

REVIEW OF ASIO SECURITY ASSESSMENTS

7 November 2011

This section addresses the Committee's request for additional submissions in response to an issue raised by Professor Ben Saul regarding the current lack of oversight over ASIO decisions that particular refugees pose adverse security threats to Australia.

Security-cleared Judicial Officers and Lawyers

In the course of the Committee's hearing, the Chair and Professor Saul participated in an exchange (Transcript of the Committee's hearings for Wednesday 5 October 2011, p17), in which the Chair (Mr Melham) raised the possibility of the Federal Court having "a panel of security cleared judges ... [and] a security cleared lawyer who could represent" an asylum-seeker who was subject to an adverse security assessment by ASIO. This was suggested as a means of satisfying concerns held by ASIO that merits review of its decision in the normal manner would inevitably reveal sensitive information. In response to Professor Saul's statement that "you need to give a merits review tribunal a shot" at reviewing such ASIO determinations, the Chair went on to suggest that one could "expand what the Federal Court can test for so that in effect the powers of the Federal Court judges are expanded to ... replace a tribunal". The Chair asked us (Transcript p23) to consider this point and to make a supplementary submission.

Obviously, both the Chair and Professor Saul are aware of the constitutional issues with reposing such powers in the Federal Court, particularly that such powers would offend the principle articulated by the High Court in *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. I do not take either the Chair or Professor Saul to have intended this result; rather, I assume that they were referring to the preferable situation of having ASIO determinations reviewed on their merits by a court (or at least by judicial officers) rather than in a tribunal, to the extent that that outcome may be constitutionally possible.

In our opinion, the constitutional impediments to reposing in a Chapter III court the powers to review both for errors of fact and of law would prevent the Federal Court from exercising a true merits review function over security assessments made by ASIO. This is an executive function which cannot be exercised by a court constituted under Chapter III of the Constitution. As far as we can see, the only ways of having a judicial officer exercise a merits review function over decisions of ASIO is either to have a statutory review function granted to a Federal Court judge acting as *persona designata* or to have that function granted to a tribunal which has Federal Court judges as members. We have not been able to come up with an alternative which is within the Commonwealth's legislative competence.

The other point raised by the Committee's discussion with Professor Saul was the possibility that an asylum seeker could be represented by a security cleared lawyer in judicial or tribunal hearings to challenge an adverse security assessment, presumably with a role as contradictor to the case being put by ASIO but without the usual obligations to the asylum seeker which would normally attach to a lawyer appearing for a client. This "special advocate" process is beyond our expertise but we would direct the Committee to two documents in particular which shed light on this process:

- Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values' (Paper presented at the IACL Research Group on Constitutional Responses to Terrorism, Milan, Italy) at 8-15; and
- Ben Saul, 'The Kafka-esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33(3) *University of New South Wales Law Journal* 629, 647-52.

Judges Reviewing ASIO Decisions as *Personae Designatae*

In response to the Chair's suggestion that a system of judicial oversight, such as we have considered above, "would require some changes in terms of the ability to expand the review provisions that a judge would be able to get involved in" (Transcript p23), we noted that the judge involved may need to sit other than in his or capacity as a Federal Court judge. This section considers the issues which would arise from such a process.

There is no problem in general with a security-cleared individual who holds the office, for example, of a Federal Court judge exercising the administrative function of reviewing the merits of an ASIO determination that a certain asylum-seeker constitutes a security risk (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 413 per Bowen CJ & Deane J; and see generally *Wainohu v NSW* (2011) 85 ALJR 746, 755-6 [21] per French CJ & Kiefel J).

Our concern with this possibility is more of a practical nature than a constitutional impediment. There is a practical limit to what judges (with existing case loads and other responsibilities) can do by way of investigating the merits of an ASIO decision without the benefit of hearing argument, both for and against the decision under review. If the investigative burden of assessing the merits of ASIO determinations falls solely on individual judges acting outside the scope of their usual duties, it is likely that the scope for challenging these determinations will be reduced as a matter of fact. It would be preferable to take advantage of the institutional advantages of an existing tribunal to perform this task.

Administrative Appeals Tribunal (Security Appeals Division)

Professor Saul's comment in the Committee hearing that there is no merits review from ASIO security assessments "because the Administrative Appeals Tribunal, AAT, review is simply precluded by the ASIO Act" is accurate. It ought not to be. The *Australian Security Intelligence Organisation Act 1979* (Cth) provides at section 65(1) that a Minister who has received a security assessment from ASIO:

may, if satisfied that it is desirable to do so by reason of special circumstances, require the [AAT] to inquire and report to the Minister upon any question concerning that action or alleged action of [ASIO], and may require the [AAT] to review any such assessment or communication and any information or matter on which any such assessment or communication was based, and the [AAT] shall comply with the requirement and report its findings to the Minister.

The AAT therefore has a Security Appeals Division, constituted subject to section 21AA of the *Administrative Appeals Tribunal Act 1975* (Cth), which allows a Tribunal constituting a Presidential Member and two other members who have been assigned to the Security Appeals Division (including at least one "with knowledge of,

or experience in relation to, the needs and concerns of people who are or have been immigrants” – s 21AA(5)(c)) to review adverse security assessments which have been made by ASIO. There are 14 Presidential Members of the AAT who also currently hold office as judges of the Federal Court (and a further three who hold office as judges of the Family Court of Australia) according to Appendix 1 to the Administrative Appeals Tribunal Annual Report 2010-11 (available at <http://www.aat.gov.au/docs/Reports/2011/AR2011-Appendix1.pdf>).

The Security Appeals Division conducts its proceedings in private and may determine who is able to be present during the course of a hearing, although there is scope for the applicant and / or the applicant’s representative to be present (see <http://www.aat.gov.au/ApplyingForAReview/SecurityAppeals.htm>). The Security Appeals Division’s findings are able to be appealed to the Federal Court under section 44 of the AAT Act and are also subject to judicial review for jurisdictional error.

The problem which arises in relation to asylum seekers applying to the Security Appeals Division is that section 36 of the *ASIO Act* excludes AAT review of security assessments made in relation to “the exercise of any power, or the performance of any function, in relation to a person under the *Migration Act 1958* or the regulations under that Act” for persons who are unlawful non-citizens.

Given the constitutional and practical problems, outlined above, with putting full merits review in the hands of sitting Federal Court judges, we take the view that the better option is to revise the terms of the *ASIO Act* in order to allow the Security Appeals Division to review ASIO security assessments of asylum seekers who do not have Australian citizenship, permanent residency or “a special category visa or is taken by subsection 33(2) of the *Migration Act 1958* to have been granted a special purpose visa”.

The Security Appeals Division is an under-utilised jurisdiction within the AAT, with only a handful of reviews being conducted by it each year. It is our view that it would perform a vital function as a means of allowing asylum seekers to obtain review of the ASIO security assessments made about them. We do not recommend any legislative changes to allow judges of the Federal Court (either sitting as judges or as *personae designatae*) to have additional powers of review over ASIO security assessments unless it is not possible that the Security Appeals Division of the AAT may deal adequately with that function.

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