Dealing With Classified Security Information – a Brief Comparative Study

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Introduction

In New Zealand the Algerian refugee, Ahmed Zaoui, was incarcerated in a maximum security prison in solitary confinement on the strength of a report produced by the threat assessment unit of the Police.[1]

On 20 March 2003 a Security Risk Certificate was issued by the Director of Security under Part 4A of the Immigration Act[2] that allows for "persons .... who pose a security risk … where necessary [to] be effectively and quickly detained and removed or deported from New Zealand"[3] on the basis of classified security information provided by the New Zealand Security Intelligence Service.

This information can be considered and its use approved by "an independent person of high judicial standing"[4] (the Inspector-General of Intelligence and Security) but "the significance of the information in question in a security sense is such that its approved use should mean that no further avenues are available to the individual under this Act and that removal or deportation, as the case may require, can normally proceed immediately".[5]

There are two principal fora which might be used to assess classified security information. These are the regular courts, and specialised outside bodies, such as tribunals. There are also three main options for providing procedural and substantive advocacy for the tribunal or court – independent counsel, counsel who have obtained security clearance, or counsel to parties who must make the best use they can of their limited access to classified material.

Security Risk Certificate procedures under the Immigration Act

The Inspector-General of Intelligence and Security, a retired High Court judge,[6] is required to review the Security Risk Certificate, as provided under the Immigration Act.[7]

Although the Immigration Act allows both the Inspector-General and the Minister to consider information other than the classified information signified by the Security Risk Certificate, it does not explicitly provide for the fair and transparent procedures required by international human rights standards.

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1 He was detained at the Auckland Central Remand Prison pursuant to a warrant of commitment issued by a District Court Judge at the Manukau District Court on 28 March 2003 under ss 114G(6) and 114O of the 1987 Act; *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690, paras 2, 6, 9.

2 *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690, para 5.

3 Immigration Act 1987 (NZ) s 114A(f).

4 Ibid s 114A(d).

5 Ibid s 114A(e).

6 Inspector-General of Intelligence and Security Act 1996 (NZ), s 5(3).

7 Immigration Act 1987 (NZ) s 114D.

The sole avenue for appeal against the Certificate is the Inspector-General of Intelligence and Security.[8] It is the role of the Inspector-General to determine whether the certificate was properly issued. This is not, properly speaking, an appeal or rehearing. In doing so, he or she has privileged access to classified security information, significant powers, and wide discretion as to how to use them.[9] The position of the Inspector-General was created in conjunction with the 1996 amendment to the New Zealand Security Intelligence Service Act.[10]

There is a right of appeal to the Court of Appeal against a decision of the Inspector-General which confirms the certificate, on the ground that the decision is "erroneous in point of law".[11]

A Security Risk Certificate is based on unchallengeable "classified security information"[12] – information that, in the opinion of the Director of the New Zealand Security Intelligence Service "cannot be divulged to the individual in question or to other persons"[13] because it may, for example:

- "lead to the identification of, or provide details of, the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the New Zealand Security Intelligence Service";[14]

- be "about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the Service or of another intelligence and security agency";[15]

- have "been provided to the New Zealand Security Intelligence Service by the government of any other country or by an agency of such a government, and is information that cannot be disclosed by the Service because the government or agency by which that information has been provided will not consent to the disclosure";[16]

- "prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand";[17] or

- "prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country or any agency of such a government, or by any international organisation" (s 72 Immigration Act).[18]

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8 Ibid s 114I(3).

9 They are acting, however, in a quasi-judicial capacity; *Zaoui v Attorney-General* [2004] 2 NZLR 339, para 28.

10 Inspector-General of Intelligence and Security Act 1996 (NZ), New Zealand Security Intelligence Service Amendment Act 1996 (NZ).

11 Immigration Act 1987 s 114P(1).

12 Ibid s 114B(1).

13 Ibid s 114B(1).

14 Ibid s 114B(1)(a)(i).

15 Ibid s 114B(1)(a)(ii).

16 Ibid s 114B(1)(a)(iii).

17 Ibid s 114B(1)(b)(i).

18 Ibid s 114B(1)(b)(ii).

Difficulties with this procedure

The current procedure involves the use of a specialised tribunal or officer, in conjunction with ordinary counsel. The latter lack access to the classified material; the former lacks the support of a court-based framework, procedural or substantive.

