the issue whether the appellant intended to encourage, or was reckless as to whether others would be encouraged, they were entitled to consider all of the publications disseminated by the appellant.

18. The prosecution sought from the judge leave to adduce evidence of the possession by offenders convicted of terrorist offences of several of the publications the subject of the indictment together with other material not the subject of the indictment. The jury heard that Operation Overt concerned Abdul Ahmed Ali, Assad Ali Sarwa, Tanveer Hussein, Umar Islam, Ibrahim Savant, Arafat Khan, and Waheed Zaman. They were convicted in 2009 and 2010 of offences relating to a plot to blow up aircraft flying between Great Britain and the United States using improvised explosives. Found in the possession of the offenders, or some of them, were copies of *Milestones – special edition*, *Malcolm X – Prince of Islam*, *21st Century Crusaders*, *The Lofty Mountain*, *Join the Caravan* and *Defence of Muslim Lands*.

19. Operation Vulcanise involved the arrest of Andrew Ibrahim in Bristol on 17 April 2008. He was subsequently convicted of making an explosive substance with intent to endanger life and the preparation of terrorist acts. In his rucksack was found a copy of *Milestones – special edition*.

20. Operation Yarrow concerned Omar Khan Sharif and Asif Hanif who, in April 2003, travelled to Tel Aviv, Israel, where they conspired to perform a suicide bombing attack. Sharif's bomb failed to explode but Hanif detonated a bomb at a seafront bar killing three people and injuring 65 others. When Omar Sharif's home address in Derby was searched a Maktabah business card was recovered.

21. Operation Lentil was an investigation into Habib Ahmed and Rangzieb Ahmed. In March 2002 Habib claimed in an interview given to the Sunday Times to be a member of Al-Qaeda who had fought in Afghanistan against coalition forces. In 2005 a contact book which had been in the possession of both men was found to contain the

names and numbers of persons associated with Al-Qaeda. In December 2008 both men were sentenced to terms of imprisonment for offences which included membership of a proscribed organisation, namely Al-Qaeda. In August 2006 officers investigating at Habib Ahmed's home address in Manchester recovered copies of *The Lofty Mountain*, *Join the Caravan*, *Defence of the Muslim Lands* and *The Absent Obligation*.

22. Operation Munder was an investigation into a group of individuals who ran a Dawah stall in Manchester. It was alleged that they sought converts to Islam and volunteers to perform violent jihad abroad. One of the group, Newton, handed to an undercover officer an eBook file of the *Milestones – special edition* publication. Another, Farouki, distributed *21st Century Crusaders* to another person in July 2009. In November 2009 officers recovered from the home address of Farouki in Manchester further copies of the DVD *21st Century Crusaders* and the DVD *Malcolm X – Prince of Islam*. They also recovered copies of *Defence of the Muslim Lands* and *The Absent Obligation*.

23. Mohammed Sadique Khan, Jermaine Linsey, Shehzad Tanweer and Habib Hussain were the subject of Operation Theseus, an investigation into the bombing of the London underground on 7 July 2005. Found in Mohammed Sadique Khan's bag were his birth certificate, last will and testament, *The Lofty Mountain*, *The Absent Obligation* and *Defence of the Muslim Lands*.

24. The prosecution also relied upon evidence that the author of *Army of Madina in Kashmir*, the subject of count 10, was Esa Al Hindi, a pseudonym for Dhiren Barot. Barot pleaded guilty in November 2006 to a charge of conspiracy to carry out terrorist attacks in the United States and in London. Following his arrest in August 2004 police officers found a holdall at his address in Wembley containing, amongst other things, Maktabah's telephone numbers. As count 10 asserted *Army of Medina in Kashmir* was one of the publications disseminated by Maktabah. It was not the prosecution case that the appellant had any knowledge or involvement in Barot's terrorist activities, or that there had been direct contact between Barot and the appellant. As we have recorded the jury returned a verdict of not guilty upon count 10 of which *Army of Madina* was the subject. Guilty verdicts were, however, returned in respect of all the other publications identified in the preceding paragraphs.

25. The prosecution carried out an analysis that, by May 2008, 94 separate searches had been performed in the course of investigations into terrorist offences. Of those cases 74% did not reveal any items disseminated by Maktabah and not all of the investigations resulted in prosecution. The prosecution was permitted to adduce by way of admission the names of the offenders, a summary of the terrorist offences they had committed and the fact of their possession of the relevant and other publications.

