UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR Regional Representative
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16 December 2011

Notre/Our code: 11/MISC/333

Dear Secretary,

Re: Joint Select Committee on Australia's Immigration Detention Network

Following my oral submission to the Committee on Tuesday 22 November 2011, I would like to attach the following supplementary submission on special advocate mechanisms, in response to a question taken on notice.

The Office is at your disposal to discuss this submission further, as required.

Yours faithfully,

Richard Towle
Regional Representative

Committee Secretary
Joint Select Committee on Australia's Immigration Detention Network
PO Box 6100
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Submission by the Office of the United Nations High Commissioner for Refugees
Inquiry into Australia's Immigration Detention Network

Supplementary Submission on Special Advocate Mechanism
16 December 2011

UNHCR, Submission No 110 to Joint Select Committee, *Inquiry into Australia's Immigration Detention Network*, 19 August 2011, Recommendation 6:

There is a need to review the practices relating to national security, including adverse national security assessments, in light of international examples in comparable jurisdictions with a view to enhancing the efficiency and fairness of such procedures.

I. SPECIAL ADVOCATE OR SECURITY-CLEARED REPRESENTATIVE

1. UNHCR advises of 'the need to establish and apply fair and expeditious asylum procedures, so as to identify promptly those in need of international protection and those who are not, which will avoid protracted periods of uncertainty for the asylum-seeker, discourage misuse of the asylum system and decrease the overall demands on the reception system'.[1]

2. UNHCR is of the view that, consistent with the minimum procedural standards required in the determination of refugee status, as well as relating to the application of articles 33(2) and 32(1) of the *1951 Convention relating to the Status of Refugees* ("the 1951 Convention"), 'there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'.[2]

3. UNHCR draws the attention of the Joint Select Committee to the experience in a number of jurisdictions, notably Canada, New Zealand and the United Kingdom, which provide for the role of a special advocate (a security-cleared person who is able to view both an original and redacted summary of the assessment to ensure, insofar as possible, unclassified material and reasons are disclosed) to represent the interests of an applicant in any proceedings involving classified information. The special advocate provides a suitable mechanism through which to ensure that broad reasons for decisions using classified information (and a non-classified summary of the information to be disclosed where possible) may be provided to the affected person and thereby ensure adequate safeguards against the potential abuse of the use of classified information. Such an advocate could possibly be established in the context of the Administrative Appeals Tribunal.

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[1] UNHCR, Executive Committee, *Conclusion on International Protection, No. 93 (LIII) – 2002*, paragraph (a).
[2] *The Case of Chahal v. The United Kingdom* (Application no. 70/1995/576/662), Council of Europe: European Court of Human Rights, 15 November 1996, [131] <http://www.unhcr.org/refworld/docid/3ae6b69920.html>

4. The evolution of these mechanisms was to ensure that a proper balance was struck between the need to protect the security information and sources and the need to ensure some degree of procedural fairness to individuals who are affected by such information.

5. UNHCR considers these models could be explored to provide a greater degree of procedural fairness with regard to adverse security assessments issued by the Australian Intelligence Security Organisation (ASIO) based on the use of classified information.

II. SPECIAL ADVOCATE IN CANADA

6. The *Canadian Immigration Act 1976*, as amended, established a review mechanism of immigration decisions made on the basis of classified information by referral to the Security Intelligence Review Committee (which operated under the *Canadian Security Intelligence Service Act 1985*).[3] The Review Committee was required to consider the opinions of the Minister of Citizenship and Immigration and the Solicitor General of Canada, based on security or criminal intelligence reports, that a person, inter alia, constituted a danger to the security of Canada. The Review Committee was required to provide a summary statement of the information 'to enable the person to be as fully informed as possible of the circumstances giving rise to the report'.[4]