With what we know of the current intelligence coming into New Zealand, we cannot rely upon a certificate from the New Zealand Security Intelligence Service as being entirely reliable, as they neither source the material directly, nor in many cases, are able to independently analyse it with sufficient expertise to render it safe without question for the purposes of a prosecution. The checks and balances for classification of a certificate to designate an entity as a terrorist entity does not apply to the prosecuting of an individual although it may be part of the prosecution case.

If you combine the requirements of a government to keep the source, and therefore often the detail of material relied upon for a prosecution, secret from the defendant, our adversarial system as a process of seeking truth and justice becomes ineffective – even were it to be fully applicable to a quasi-judicial procedure as established under the Immigration Act. The government clearly has a duty to ensure it is not at the mercy of other states with separate, sometimes unknown, agendas in accepting intelligence as the basis of a case against a New Zealand citizen or even a foreigner in New Zealand being judged by our courts.

Due to litigation concerning the review process and the role of the Inspector-General, the Inspector-General is yet to commence the review of the Security Risk Certificate issued with respect to Mr Zaoui.[19]

Comparable arrangements under the Terrorism Suppression Act

A comparable procedure to the current system for review of a Security Risk Certificate is that provided for the designation of an entity as a terrorist entity or an associated entity of a terrorist by the Prime Minister under the Terrorism Suppression Act 2002.[20]

Under s 38 a marked departure occurs to our open justice and adversarial process in procedures relating to such applications to challenge or to appeal such designation.

The Chief Justice or nominee, on a request by the Attorney-General, if satisfied that it is desirable to do so for the protection of the classified information, may receive or hear the classified security information in the absence of the designated entity, all barristers and solicitors representing that entity, and all members of the public.[21] A summary of the information, excluding any summary of information that will itself likely

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19 See, for example, the applications for judicial review and declaratory relief with respect to the Inspector-General's interlocutory decision of 6 Oct 2003; *Zaoui v Attorney-General* [2004] 2 NZLR 339.

20 Terrorism Suppression Act 2002 (NZ), ss 20, 22.

21 Ibid s 38(3)(b).

to prejudice the interests set out in s 32(3), is then approved by the Court.[22] A copy of that would then be given to the entity concerned.[23]

Section 32(3) is denied if the disclosure would be likely:

- to prejudice the security or defence of New Zealand, or *the international relations of the Government of New Zealand*;[24] or
- to prejudice the entrusting of information to the Government … by the Government of another country or international organization;[25] or
- to prejudice making of law including the prevention, investigation and detection of offences and *the right to a fair trial*;[26] or
- to endanger the safety of any person[27] [emphasis added].

While the specific offences of terrorist bombing and financing of terrorism do not rely on the designation of entities, the other prohibition offences do, unless the prosecution can rely upon knowledge/recklessness of the group carrying out a terrorist act. The other offence (relating to dealings with terrorists) is also affected by extra-territorial jurisdiction either as to the *actus reus* or to some aspect of connection with the offence or offenders.

An entity designated as a terrorist entity or as an associated entity of a terrorist would be unable to effectively challenge the designation, if it were deemed that disclosure of evidence would prejudice the international relations of New Zealand. It may be questioned whether this is sufficient to outweigh the presumption that every accused person is entitled to know the evidence on which he is charged.

However, the procedures for dealing with classified information with respect to the Terrorism Suppression Act 2002 is slightly more open than that which governs Security Risk Certificates under the Immigration Act 1987, in that there is a presumption that a summary of information will be made available to the applicant. The counsel are ordinary defence counsel, and lack access to the classified material. But the procedural framework of a court exists.