26. In a skeleton argument dated 9 September 2011 the prosecution contended that this material was admissible as relevant to three issues:

    i) whether the items were terrorist publications within the meaning of section 2(3) and (4) of the 2006 Act;

    ii) the appellant's intent in distributing the publications under section 2(1) of the 2006 Act; and/or

iii) whether the material was being disseminated by the appellant within the meaning of section 2(2) of the 2006 Act.

27. The prosecution's first contention was that the additional material "has to do with the alleged facts of the offence with which the defendant is charged" within the meaning of section 98(a) of the Criminal Justice Act 2003. If that was so, the evidence was admissible as relevant at common law. In the alternative, it was evidence of the bad character of persons other than the appellant for which the prosecution required leave pursuant to an application under section 100 Criminal Justice Act 2003. The prosecution asserted that the additional material was relevant and, for that reason, admissible at common law; alternatively, it provided "important explanatory evidence" within the meaning of section 100(1)(a) and (2), *and* had "substantial probative value in relation to a matter which is of substantial importance in the context of the case as a whole", within the meaning of section 100(1)(b).

28. The judge accepted the appellant's argument that the evidence could not assist upon the issues identified at paragraph 26(ii) and (iii) above. For present purposes, therefore, it is necessary only to identify the prosecution's rationale for claiming that the evidence was relevant to the question whether the publications were "terrorist publications". Mr Hill QC and Mr Atkinson contended at paragraph 6.3 of their written skeleton argument to the judge that *"the evidence that these publications were found in the hands of terrorists provides a proper basis for the conclusion by the jury that they were terrorist publications, within the meaning of section 2"*. At paragraph 6.4 it was asserted *"in assessing the items to determine that issue* [whether the material was a terrorist publication] *the jury will be assisted by knowing that copies of the items that originated with Maktabah … found their way into the hands of convicted terrorists. The jury would be entitled to conclude that this direct connection of the books to those engaged in acts of terrorism was important evidence in forming their assessment of the nature and purpose of the books in question. This is notwithstanding the lack of evidence or allegation that the defendant was himself engaged in the plots of others, a feature which can be made clear to the jury before, during and after the calling of this evidence … put another way, the jury would be entitled to conclude that it was no coincidence that books advocating or endorsing violence in the name of Islamic jihad should be found in the possession of those engaged in such jihad"*.

29. It was contended at paragraph 6.13 that section 2(3) required the jury to assess whether it was likely that a publication would be understood, by some at least, as an encouragement to the commission of acts of terrorism. It was therefore essential to know that the prospective readership of such documents included those who were engaged in acts of terrorism. The possession by known terrorists of such material provided an essential context without which the jury could not fairly judge the likely impact of the material.

30. It was submitted on behalf of the appellant in a skeleton argument submitted by Mr Bennathan QC and Mr Friedman that the additional material did not have to do with the alleged facts of the offences charged. If it was admissible at all then it was as bad character evidence under section 100. As to the explanatory function of the evidence contended, it was submitted that possession by terrorists of copies of the indicted publications begged the question whether the publication either did or was likely to be understood by them as encouraging acts of terrorism. What would be required was an

investigation of the motivation of each of the alleged terrorists. Such an investigation would create satellite issues in the speculative exploration of which the appellant was bound to suffer prejudice. It was asserted that it was not possible to say that the jury would find it impossible or difficult properly to understand other evidence in the case (section 101(2)(a)) without receiving the additional evidence or that (section 100(2)(b)) its value for understanding the case as a whole was substantial; neither was it possible to argue that possession of the material in the hands of terrorists was of substantial probative value in relation to a matter of substantial importance in the context of the case as a whole (section 100(1) (b)).

31. In a ruling given on 6 October 2011, the learned judge concluded that the additional material did not have to do with the facts of the offences alleged. He accepted that since dissemination was not in issue the evidence should not be admitted for that purpose. The judge also accepted the appellant's contention that there was no more than a tenuous link between the possession by terrorists of such material and the intention of the appellant in disseminating it. However, the judge concluded as follows:

