



Refugee detained for two years on false ASIO intelligence

MICHAEL HEAD examines the implications of recent revelations involving ASIO and the detention of a Kuwaiti refugee.

It was reported last November that the Australian Security Intelligence Organisation (ASIO) was belatedly forced to pay about \$200,000 compensation to a refugee it falsely classified a national security risk, causing him to be detained without trial for nearly two years. Nearly five years after finally being set free in late 1999, the traumatised Kuwaiti man obtained the payment — hardly sufficient to make up for his wrongful imprisonment — only through the strenuous efforts of lawyers.¹

The saga is another reason to question the extraordinary powers that the Howard government has given its security and intelligence agencies, including ASIO, under the pretext of combatting terrorism. It also highlights the draconian character of Australia's refugee detention regime, which not only automatically locks up all asylum seekers for many months but also hands the government extraordinary powers to selectively incarcerate political refugees. These concerns have been heightened by the High Court's August 2004 rulings, permitting the indefinite detention of rejected asylum seekers, even if no other country will accept them.²

The person directly responsible for the refugee's extended detention was immigration minister Philip Ruddock. Under the provisions of s 65(1)(b) of the *Migration Act 1958* (Cth), his delegate denied the man — who now wishes to be identified only as Mohammed — a protection visa on ASIO's advice. Ruddock is currently Attorney General, in charge of implementing the even greater powers afforded to ASIO and other agencies since 11 September 2001.

Mohammed arrived in Australia seeking asylum in early 1997, and was initially found eligible for refugee status by the immigration department, subject to an ASIO security check. He had been living in Kuwait when Iraq invaded it in August 1990. In May 1991, he was arrested by the Kuwaiti monarchy's police and later deported to Iraq. Eventually he fled to Australia via Jordan and Syria.

However he remained in Melbourne's Maribyrnong detention centre for two years because ASIO classified him as 'directly a risk to Australian national security'. He was released and granted a protection visa only after ASIO admitted that its security assessment was based solely on unverified information provided by the secret police who persecuted him. An ASIO internal review found that the country involved 'has been assessed as having a poor human rights record'.

Anonymous intelligence sources told *The Age* that the information came from the Kuwaiti intelligence, but a report on the case by a Brisbane law firm said the Iraqi secret police of Saddam Hussein's Baathist regime were responsible.³ Whichever version is true, it is clear that through ASIO, Canberra has maintained intimate working relations with repressive governments that are, or were, regarded as allies.

For two years, ASIO blocked Mohammed's efforts to appeal against its security assessment in Australian tribunals and courts, insisting that to reveal the source and nature of the information to his lawyers would jeopardise its relationship with a foreign intelligence agency.

In August 1998, after four months of hearings and procedural manoeuvres in the Administrative Appeals Tribunal (AAT), ASIO appealed to the Federal Court against the AAT's ruling that part of its security assessment be released to Mohammed. The AAT directed that two key paragraphs of the assessment be amended or kept confidential in order to keep secret the source of the information. But ASIO objected to anything being released that could indicate the thrust of the allegations.

Mohammed filed a cross-appeal, arguing that he had been denied procedural fairness by not being given access to the evidence and a proper hearing necessary to challenge the security assessment. He also said the AAT had failed to adequately consider the public interest issues at stake.

When the case went before the Federal Court in December 1998, lawyers for the Director-General of Security told Justice Ross Sundberg that ASIO had received 'a written response from the overseas agency refusing to agree to the disclosure of the material'. Ruddock, as immigration minister, joined the case on ASIO's side.⁴

Remarkably, Sundberg J accepted ASIO's contention that the AAT had no jurisdiction to review a visa decision based on an adverse security assessment by 'the competent Australian authorities', that is, ASIO. As long as the immigration minister was 'satisfied' that an adverse security assessment existed, the tribunal could not review that assessment.

In effect, Sundberg J ruled that ASIO was above the law — that its security reports could not be questioned by the tribunal that hears appeals against the denial of protection visas on relevant grounds under s 500(1)(c)

REFERENCES

1. M. Forbes, 'Refugee blunder costs ASIO', *The Age* (Melbourne), 10 November 2004.
2. *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38 (6 August 2004); *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36 (6 August 2004).
3. Macrossans Lawyers, Migration Law Update, 30 September 1999 <<http://www.macrossans.com.au/Migration19992.htm>> at 15 November 2004.
4. *Director General Security v Nashmy Obed Sultan & Anor* [1998] 1548 FCA.

of the *Migration Act*. Moreover, he ordered that Mohammed's application to the tribunal be dismissed as 'frivolous or vexatious' and ordered Mohammed to pay the legal costs of ASIO and the minister, which would have amounted to many thousands of dollars.

Sundberg J's ruling, while particularly troubling, was in line with the approach consistently taken by the High Court. While denying that ASIO is beyond judicial scrutiny, in practice it has refused to call into question ASIO's assessment of what constitutes a threat to security. In the best known example, in 1982 the court rejected an attempt by the Church of Scientology to challenge ASIO's assessment that the church presented a possible threat.⁵

Official inquiries

As a last resort, Mohammed's lawyer complained to the Inspector-General of Intelligence and Security, a small agency in the prime minister's department that is meant to scrutinise the operations of ASIO and the rest of the spy network. By this stage, it seems that the lawyer had become aware of the dubious source of the allegations against Mohammed. If the identity of the foreign police involved — whether Iraqi or Kuwaiti — had become known publicly, it would have proven highly embarrassing for ASIO and Ruddock.