Arrangements in the United Kingdom

In the United Kingdom, the Anti-Terrorism Crime and Security Act 1981 (UK), the Terrorism Act 2000 (UK), the Regulation of Investigatory Powers Act 2000 (UK) and the Special Immigration Appeals Commission Act 1997 (UK) all permit or require the relevant Commission or Tribunal to make rules in relation to providing a party with a summary of evidence taken in his or her absence.

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22 Ibid s 38(4)(a).
23 Ibid s 38(4)(b).
24 Ibid s 32(3)(a).
25 Ibid s 32(3)(b).
26 Ibid s 32(3)(c).
27 Ibid s 32(3)(d).

The Special Immigration Appeals Commission Act 1997 (UK) also has an extra safeguard in providing that a person may be appointed to represent the interests of an appellant in any proceedings from which the appellant and his or her lawyer are excluded. The Special Immigration Appeals Commission (Procedure) Rules 2003 (UK) provide that the Secretary of State may not rely upon evidence that it objects to disclosing to a party or their lawyer in a proceeding before the Special Immigration Appeals Commission (SIAC) unless a special advocate has been appointed to represent the interests of the absent party.

In the United Kingdom the system of law governing proscription is subject to the Proscribed Organisations Appeal Commission (POAC), established under s 5 of the Terrorism Act 2000 (UK). An application to the Secretary of State for removal of a designation may be appealed to the POAC.[28] This body comprises a current or past holder of high judicial office, and two members (not being judges) appointed by the Lord Chancellor.[29] Although hearings take place in public, POAC is able to hear closed evidence in camera and with the applicant and their representatives excluded. However, there lies a further right of appeal, to the Court of Appeal of England and Wales (on a question of law).

On an appeal to the Court of Appeal, the Court must ensure that information is not disclosed contrary to the interests of national security.[30] This enables the Court to exclude any party and his or her representative – except the Secretary of State.[31]

However, special advocates are appointed by the Law Officers of the Crown to represent the interests of an organisation or other applicant in the proceedings.[32] Lord Carlile of Berriew, QC, in his report on the working in 2003 of the detention provisions contained in Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (UK), recommended that there should be special training of special advocates.[33]

The role of the special advocates is to represent the interests of an organisation or other applicant, but they are not instructed by or responsible to that organisation or person.[34] Like the members of the POAC, the special advocates see all the closed material.[35] They are not however permitted to disclose any part of the material to those whom they represent.[36] They face the difficult task of having to present (on behalf of their clients) facts or versions of events in relation to which there is the strongest contradictory evidence, but evidence which they are not permitted to reveal.[37]

Amnesty International, Liberty, and other groups have maintained that POAC and its sister organisation, the SIAC, are at odds with international and European human

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28 Ss 4, 5(3): "The Commission shall allow an appeal to de-proscribe an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review."

29 Sch 3 to Terrorism Act 2000 (UK).

30 The Court of Appeal (Appeals from Proscribed Organisations Appeal Commission) Rules 2002 (UK).

31 R 4.

32 Terrorism Act 2002 (UK), Sch 3 paras 7, 7(1).

33 Lord Carlile of Berriew, QC, "Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003" (Home Office, London, 2004).

34 Ibid, para 41.

35 Ibid.

36 Ibid.

37 Ibid.

rights laws which do not permit state authorities to keep away from an individual or organisation the nature of all the evidence to be deployed against them.[38] This attitude is of course also at odds with the requirements of national security.

Lord Carlile, in his report on the operation in 2002 and 2003 of the Terrorism Act 2000 (UK),[39] held that the special advocate system worked rigorously in practice.[40] He also observed that the integrity of the system was reinforced by the independence of the advocacy professions.[41]

This system utilises special tribunals, courts, and independent counsel to represent the interests of any party.

Australian arrangements

In Australia, the people dealing with classified and security sensitive information who require security clearances are generally Australian Government employees, but this requirement is also applied to contractors and others (including state and territory government employees) who need access to classified information or areas.

There are two categories of clearance: Designated Security Assessment Position, for positions requiring access to national security information; and Position of Trust, which is used for positions requiring access to non-national security information. There has been recent public debate about whether lawyers representing an accused charged with an offence that involves an issue of, or evidence concerning, national security should be required to have a security clearance.