> "The Crown contends that the evidence qualifies under both the heads referred to in section 100 – the explanatory head and the probative head. As far as the explanatory head is concerned it is submitted that any intelligent jury once he or she had understood the broad thrust of the case would want to know "who actually bought these publications or came into possession of them?" It seems to me that this is indeed important explanatory evidence and qualifies under both sub-sections 2(a) and (b). If the fact was that although the publication had been on sale for years none of them had ever found their way on [to] the bookshelves of any person convicted of any terrorist offence, the defence would surely be entitled, for their part, to adduce that fact in evidence … in making their case. In addition, so far as one particular facet of this evidence is concerned, the fact that *prima facie* the defendant was known personally to the author of one of these volumes is equally important explanatory evidence. As far as the probative head is concerned, the Crown contend that sections 100(1)(b) and (3) are satisfied on three different grounds … second, the evidence is potentially powerful evidence to prove that the publications are in fact terrorist publications as defined in section 2(3)(a) of the Terrorism Act 2006. I do accept the Crown's submissions as to the relevance and probative value of the evidence to the question of whether the publication concerned is in fact a terrorist publication. It seems to me clearly relevant that a small, but significant, number of those who came by the publications did in fact commit terrorist offences. It might be said that a significant proportion of those who have in fact been convicted of terrorist offences in the last few years, had in fact acquired some of these publications from the defendant's bookshop, directly or indirectly. Clearly the question is one which is in issue between

> the parties … the evidence, subject of course to the view in due course of the jury, has substantial probative value in respect of that issue and again, subject to the jury's assessment in due course, is in my judgment of substantial importance in the context of the case as a whole."

32. The judge was also addressed upon the potential of the evidence to cause unfair prejudice to the appellant. The judge's decision was:

> "I am of course aware of that potential. However, the Crown will no doubt make it plain that they do not allege and that there is no evidence that this defendant had any prior knowledge of, let alone participation in, any of the offences committed by those in possession of the publications. I would strongly encourage the preparation of admissions which could summarise the facts of the cases concerned in a few words, together with facts which emerged during those cases, in particular as part of the Crown's case, which did or even may have provided motives for the commission of those offences, quite apart from their possession of one or other of the publications in question. As to the general prejudice concerned, it has to be recognised that all cases in which allegations are planned or attempted terrorist offences have been made, have been committed against a background known to every citizen of those country of 9/11 and 7/7. In my judgment, the jury will be able after careful submissions by counsel and directions by me to place the evidence which I have indicated is admissible in the limited category in which I have allowed the Crown to place it."

33. We are grateful to Mr Hill QC for providing us with a copy of an extract from his concluding address in order that the court might appreciate how the matter was left by the prosecution to the jury. In the course of his submissions Mr Hill argued:

> "The recipients included many of those convicted of the most serious terrorist offences committed in this country in the last decade. The defendant was at the very least reckless as to the likelihood that such people would receive these publications. You may think the evidence goes further and leaves little if any room for doubt that he intended such people to receive these publications. …"

Mr Hill then summarised the additional material which was before the jury in the form of the admitted facts (which we have already summarised). He continued:

> "These men, who committed serious terrorist offences in other cases, were an important part of the defendant's audience. Remember the statistics about the significant percentage of all recent terrorist investigations in which Maktabah products are found. … Of 94 police terrorist investigations, as at May 2008, no less than 26% revealed items linked to Maktabah so a

> quarter of all terrorist investigations by police in this country alone showed a link to Maktabah materials. That is highly significant is it not? **Look at the section 2 tests: is it probable that the publication you are considering would be understood by a significant number of its readers as directly or indirectly encouraging terrorism? If the statistics are anything to go by, as well as the actual attribution of indicted publications in the most serious terrorist cases we have listed are anything to go by, the answer to that question is a resounding yes."** [emphasis added]

34. In his directions of law, given to the jury both orally and in writing, the judge said about the additional material in the hands of known terrorists:

> "The relevance of the possession of exhibits by persons convicted of offences with a terrorist connection. You have these set out at the admissions at pages 92 – 102, as you know. This evidence has potential relevance in counts 1 – 19 only as to the question of whether the publication was a terrorist publication at the time it was distributed or possessed by the defendant.
>
> Parliament had decreed, in a sub-section of section 2 of the Terrorism Act 2006, that it is irrelevant … whether any person has in fact been encouraged by the publication in question to commit, prepare or instigation a terrorist offence. You have heard the points made by each side on this topic and will give them the weight you feel they deserve. …"

35. On the second day of his summing up, 5 December 2011, the learned judge concluded with a synopsis of the case respectively for the prosecution and the defence. Of Mr Hill QC's submissions concerning the additional material in the hands of terrorists, he said:

> "He relies on the fact that in the cases which you know, from pages 92 from tab 2 from volume 2 onwards to 102, that so many of those arrested in recent years had had Maktabah publications in their possession. Again I don't need to remind you of all that detail and I have explained the potential relevance of it."