7. Any security certificate subsequently issued by the Minister would be referred to the Federal Court of Canada to determine whether the certificate was reasonable on the basis of the evidence and information available. The Court could examine any relevant information in the absence of the person named in the certificate and any counsel representing the person where disclosure would be injurious to national security or to the safety of persons. However, the Court was required to provide the person with a statement summarizing such information which would not be injurious to national security or to the safety of persons to enable the person to be reasonably informed of the circumstances giving rise to the issue of the certificate, and to provide the person named in the certificate with a reasonable opportunity to be heard.[5]

8. The *Immigration Refugee and Protection Act 2001* ("IRPA 2001") amended the review mechanism to eliminate the role of the Review Committee by specifying that the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness must issue a security certificate where a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer the matter to the Federal Court – Trial Division. The judge of the Federal Court was required to make a determination, on the basis of the information and evidence available, whether the certificate was reasonable and whether the decision on the application for international protection, if any, had been lawfully made.[6]

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[3] *Canadian Security Intelligence Service Act* (R.S.C., 1985, c. C-23).
[4] *Canadian Immigration Act 1976*, s 39.
[5] Ibid s 40.1.
[6] *Immigration Refugee and Protection Act 2001*, Part 1, Division 9 (Protection of Information).

9. The IRPA 2001 required the judge to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit; however, the judge must ensure the confidentiality of the information if its disclosure would be injurious to national security or to the safety of any person by examining the information and any other evidence in private and, specifically, in the absence of the person named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person. The judge was required to provide the person with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, as well as an opportunity to be heard regarding their inadmissibility. The determination of the judge was final and could not be appealed or judicially reviewed.[7]

10. The validity of the procedures to determine the reasonableness of a security certificate was considered in the case of Mr Adil Charkaoui, a Moroccan national, who, inter alia, challenged the basis of the security certificate and his consequential detention pending removal.[8] The Supreme Court held that '[t]he procedure for determining whether a certificate is reasonable and the detention review procedure fail to assure the fair hearing that s. 7 [of the *Canadian Charter of Rights and Freedoms* relating to the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice] requires before the state deprives a person of this right',[9] and therefore declared that the procedure had no force or effect.

11. The Government of Canada, consequentially, enacted *Bill C-3: An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act* amending the IRPA 2001:

> to add provisions relating to a special advocate to Division 9 of Part 1 of that Act. The special advocate's role is to protect a person's interests in certain proceedings when evidence is heard in the absence of the public and of the person and their counsel. The special advocate may challenge the claim made by the Minister of Public Safety and Emergency Preparedness to the confidentiality of evidence as well as the relevance, reliability, sufficiency and weight of the evidence and may make submissions, cross-examine witnesses and, with the judge's authorization, exercise any other powers necessary to protect the person's interests.
> …
>
> The enactment permits the appeal of a determination whether a security certificate is reasonable and of a decision resulting from a review of a person's detention or release under conditions to the Federal Court of Appeal if the judge certifies that a serious question of general importance is involved.
> …
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> The enactment enables the Minister to apply for the non-disclosure of confidential information during a judicial review of a decision made under the Act and gives the

[7] *Immigration Refugee and Protection Act* (S.C. 2001, c. 27), ss 76-87.
[8] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9.
[9] Ibid [13]-[14], [17]-[18] and [65].

judge discretion to appoint a special advocate to protect the interests of the person concerned.[10]

III. SPECIAL ADVOCATE IN NEW ZEALAND

12. The *Immigration Amendment Act 1999*[11] was enacted by the Government of New Zealand in April 1999 to, inter alia, provide for a special security regime to protect sensitive security information that is relevant to immigration matters. The introduction of a special security regime recognized that the New Zealand Security Intelligence Service held classified security information relevant to the administration of the *Immigration Act 1987* which, in the public interest, required protection, but equally that fairness required some protection for the rights of any individual affected by it. The Government of New Zealand noted that the balance between the public interest and the individual's rights would be best achieved by allowing an independent person of high judicial standing to consider the information and approve its proposed use.[12]

