IGIS INQUIRY INTO ASIO'S ASSESSMENT OF MR RHUHEL AHMED

Background

1. I received a written complaint on 27 November 2006 from a member of the public who was concerned about the denial of a visa to Mr Rhuhel Ahmed, the effect of which was to deny Mr Ahmed entry into Australia.

2. The decision to deny Mr Ahmed a visa was made by a delegate of the Secretary of the (then titled) Department of Immigration and Multicultural Affairs (DIMA), on the basis of an adverse security assessment made of Mr Ahmed by the Australian Security Intelligence Organisation (ASIO).

3. Media reporting around the time I received this complaint indicated that Mr Ahmed, who is a United Kingdom national, planned to visit Australia to promote the cinema release of a new film *"The Road to Guantanamo"*.

4. The film Mr Ahmed intended to promote recounts the story of Mr Ahmed and two fellow UK nationals who were captured in Afghanistan in 2001 and subsequently detained in the United States of America complex located at Guantanamo Bay, Cuba, until their eventual release in March 2004. The film, which was released in Australia, uses a mixture of traditional documentary form (i.e. interviews with the three key subjects) with dramatic recreations of particular events (performed by actors) to convey Mr Ahmed and his colleagues version of events.

5. The complainant who wrote to my office expressed concern that the ASIO assessment may have been politically driven to avoid embarrassment to the Australian and American governments over issues such as the continuing detention of Mr David Hicks at Guantanamo Bay.

6. I decided to conduct an inquiry under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) into the matter and advised the Attorney-General and the Director-General of Security accordingly, on 29 November 2006.

7. Shortly thereafter my office received another 36 similarly expressed complaints on the matter, but the author of the first letter my office received has been taken as the principal complainant for the purposes of the IGIS Act.

Scope of inquiry

8. My jurisdiction in respect of ASIO security assessments of non-citizens was succinctly described by Madgwick J in *Leghaei v Director-General of Security* [2005] FCA 1576 as follows:

"Non-citizens etc. therefore have limited rights under the IGIS Act, in that while they may make complaints to the Inspector-General under s 11 of the IGIS Act, any consequent inquiry by the Inspector General must be within the latter's functions (s 11(1)(b)). In the result, effectively, the only recourse a non-citizen etc. has under the IGIS Act is in relation to the matters contained in s 8(1)(a). Those matters may be summarised as legality, propriety and procedural efficacy. They do not include the merits of a security assessment."

ASIO legislation

9. The functions of ASIO are prescribed at section 17 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act).

10. One of the significant functions which ASIO is required to perform is set out at section 17(1)(c) of the ASIO Act, namely:

"to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as these matters are relevant to their functions and responsibilities."

11. "Security" is defined under section 4 of the ASIO Act as meaning:

> "(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage
> (ii) sabotage
> (iii) politically motivated violence
> (iv) promotion of communal violence
> (v) attacks on Australia's defence system; or
> (vi) acts of foreign interference
>
> whether directed from, or committed within Australia or not; and
>
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the sub paragraphs of paragraph (a)."

12. In addition to defining ASIO's mandate, there is also a separate component of the ASIO Act which deals exclusively with the subject of security assessments (Part IV). This provides, among other things, that ASIO may make security assessments and assessments in the performance of its functions.

13. The terms "security assessments" and "assessments" are defined under section 35 of the ASIO Act in the following way:

*"**security assessment** or **assessment** means a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question."*

14. The term ***prescribed administrative action*** is also defined under section 35 of the ASIO Act and is taken to include:
"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."

ASIO Assessment

15. Mr Ahmed lodged an application for a Business (Short Stay) Visa in the United Kingdom on 16 October 2006, indicating that he wished to travel to Australia on 26 October 2006.

16. One of the requirements Mr Ahmed needed to satisfy for a visa to be issued is public interest criterion 4002 in Part 1 of Schedule 4 of the Migration Regulations. This provides as follows:

"4002 The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*."

17. DIMA sought an assessment from ASIO, and this request was referred to the relevant work area within ASIO for consideration on 18 October 2006.

18. Security considerations preclude me from detailing the checks which the ASIO action officer undertook, but they were of the kind I would have expected to be done, and not otherwise.

19. The officer drafted an assessment and submitted it to a more senior ASIO officer on 25 October 2006. The senior officer approved the assessment the same day and advised DIMA that ASIO had assessed Mr Ahmed to be directly or indirectly a risk to Australian national security.

20. The consequential effect of ASIO's assessment, given the requirement cited in paragraph 16 above, was that Mr Ahmed was refused a visa.

Comments

21. One of the questions raised by the complainant was whether there was any political or external influence on the assessment.

22. There is no indication whatsoever in the records that there was such influence or attempt at such influence, nor have I found any such evidence in my investigation into this matter. The process followed was entirely normal and the staff concerned have assured me that the assessment was ASIO's judgement alone.

23. I also asked these staff for statutory declarations and each stated unequivocally in these statements that there had not been any attempt to improperly influence the assessment.

24. The material on which the assessment drew was relevant and apparently reliable. I am also satisfied that there was no inflation of the significance of the material in its use in the assessment.

25. As noted earlier, the central test applied was whether Mr Ahmed was directly or indirectly a threat to security, and this was legally correct. Although I am not empowered to make a merits-based assessment of Mr Ahmed's case, I can say that I am of the view that the material available to ASIO was sufficient for it to conclude that this test was met.

26. I would have preferred the assessment to have included more exposition of one element of the underlying reasoning. However, the conclusion reached was sufficiently justified.

27. I should note that independently of this particular inquiry ASIO has introduced enhancements to the way in which its approaches the structuring of the content of assessments and I am supportive of such action.

Conclusion

28. Taking into account all of the above circumstances, I conclude that ASIO acted legally and properly in making its assessment in respect of Mr Ahmed in October 2006.

12 March 2007

Back