As to Mr Bennathan QC's submissions on the same issue the judge said:

> "What about the other criminals? Are books really capable of constituting the kind of direct or indirect encouragement alleged by the prosecution? He reminds you that within the admitted facts, Mr Ali, the leader of the plot to blow up aeroplanes between this country and the US was apparently "a jihadist" from the age of 14 from the case evidence."

Notwithstanding the judge's recognition at the time of his ruling of the potential of this evidence to cause unfair prejudice to the appellant, we have not found within the summing up any direction warning the jury against making improper use of the material.

Ground 1: The other cases

36. There is in the appeal no issue as to the judge's finding that the admissibility of the other case material was governed by section 100 of the 2003 Act, although it is right to say that our impression is Mr Hill was conceding the issue for the purposes of the section 100 argument only, and was not conceding that the application of the section 98(a) test was correct. In view of what follows it is unnecessary to reach a concluded view upon the application of section 98(a). It is submitted on behalf of the appellant that the "other case" material provided no explanation which the jury was entitled to hear; nor was it substantially probative of the issue whether a publication was a "terrorist publication". First, it was not in doubt that many of the convicted terrorists had other publications in their possession. It was entirely possible that if they had been influenced at all they were influenced by that other material rather than that which was indicted in the present case. It was entirely possible that those "of a jihadi disposition" acquire all sorts of material as a form of declaration or self-justification. It did not follow that they were converted to jihadism or were encouraged by the terms of the publications themselves to commit terrorist acts. In none of the other cases did the jury have evidence of the dates on which copies of the indicted material came into the possession of the offenders, nor what parts had been read by the offenders and, if so, to what effect. It was not suggested that any of them had been in direct contact with the appellant.

37. The second ground for resistance of the admission of the additional material was that section 2(8) of the Terrorism Act 2006 stated expressly that "it is irrelevant … whether any person … is in fact encouraged or induced by that matter to commit, prepare, or instigate acts of terrorism". It is submitted that the declaration of irrelevance should have been determinative of the judge's decision as to the admission of the material. The issue of the material's capacity to encourage was to be judged, on the facts of the present case, solely upon an assessment of its contents in the context in which it was disseminated. As it was argued in writing *"the only basis for the admission of this material is expressly banned by the statute"*. In the alternative, it is argued that the issue whether any individual was in fact encouraged was so relegated in importance by the terms of section 2(8) that it could not be claimed it was "a matter of substantial importance" or that "the jury would find it impossible or difficult properly to understand other evidence in that case" without it.

38. Mr Bennathan submitted that there could be no question but that the material adduced by way of formal admission was highly prejudicial to the appellant's case. Given that the jury returned not guilty verdicts in respect of some of the counts it was not possible to conclude that the jury may not have been influenced, in respect of those counts upon which they convicted, by the prejudicial knowledge that known terrorists had been in possession of publications disseminated by the appellant.

39. Mr Hill QC, in his response to the perfected grounds of appeal, said at paragraph 17:

> "… just as it is relevant to see what other property a defendant has in his possession in order to understand his mindset, because it provides necessary context without which the jury's knowledge would be incomplete, so it was relevant to the jury's assessment as to whether the indicted publications were terrorist publications to consider their readership. It should be stressed that this does not involve establishing those readers were inspired to commit acts of terrorism by reading the books, rather the association of those persons with these books provides context."

40. As to the application of section 100(1)(b) and (3), Mr Hill said at paragraph 27:

> "… the jury were entitled to ask themselves, in assessing whether or not the indicted items are terrorist publications, whether it was a coincidence that those same items were found to have been in the possession of those who had engaged in, or prepared for acts of terrorism. Again, this does not involve any assessment of whether it was these publications that encouraged them to undertake those acts."

And at paragraphs 28 and 29:

> "28… the evidence identified a relevant component of the readership of the books as those committed to violent terrorism, which formed the proper basis for an inference as to the nature of those publications.
>
> 29. The applicant's ground of appeal in relation to the admission of the evidence of the other cases depends on the contention that the evidence was adduced to prove that those who had committed acts of terrorism had been encouraged to do so by indicted publications found in their possession. Contrary to paragraph 131 of the applicant's grounds, it was not the respondent's contention that this evidence proved that those persons had in fact been encouraged by those publications to commit acts of terrorism, nor was it necessary for the evidence to prove that encouragement in order to be admissible pursuant to section 100 Criminal Justice Act 2003."