Once Inspector-General Bill Blick decided to launch an investigation, ASIO quickly withdrew its claim that Mohammed was a security risk. An internal ASIO review, later quoted by Blick in his 1999–2000 annual report, discovered 'substantive defects in the assessment process'. According to the internal review, the advice received from the overseas agency had been 'internally inconsistent' and ASIO had taken no action to corroborate its allegations. Furthermore, ASIO had no reasonable grounds to disbelieve Mohammed, and had failed to give him any opportunity to refute the allegations. Blick found that ASIO had breached its guidelines by accepting 'the foreign service's version of events without corroboration or serious question'. As a result, Mohammed had been denied a protection visa for about 18 months after the date on which he would probably have been granted one. The Inspector-General therefore recommended that Mohammed be compensated.⁶

Despite these damning reports, listing serious breaches of basic rights, no compensation was paid until early 2004. ASIO has continued to cover up the case, which was not mentioned in its 2003–04 annual report. When an Age reporter asked for an explanation, a spokeswoman for ASIO Director-General Dennis Richardson replied: 'The director-general does not wish to comment on your questions'.⁷

Refugee advocates made the obvious point that by relying on information supplied by foreign agencies, ASIO can only assist the regimes from which asylum seekers are fleeing. Independent Council for Refugee Advocacy president Marion Le observed: 'Many people are fleeing torture and political oppression in their own country. It stands to reason that the governments will then provide information to assist the Australians handing them over if they want them back for any reason'.⁸

Ruddock, however, defended ASIO. He insisted that its systems were not flawed and claimed that the complaints procedure was functioning as it should. Only one defective security assessment had been identified among 'tens of thousands,' he argued. 'The reason we have the Inspector-General of Intelligence and Security is to enable people who have complaints to be able to bring them forward and have them investigated', he said.⁹

It apparently matters little that Mohammed and his lawyers fought unsuccessfully against ASIO and the minister himself for two years in the AAT and the Federal Court. Nor that it took a further five years for Mohammed to be partially compensated for his unlawful incarceration. According to *The Age*, Mohammed has been left severely distressed and concerned for his security.

Moreover, Mohammed's ordeal may be the tip of a large iceberg. As Ruddock stated, ASIO conducts thousands of security assessments every year. They cover not only asylum seekers but all migration visa applicants, as well as public service appointees and people seeking various government licences. Acting on ASIO's advice, under s 8 of the *Passports Act 1938* (Cth), the foreign minister can strip citizens of their passports — a power that has been used against a number of Muslim men in recent years.¹⁰

Selective victimisation of refugees by ASIO and its predecessor agencies has a long history in Australia. In his 1989 book *Sanctuary! Nazi Fugitives in Australia*, Mark Aarons documented how Australian authorities had allowed between 150 and 200 Nazi collaborators into the country in the late 1940s and 1950s and that a number had occupied influential posts in displaced persons camps and migrant centres. Their work consisted of helping other ex-Nazis to enter Australia, while ensuring that left-wing migrants were deported.¹¹

These powers, like every other aspect of ASIO's activities, have been extended to an unprecedented degree over the past three years as part of the 'war on terrorism'. Now that ASIO has the right to detain and interrogate anyone without charge or trial, simply because they might have information relevant to terrorism, it can even object to detainee's lawyers on security grounds.¹²

Far from curtailing ASIO's national security assessment powers in light of Mohammed's treatment, the government has moved since its October 2004 election victory to expand their scope. When parliament resumed last December, it introduced National Security Information legislation that allows courts, on request from ASIO and the government, to conduct terrorism, espionage, treason and other 'national security' trials partly behind closed doors. The legislation, passed swiftly with the Labor Party's support, allows ASIO to deny security clearances to lawyers, excluding them from secret sessions, and possibly forcing accused people to appear unrepresented.¹³ In addition, an amendment to the ASIO Act widened the agency's ability to undertake security assessments as part of a new national licensing regime for regulating access to explosive and hazardous materials.¹⁴

There are good reasons for concern that ASIO's powers will be used for political purposes. Since

5. *Church of Scientology v Woodward* [1982] 154 CLR 25.

6. Inspector-General of Intelligence and Security, Annual Report 1999-00, paras 151–167 <www.igis.gov.au/1999_00/asio_complaints_inquiries.htm> at 15 November 2004.

7. Forbes, above n 1.

8. 'Ruddock defends refugee error', *SBS World News*, 11 November 2004 <www9.sbs.com.au/worldnews/region.php?id=98646®ion=7> at 15 November 2004.

9. Ibid.

10. Richard Phillips, 'Australian secret police withhold young worker's passport', *World Socialist Web Site*, 1 July 2002 <www.wsws.org/articles/2002/jul2002/mal-j01.shtml> at 15 November 2004.

11. Mark Aarons, *Sanctuary! Nazi Fugitives in Australia*, 1989.

12. Michael Head, 'Another threat to democratic rights: ASIO detentions cloaked in secrecy' (2004) 29 *AltLJ* 127.

13. *National Security Information (Criminal Proceedings) Act 2004*.

14. *Australian Security Intelligence Organisation Amendment Act 2004*.