Some of this debate may have been sparked by concerns arising from the trial of Simon Lappas (*R v Lappas*[42]). Lappas was alleged to have tried to sell two highly sensitive documents that originated from an overseas country. That country refused to allow the documents to be tendered in open court or to allow access to them by anyone without a security clearance to the requisite level. Mr Lappas's counsel at his trial did not hold a security clearance and declined to seek one. The judge stated he had no power to force defence counsel to obtain a clearance, and eventually a confidentiality undertaking was given to the Court in order to allow access to the documents.

The Australian Government has sought to introduce the requirement of counsel obtaining security clearances in two ways: through amendments to the ASIO Act and through amendments to the Legal Aid Guidelines.

The NSW Law Society's Criminal Law Committee opposed the changes on the basis that "the security of any classified documents can be sufficiently assured by the court and by practitioners observing their professional obligations as officers of the court".

If, as was the case in *Lappas*, evidence could not be presented to the defence because counsel lacked a security clearance, the courts may take the view that the

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38 Ibid, para 43.
39 Ibid.
40 Ibid, para 45.
41 Ibid, para 46.
42 [2003] ACTCA 21.

interests of justice require that counsel be security cleared and order that they seek such a clearance or at least that certain information can only be shown to counsel and other people who hold a particular clearance.

A security clearance does not of itself guarantee that information is safe from improper disclosure. Indeed when national security information has been disclosed unlawfully, it is usually at the hands of someone with a high-level security clearance – since these are by definition the people with access to such information. On the other hand, requiring a security clearance is an essential feature of sensible risk management in that it helps to prevent people who are discerned to be security risks from having contact with the information.

The system utilises security-cleared counsel in ordinary courts.

Canadian arrangements

A common feature of international legislation permitting the use of secret evidence is the provision of a summary of the evidence taken in a party's absence to be provided to the party, or the making of rules allowing such a summary to be provided to the absent party. This is the case in respect of certain judicial review hearings under the Canadian Criminal Code[43] as well as hearings before a judge under the Charities Registration (Security Information) Act 2001 (Canada) and the Immigration and Refugee Protection Act 2001 (Canada). In each case, the judge must provide to the absent party a summary of the information available to the judge without disclosing information that would injure national security or endanger the life of a person, and, in addition, provide the absent party an opportunity to be heard.

In Canada, independent security-cleared counsel appear before hearings conducted by the Security Intelligence Review Committee (SIRC).[44] The SIRC appoints counsel to assist it from a panel of security-cleared lawyers.

Two tasks of counsel to SIRC are particularly important: cross-examining in the *in camera* portion of the proceedings (one counsel described this as attempting 'to fill the vacuum of the complainant's absence'[45]) and negotiating with counsel for [the Canadian Security Intelligence Service (CSIS)] on the form of evidence to be disclosed from this portion of the hearings.[46] Additionally, counsel acting for SIRC will liaise with the complainant's counsel to ensure that the questions the latter wishes to see answered are put in the closed session.[47] However, counsel to SIRC, complainants' counsel, and SIRC all expressed scepticism about the practical utility of this facility.[48] Without knowledge of CSIS's evidence, counsel to the complainant faced inevitable difficulties in preparing for this vicarious cross-examination.[49]

Security cleared counsel have in fact been rejected.

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43 RS 1985, c C-46. See, in particular, *Suresh v Canada (Minister of Citizenship and Immigration)* (2002) 208 DLR (4th) 1 (SC).

44 See Canadian Security Intelligence Service Act 1985 RS 1985, c C-23 (Canada), s 38; and I Leigh, "Secret Proceedings in Canada" (1996) 34 *Osgoode Hall Law Journal* 113.