13. Part 4A (Special procedures in cases involving security concerns) of the *Immigration Act 1987* provided that the Director of Security may determine that a person meets the relevant security criterion and the Minister may rely on the certificate when making a decision relating to the grant or revocation of a visa in respect of the person. A person who was the subject of a risk certificate was able to seek a review by the Inspector-General of Intelligence and Security of the decision of the Director of Security to make the security risk certificate. The person was entitled to representation, whether by counsel or otherwise, in his or her dealings with the Inspector-General and to have access, to the extent provided by the *Privacy Act 1993*, to any information about the person other than the classified security information.[13]

14. A person who was the subject of a risk certificate was also entitled to apply for a review to the Inspector-General of the merits of the decision to issue the security risk certificate. The Inspector-General was required to determine whether the certificate was properly made having regard to the information that led to the making of the certificate included information that was properly regarded as classified security information and whether that information is credible, having regard to the source or sources of the information and its nature, and is relevant to any security criterion.[14] However, no review proceedings could be brought in any Court in respect of the certificate or the Director's decision to make the certificate, and the person was not entitled to access the information on which the decision was made.

15. The role of the independent, security-cleared representative was considered in the case of Mr Ahmed Zaoui, an Algerian national, who initiated judicial proceedings to obtain a summary of the allegations that had led to the issuance of a security risk

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[10] Statutes of Canada 2008, Chapter 3, *Bill C-3: An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, Summary <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=3300375&file=4>

[11] *Immigration Amendment Act 1999* (NZ) <http://www.legislation.govt.nz/act/public/1999/0016/1.0/DLM20899.html>

[12] *Immigration Act 1987* (NZ), s 114A <http://www.nzlii.org/nz/legis/hist_act/ia19871987n74165/>

[13] Ibid s 114H.

[14] *Immigration Act 1987* (NZ), s 114I.

certificate against him. The Court recognized the limitations in the special security regime and the necessity for procedural fairness in the review of a decision of the Director of Security.[15] Consequently two "special advocates" were appointed on behalf of Mr Zaoui to review and summarize the classified material (without disclosing the classified information) and the security risk certificate was subsequently revoked. This case led to a greater emphasis being placed in the new immigration legislation on procedural fairness involving classified information.

16. The *Immigration Act 2009*[16] provides that classified information may be relied on in making decisions or determining proceedings if the Minister determines that the classified information relates to matters of security or criminal conduct. Classified information must be provided to a refugee and protection officer to enable the information to be considered in respect of a decision under Part 5 (Refugee and protection status determinations).[17]

17. A summary of the allegations arising from the classified information (without disclosing the classified information) must be provided to the person who is the subject of the proposed decision for comment before a decision is made that relies on any classified information. Where the decision is prejudicial to the person concerned they may have appeal rights and the right to be represented by a special advocate.[18]

18. Part 7 (Appeals, reviews, and other proceedings), inter alia, establishes special procedures where classified information is involved, including the nomination of a special advocate. A special advocate is a lawyer who holds an appropriate security clearance given by the chief executive of the Ministry of Justice and has appropriate knowledge and experience. The role of a special advocate is to represent a person who is the subject of a decision made or proceedings involving classified information by lodging or commencing proceedings on behalf of the person, making oral submissions and cross-examination of witnesses at any closed hearing, and making written submissions. The special advocate must have access to the classified information and must ensure that the confidentiality of the classified information remains protected.

19. A special advocate may communicate with a person to whom classified information relates (or the person's representative) on an unlimited basis until the special advocate has been provided with access to the classified information concerned and, thereafter, he or she may not communicate with any (non-security cleared) person about any matter connected with the proceedings involving the classified information unless written approval is provided by the Tribunal or the Court. The person (or representative) may, of his or her own volition, communicate with the special advocate on any matter in writing; however, the special advocate must not reply to such a communication except with written approval by the Tribunal or the Court.