41. Mr Hill maintained in his oral argument to the court that it was not his purpose to invite the jury to infer that terrorists in possession of the indicted material had been encouraged by it to commit such offences. When, however, the court invited Mr Hill to specify the evidence in the case which the jury could not properly understand without reference to the additional material, Mr Hill referred only to "context". When we asked him to identify the issue of substantial importance in the context of the case as a whole in respect of which the additional material was substantially probative he was able only to submit that it was probative of the appellant's readership.

42. In support of his argument that background material was admissible Mr Hill relied on *Sawoniuk* [2000] 2 Cr App R 220 in which the Court observed:

> "Criminal charges cannot fairly be judged in a factual vacuum. In order to make a rational assessment of evidence directly relating to a charge it may often be necessary for a jury to receive evidence describing, perhaps in some detail, the context and circumstances in which the offences are said to be committed."

In *Sawoniuk* the jury received evidence of the historical context in which it was alleged the offences of murder took place.. Secondly, Mr Hill relied on *Sidhu* [1994] 98 Cr App R 59. The jury considered a video recording of the appellant firing weapons and chanting his support for the Khalistan Liberation Force during the trial of a bomb making conspiracy. The video was admissible "as evidence of a continual background of history relevant to the appellant's part in the alleged conspiracy". In *Warner & Jones* [1993] 96 Cr App R 324 the appellants were charged with conspiracy to supply heroin. The prosecution was permitted to adduce evidence under section 74 Police and Criminal Evidence Act 1984 that eight of the people who visited the appellants' address had convictions for the possession or supply of heroin. That evidence was relevant to the issue what transactions were carried out at the house. We accept that essential background and relevant evidence is admissible at common law.

Discussion

43. The issue in respect of which the judge found the "other cases" evidence to be relevant was (section 2(3)) whether matter contained in the publication under consideration "is likely (a) to be understood by some or all of the persons to whom [the publication] is or may become available...as a direct or indirect encouragement...to them to the commission...of acts of terrorism". Subsection (3) requires the jury to judge the effect of the publication upon the minds of those to whom it will or may become available as a result of the defendant's conduct; it does not require them to decide whether *they* would regard it as an encouragement to commit a terrorist act, although their own reaction to the publication would, no doubt, form part of their decision-making process. A publication's readership may include historians, theologians, academics, liberal and conservative Moslems, militant jihadists, the weak and impressionable, and the strong and independent. We accept the respondent's submission, as did the judge, that the jury would, when judging the subsection (3)(a) question, be entitled to consider the range of people who formed the market for the publication. It seems to us probable that there would be among Maktabah's readership some who were more likely than others, particularly those who were already sympathetic to the objectives of militant Islam, to interpret any given text as encouragement. The judge, correctly in our view, found that the composition of the publication's readership could be an important facet of the jury's consideration of the issue whether some of them would understand the publication to be an encouragement to commit terrorist acts. It also seems to us that if the jury had before them *admissible* evidence that some readers had in fact been encouraged by a publication to commit terrorist offences, that evidence would also be relevant to their consideration of the likely effect of the publication upon its readership.

44. However, consideration of the composition of the readership of a publication for the purpose of judging the publication's likely effect upon them is a quite separate and different exercise from consideration of evidence that people who had read it were in fact encouraged to commit terrorist offences. The danger here was the elision of the two.

45. As to relevance (whether at common law or under section 100) we do not accept the appellant's argument that because section 2(8) provided that it was *irrelevant* for the purposes of the section whether anyone was encouraged or not, evidence which demonstrated that people were in fact encouraged was inadmissible. It will be seen that section 2(7) was in similar terms in that it declared irrelevant the issue whether the encouragement was to commit any specific terrorist act or just terrorist acts generally. The plain effect of section 2(7) and (8) is that the offence could be committed (1) whether the encouragement was to commit a specific terrorist act or terrorists acts generally and (2) whether or not any person was actually encouraged to commit acts of terrorism. Admissible evidence that a person was indeed encouraged by a publication to commit terrorist acts would be, it seems to us, admissible in support of the prosecution case that people were likely to be encouraged by the publication to commit terrorist acts.