45 I Leigh, ibid, at 163.

46 Ibid, 163.

47 Ibid, 163.

48 Ibid, 163.

49 Ibid, 163.

Arrangements in the USA

In the United States of America, an alien (ie, a non-citizen) facing deportation proceedings before the US Alien Terrorist Removal Court (ATRC), while not entitled to see classified evidence or be informed as to its sources, is entitled to an unclassified summary of specific evidence that does not pose a risk to national security or to the security of a person.[50] The summary must be sufficient to enable the alien to prepare a defence and the summary is to be approved by the ATRC.[51] The alien is also entitled to be represented by a security-cleared lawyer who can challenge the veracity of the classified evidence in an in-camera proceeding.[52]

This system uses special tribunals, and security-cleared counsel.

In camera counsel

Returning to New Zealand, *in camera* counsel could in this jurisdiction be used to assist the Court in determining whether the Certificate was properly issued. The present arrangement allows the person subject to a Certificate to be represented, whether by counsel or otherwise, in all their dealings with the Inspector-General.[53] However, they are not entitled to access to classified security information. Since this information might reasonably be expected to be the basis of the Certificate, the exclusion of this evidence is crucial. Everyone has the right to know by what evidence they are being tried. This is not a criminal prosecution, yet the consequences for the person concerned are potentially grave.

Security considerations might well preclude the disclosure in public Court of all the classified security information upon which the Certificate is based. Indeed, to disclose this information would seriously jeopardise the future provision of such information. However, its disclosure to counsel for the subject person *in camera*, and with suitable precautions, would give the person a genuine opportunity to give their side of the case.

The use of *in camera* disclosure should not jeopardise the sources of information, since the counsel's duty as officers of the court should be relied upon to maintain secrecy.

Conclusions

The systems currently in vogue range from special tribunals to ordinary courts. Security-cleared counsel in Canada, USA and Australia are not generally successful. Ordinary counsel in New Zealand are even less satisfactory. Independent counsel, such as those used in the UK, would appear most likely to provide adequate safeguards, especially if provided with mandatory training.

As a matter of principle, the leading of secret evidence against an accused, for the purpose of protecting classified or security sensitive information in a criminal

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[50] 8 USC (US), s 1534(3)(A) and (3)(B).
[51] s 1534(3)(C) and (D).
[52] s 1532(e) and s 1534(F).
[53] Immigration Act 1987 (NZ) s 114H(2)(a).

prosecution, should not be allowed. To sanction such a process would be in breach of the protections provided for in Article 14 of the International Covenant on Civil and Political Rights for an accused to be tried in his or her presence and to have the opportunity to examine, or have examined, any adverse witnesses. Where such evidence is central to the indictment, to sanction such a process would breach basic principles of a fair trial, and could constitute an abuse of process.

The leading of secret evidence against a party in civil proceedings should not generally be allowed except in exceptional circumstances, and subject to certain safeguards.

The affected person should always be represented by a lawyer, even if that lawyer is not one of the person's choosing, but rather a court-appointed lawyer holding the requisite security clearances.

The current arrangement for the review of Security Risk Certificates by the Inspector-General of Intelligence and Security lead to protracted proceedings that do not satisfy the requirement that fair or just process should be available to an applicant in Ahmed Zoaui's position. At the same time no resolution is in sight, although the Supreme Court concluded that to come within article 33.2 of the Convention relating to the Status of Refugees 1951, the person in question must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial.[54] The procedure fails to both preserve perceived security issues (because it leads to the nature of the security information being questioned), and to adequately protect the suspect's human rights.

It should be possible to implement a special counsel system such as operates in the United Kingdom, to ensure that applicants have someone acting on their behalf who will have access to classified information.

The Canadian alternative of security-cleared counsel could be adopted, but a fuller integration of counsel into the process, as operates in the United Kingdom, would appear to be more effective. The security-cleared counsel did not necessarily have access to all the material, not is it necessarily practical to rely on the obtaining of security clearances for counsel at short notice.

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54 Mr Zaoui had made a number of applications to the High Court with the objective of obtaining his release from detention or his transfer to a less onerous form of detention at the Mangere Detention Centre. These culminated in a decision of the Court of Appeal (rejecting his appeal), in *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690, and the Supreme Court, in *Zaoui v Attorney-General* [2005] NZSC 38, which upheld his appeal. He was eventually released, and was never tried in New Zealand.