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[15] *Zaoui v Attorney-General (No 2)* [2004] 2 NZLR 339
[16] *Immigration Act 2009* (NZ) <http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440303.html>
[17] Ibid s 33.
[18] Ibid ss 33-42.

IV. SPECIAL ADVOCATE IN THE UNITED KINGDOM

20. The European Court of Human Rights considered, in the case of Chalal,[19] the application of section 15(3) of the *Immigration Act 1971* (UK) which restricted a person from appealing against a decision to make a deportation order 'if the ground of the decision was that [the person's] deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature.'[20]

21. Although the decision to make a deportation order remained subject to a non-statutory advisory procedure, the Court concluded that 'the advisory panel could not be considered to offer sufficient procedural safeguards' because the person 'was not entitled, inter alia, to legal representation, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed'.[21]

22. In this regard, the Court noted that evolving case-law supported the existence of 'a more effective form of judicial control' and the special advocate mechanism established pursuant to the *Canadian Immigration Act 1976*.[22]

23. As a result of the judgment the UK Government enacted the *Special Immigration Appeals Commission Act 1997* (UK) which established the Commission to hear any appeals relating to immigration decisions involving matters of national security.[23] The Act, additionally, established a special advocate mechanism 'to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.'[24]

V. SECURITY CONSIDERATIONS WITHIN THE 1951 CONVENTION

24. It is UNHCR's view that the 1951 Convention provides an appropriate legal framework through which these security-related matters may be considered by the country of asylum. The 1951 Convention does not provide a safe haven to terrorists or war criminals, and does not protect them from criminal prosecution. On the contrary, it renders the identification of persons engaged in terrorist activities possible and necessary, foresees their exclusion from refugee status and does not shield them against either criminal prosecution or expulsion.[25]

25. Article 1F of the 1951 Convention sets out, exhaustively, the grounds on which an asylum-seeker may be excluded from international refugee protection due to an association with serious criminal activities. This should form part of an assessment

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[19] *Chahal*, above n 2.
[20] *Asylum and Immigration Act 1993* (UK), c. 23, s 6, retains the national security exception provided by the *Immigration Act 1971* (UK), c. 77.
[21] *Chalal*, above n 2, [154].
[22] Ibid [131]; see, also, Concurring Opinion of Judge Jambrek, [6].
[23] *Special Immigration Appeals Commission Act 1997* (UK), c. 68, ss 1-4.
[24] Ibid, s 6.
[25] UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective*, 29 November 2001, Rev.1 <http://www.unhcr.org/refworld/docid/3c0b880e0.html> at 22 March 2011, [3].

for eligibility for refugee status. Indeed, it is arguable that should a security assessment uncover activities which would exclude the individual from receiving protection under the 1951 Convention it would be desirable for such information to be considered as part of the procedures relating to the initial determination (or subsequent cancellation) of refugee status, as well as in any removal or indeed prosecution proceedings.

26. In addition, article 33(2) of the 1951 Convention addresses the situation where a refugee constitutes a 'danger to the security of the country' or 'danger to the community of that country'; and article 32 requires that States shall not expel a refugee except on grounds of national security or public order and 'shall only be in pursuance of a decision reached in accordance with due process of law.'

27. UNHCR notes, in this regard, that the special advocate mechanisms established in Canada, New Zealand and the United Kingdom enable any security issues which arise to be considered by the relevant authorities during an initial eligibility determination of refugee status, subsequent procedures relating to the cancellation of refugee status, and application of the exception to the principle of *non-refoulement*.

28. In UNHCR's respectful view, these three articles in the 1951 Convention, properly applied, provide States with adequate "Convention-based" opportunities to assess the impact of legitimate national security consideration on the rights of refugees and asylum-seekers.

UNHCR Regional Representation for Australia,
New Zealand, Papua New Guinea and the Pacific

16 December 2011
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