46. However, the prosecution could not and did not rely on the "other cases" evidence to prove that certain individuals were encouraged to commit terrorist acts (see paragraph 41 above). It could not do so because the evidence was not direct, and an inference, drawn merely from possession, that the other offenders were so encouraged was not fairly available, for reasons to which we have referred in paragraph 36 above and to which we refer below at paragraph 48. In our judgment, the evidence was admissible, if at all, for the extremely limited purpose of demonstrating that among the readership of the Maktabah publications were people who were prepared to commit terrorist acts. But if the evidence was admitted for that purpose, it was relevant only to the question whether such people were likely to regard the contents of the publication as encouragement to commit terrorist acts. It was not admissible in proof of the fact that people had been so encouraged. In our view, the danger inherent in admitting the evidence even for that extremely limited purpose is manifest. The danger is that the jury would condemn the publication purely by reason of its association with known terrorists. The temptation to move to the conclusion that terrorists would not be in possession of a publication *unless* it encouraged them to acts of terrorism is a powerful one; but such a conclusion would, of course, be speculative, unfair and prejudicial.

47. We have extracted from Mr Hill's final address to the jury his invitation that they should consider the significance of the fact that as many as 26 per cent of terrorist investigations had found some of the indicted publications in the possession of suspected terrorists. Mr Hill referred to "the most serious terrorist cases". The critical question posed was:

> "Look at the section 2 tests: is it probable that the publication you are considering would be understood by a significant number of its readers as directly or indirectly encouraging terrorism?"

This question to the jury reveals, graphically in our view, the danger of elision of the two questions: "Would some of the readership have understood the publication to be an encouragement to commit terrorist acts?" *and* "Did the publications encourage terrorists to commit the terrorist acts." The statistic, 26 per cent, added another prejudicial dimension. A proper "statistical" exercise in the present context would be very difficult, if not impossible, to carry out, and would pose formidable problems of explanation to the jury. The 26 per cent figure itself might be dubious, for it does not include those who would be disposed to carry out terrorist acts if they had the chance

(whatever the contents of the publication), nor those who might have committed violent offences with an undetected terrorist motive. Crucially, it is not known (and probably could not be reliably ascertained) how many young Muslim men, *who had no terrorist intentions whatsoever,* possessed the relevant material or other reasonably comparable material. However, without that further "statistic" the probative value of the 26 per cent figure relied on by the prosecution is virtually nil, and certainly has no substantial probative value within the meaning of the 2003 Act, in showing either that those who possessed the relevant material were likely to be terrorists or that the relevant material was likely to encourage the commission of terrorist acts.

48. We do not consider that this evidence was admissible save for the narrowest of purposes. If it was to be admitted at all we consider the terms of the admission should have been strictly confined and expressed in uncontentious terms along with a firm health warning as to its limitations. We do not think that a reference to the terms of section 2(8) was enough to avoid the risk either of the improper use of the evidence to establish "encouragement" or to remove the risk of prejudice merely by association. Whether it was treated as relevant evidence at common law or important explanatory evidence (section 100((1)(a)) or as substantially probative upon an important issue (section 100(1)(b)), it was essential that the limitations and pitfalls of the evidence should be explained to the jury. The learned judge clearly intended to provide the jury with suitable directions which headed off the risk of unfair prejudice. However, in the result the jury was told only that the evidence was relevant to the issue whether the publication was "a terrorist publication" and that they should judge the merits of the competing submissions on that issue. Unhappily, neither counsel reminded the judge of his intention before or during his summing up and the jury received no further assistance.

Ground 2: Article 10 ECHR

49. Ground 2 is confined to count 1 of the indictment and to the capacity of *Milestones – special edition* to encourage acts of terrorism. The appellant submits that the learned judge should further have read down the requirements of section 2, using his power under section 3 Human Rights Act 1998, so as to comply with the United Kingdom's obligations under Art 10. For present purposes the Art 10 right gives full and sufficient expression to the right protected. All these arguments were considered by the judge at a pre-trial preliminary hearing from which there was no appeal. In his judgment of 27 May 2011 the judge held that:

(1) The "recklessness" required by section 2(1)(c), as an alternative to intention to encourage in section 2(1)(a), was subjective recklessness, namely that the defendant "had knowledge of a serious and obvious risk that a publication will have the effect of encouraging, directly or indirectly, the commission of terrorist offences". To that extent, the judge found, the offence created was a legitimate and proportionate (and therefore necessary) restriction on the right of the individual to freedom of expression for the purposes of Art 10(2).

(2) The expression "acts of terrorism" in section 2(1) excludes any act other than acts which constitute criminal offences.

(3) The term "with a view to" in section 2(2)(f) should be read as "with intent that" so that if the jury were to find that a publication was in the possession of the

defendant it would constitute an engagement in conduct for the purposes of section 2(1) only if the defendant intended that it should be distributed or given or sold etc.

(4) As to the requirement for encouragement to commit terrorist acts in section 2(3) what was required was an encouragement to commit such an act within a reasonable time "within the current context".

(5) The requirement that it was "likely" that a publication would encourage acts of terrorism meant that it must be "probable" that the publication would have that effect. Discussion, criticism or explanation would not be enough.

(6) As to the alternative of "indirect" encouragement the judge found that the minimum requirement was that the publication encouraged by "necessary implication".

50. The appellant argues that the learned judge did not go far enough. It is suggested that:

(1) The alternative requirement for recklessness in section 2(1)(c) should not have applied if the jury was to conclude that the subject matter of the publication was "political or religious ideas".

(2) The requirement of a likelihood that the publication would be understood as encouragement in section 2(3)(a) should not apply to the extent that the jury concluded "that the publication was a legitimate expression of a political or religious view".

(3) The jury should have been directed that the encouragement required by section 2(3)(a) was for the "imminent" commission, preparation or instigation of acts of terrorism.

(4) The judge should have left to the jury an Art 10 defence, namely, the jury should be slow to convict in respect of a publication which amounted to a political or religious argument even if it would be understood to encourage terrorism.

51. Without these further restrictions it is submitted that section 2 offends Art 10 since the offence created would be disproportionate and, therefore, unnecessary in a democratic society in the interests of national security and the prevention of disorder and crime. Mr Bennathan has cited to us a number of UK, United States and European authorities, a report of the International Commission of Jurists 2009, the opinion of the Joint Committee on Human Rights 2005/2006, the Council of Europe Convention on the Prevention of Terrorism 2006/2007, LIBERTY and Lord Carlisle of Berriew QC, former independent reviewer of terrorism legislation. We are grateful for counsel's efforts to provide, at our request, copies of the source material, which we have considered.

52. The trial judge explained the requirements of section 2 as follows:

> "Are we sure (1) that at any time at which he was a party to...distribution it was probable that [the publication] would be understood by a *significant* number of its readers as directly or indirectly encouraging the instigation, preparation or commission of one or more of the serious offences listed on

> the attached schedule...(2) are we sure that at any time he was a party to that distribution he intended that [the publication] would be so understood [or] (3)...are we sure that at any time at which he was a party to that distribution, he saw that there was an obvious and serious risk that [the publication] would be so understood?...What does "indirectly encouraging" mean? It means by necessary implication...The "encouragement" need not be to immediate action although it must be within the foreseeable future. One has to be reasonable about this...(4) Are we sure that at any time at which he was a party to that distribution the defendant did not make clear that it did not express his views or have his endorsement?...The question of whether a publication is or is not a terrorist publication is to be decided by you by reference solely to the publication itself at the time it was being distributed...that is because they were being distributed individually to individual purchasers and not as a collection. The relevance of the body of exhibits comes when considering the defendant's state of mind, the recklessness or intent issue...The question of whether a particular book, DVD, video or computer file was Islamically correct is also of limited value. We are not trying this case by Islamic law or theology, we are trying it by UK law... Although arguments about offensive and defensive Jihad, of course, have some relevance, ultimately it is not as to whether it amounted to defensive Jihad in Islamic law that matters; it is whether it amounted to an offence in English law; whether, for instance, the defence of reasonable self-defence would apply, and I will come to that in a moment...[T]he offences that I have set out in the list...are, of course, unlawful acts. However, acts which would otherwise be unlawful are not unlawful if (i) they were committed in reasonable self-defence of yourself or...other persons threatened with immediate unlawful violence, such as your family or neighbours, or (ii) if committed under circumstances of extreme and immediate urgency amounting, in effect, to necessity...where you take the lesser of two evils perhaps."

53. It follows from the judge's directions of law that the jury were not permitted to return a verdict of guilty in respect of any publication unless they were sure that:

(1) the appellant distributed it;

(2) at the time of distribution the publication would be understood by a significant number of its readers, directly or by necessary implication, to be encouraging the instigation, preparation or commission of a terrorist offence within a reasonable time-scale;

(3) at the time of distribution the appellant intended that the publication should be so understood or, knowing of a serious and obvious risk that it would be so understood, he distributed it.

In judging the capacity of the publication to encourage unlawful acts of terrorism the question whether the publication was a correct interpretation of the teaching of Islam was of marginal relevance. The case was not a judgement on Islamic law or theology; it was about the encouragement of unlawful terrorist acts. Some acts of violence were lawful, namely those reasonably used in self-defence or out of necessity.

54. We need not venture in this judgment into the interesting commentary of respected observers, or into the principles to be derived from authority. The latter are well known. As to the former, we are presently concerned not with commentary upon the terms of the Bill, or with the Act as enacted, or with opinion as to how, in the absence of safeguards, the terms of section 2 arguably might be understood. We are concerned only with the definition of the offence as it was left by the judge to the jury and with the terms in which he guided them as to their legitimate approach. We are satisfied that in the judge's own words he defined the offence in a way which could not arguably offend the appellant's Art 10 right to freedom of expression. It was perfectly obvious to the jury that they could not convict the appellant merely because his publication expressed a religious or political view, controversial or not. We do not consider it arguable that a publication which to the knowledge of the appellant carried a real risk that it would be understood by a significant number of readers as encouraging the unlawful commission of terrorist offences (as defined by the judge) is entitled to exemption (in consequence of Art 10) merely because it expressed political or religious views.

55. One important decision of this court upon section 2 was brought to our attention, *Brown* [2011] EWCA Crim 2751 (Lord Judge CJ, Henriques and Irwin JJ). Mr Bennathan QC represented the applicant both at trial and upon a renewed application for leave to appeal against conviction. He argued that the prosecution (partly for offences under section 2) constituted an unacceptable interference with the applicant's right to freedom of speech at common law and freedom of expression under Art 10 of the Convention. At paragraphs 23 and 24 of the judgment of the court Lord Judge said:

> "23. As to the 2006 Act, it is clear that the question whether or not an individual has distributed or circulated a terrorist publication, or conducted any of the remaining activities prohibited by section 2(2), either intending to encourage, directly or indirectly, or to induce the commission, preparation or instigation of acts of terrorism, or intending to assist such acts, or being reckless as to whether or not they intend *[sic]* so to do, is subject to determination on the basis of the facts as they existed at the time of the conduct which is impugned, in the context of the publication as a whole and to the circumstances in which the conduct occurred. As we have already observed, it is difficult to see how a criminal act of distribution or circulation of a terrorist publication with the specific intent, or in the frame of mind expressly required as an essential ingredient of this offence to encourage or assist acts of terrorism, can be saved by reference to the principle of freedom of speech, unless that principle is absolute, which, as we have indicated, it is not.
>
> 24. In the context of the present trial it was agreed that the applicant would be free to argue a "freedom of expression" defence. He gave evidence in support of this defence. The case was argued on his behalf before the jury. The jury rejected it. They were entitled to do so. There is nothing in this ground of appeal."

56. Mr Bennathan has been able to recover a copy of Blair J's summing up in *Brown*. The learned judge explained to the jury that by the Terrorism Act 2006 Parliament had restricted free speech "as prescribed by law and necessary in a democratic society".

They were to apply the law as enacted by Parliament and explained by the judge, notwithstanding defence counsel was permitted to emphasise the importance of freedom of speech and the defendant said in evidence that he had been exercising his right to free speech. Very much the same thing happened in the present case. Mr Bennathan submitted to the jury that the prosecution had no case which required an answer from the appellant. The publications did not amount to encouragement to unlawful terrorist acts; they were expressions of political and religious opinion which the appellant was entitled to distribute. Calvert-Smith J gave the jury a specific warning about the limitations of this approach:

> "If you felt, maybe you didn't, that...Mr Bennathan's subtext was...an indirect encouragement to disregard the law of England and Wales because infringements of free speech should not be put up with, please disregard any such implied...encouragement."

The judge informed the jury that they were required to apply the law of the land enacted by Parliament. He provided the jury with examples of other encroachments on personal freedoms such as the distribution of racially and religiously offensive material and indecent images of children.

57. We accept that the requirements of section 2 must not be watered down so as to encroach unlawfully upon the important right to freedom of expression, but we are satisfied that, on the contrary, the trial judge emphasised the requirements of the section so as to ensure that the jury concentrated upon the distinction between that which was permissible and that which was not. Mr Bennathan attempted to persuade us of the limited persuasive effect of a judgment of the court upon an application for leave. We recognise that Blair J and the Court of Appeal were considering in *Brown* the different wording of section 2(3)(b) which required an assessment whether the material would be understood as being "useful in the commission...of" acts of terrorism. However, we regard the underlying proposition as persuasive. Provided, as here, the importance of applying the legal meaning of the section as defined by the trial judge is stressed, there is no risk that the Art 10 right is unlawfully encroached.

Conclusion

58. For the reasons we have discussed in relation to ground 1, we regard the convictions upon counts 1, 2 and 4 - 8 inclusive as unsafe. We refuse permission on ground 2. The convictions upon counts 1,2 and 4 - 8 will be quashed.