

UNCLASSIFIED REPORT

IGIS INQUIRY INTO ASIO'S TREATMENT OF MR SCOTT PARKIN

1. On 13 September 2005 my office started to receive a number of complaints about the treatment of Mr Scott Parkin, a US citizen in Australia on a temporary visa who had been detained as a result of the Australian Security Intelligence Organisation (ASIO) issuing an adverse security assessment. Mr Parkin's visa was cancelled and he was removed from Australia on 16 September 2005.

2. The essence of the first complaint to my office was that such action by ASIO was wrong because, it was said, Mr Parkin is a proponent of non-violent direct action and peaceful civil disobedience against the war in Iraq.

3. This raised the question of whether ASIO had acted in accordance with section 17A of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), which requires that the functions of ASIO must not be carried out so as to "limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security". This requirement is a very important one – a vibrant democracy thrives on lawful advocacy, protest and dissent.

Initiation and scope of inquiry

4. Under section 8(1) of the Inspector-General of Intelligence and Security Act 1986 (IGIS Act), the Inspector-General of Intelligence and Security can of his or her own motion, or in response to a complaint made to the Inspector-General, inquire into matters that include the following:

(a) the compliance by ASIO with the laws of the Commonwealth and of the States and Territories;

(b) the compliance by ASIO with directions or guidelines given to ASIO by the responsible Minister;

(c) the propriety of particular activities of ASIO;

(d) the effectiveness and appropriateness of the procedures of ASIO relating to the legality or propriety of the activities of ASIO; or

(e) an act or practice of ASIO that is or may be inconsistent with or contrary to any human right, that constitutes or may constitute discrimination, or that is or may be unlawful under the *Racial Discrimination Act 1975* or the *Sex Discrimination Act 1984*, being an act or practice referred to the Inspector-General by the Human Rights and Equal Opportunity Commission.

5. The IGIS Act precludes the Inspector-General from inquiring into matters where there is a right of appeal to the Security Appeals Division of the Administrative Appeals Tribunal, but Mr Parkin does not have such an appeal right because of the effect of section 36 of the ASIO Act.

6. I therefore considered it was open to me to inquire into ASIO's treatment of Mr Parkin in issuing an adverse security assessment. I informed the Attorney-General and the Director-General of Security (the head of ASIO) of my intention to conduct an inquiry on 13 September 2005.

7. My statutory jurisdiction does not extend to the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) or to the Australian Federal Police (AFP). The decisions of, and actions taken by these agencies once ASIO had issued an adverse security assessment are necessarily outside the scope of this inquiry. The actual taking into custody of Mr Parkin, his detention and questioning, and his subsequent removal from Australia, are not actions in which ASIO officers were involved.

8. I also received representations that I should include within the scope of this inquiry the possible leaking of information to *The Australian* newspaper on 22 September 2005, and the non-provision of a briefing on the case to the Leader of the Australian Greens Party.

9. Whether or not there may have been criminal conduct underlying what was published in *The Australian* newspaper on 22 September 2005 is a matter for the police. I therefore drew this matter to the attention of the Commissioner of the AFP.

10. I need to emphasise that my drawing of the attention of the Commissioner to this story should not be taken as confirming all or even part of that story. On the face of it the story did purport to represent information from official sources and that was sufficient justification for me to bring the story to the Commissioner's attention.

11. I distinguish between a formal "referral" where an agency believes it is very likely that a leak has occurred, and merely drawing something to the Commissioner's attention.

12. For reasons I shall go into a little more shortly, it is important that most, if not all, of the substance of security assessments not be put in the public domain. Nor should relevant agencies be drawn into responding to media stories lest it encourage a "publish to see if it's true" approach (at least by less responsible sectors of the media). However, I do believe that in the situation which has developed, a narrow exception should be made.

13. I make this exception because the story in *The Australian* newspaper is not a reliable guide to the ASIO assessment. In particular, the reference in the story to the tactic of rolling marbles under the hooves of police horses appears to have raised in the minds of Mr Parkin's associates and others whether ASIO's factual basis for the assessment was flawed. The story is wrong in this regard. Nor, I emphasise, should readers assume that the rest of the story is correct.

14. As regards the briefing of non-government parliamentarians, section 21 of the ASIO Act requires the Director-General of Security to keep the Leader of the Opposition in the House of Representatives informed on matters relating to security, but does not refer to other non-government parliamentarians. Nor does there appear to be any other legal duty or general practice which meant the Director-General was required in these circumstances to provide a briefing beyond one to the Leader of the Opposition.

15. In the complaints received as well as in comments in the Commonwealth Parliament and the media, some of the questions raised in relation to this matter were:

(a) Why, if Mr Parkin is a threat to security, was he originally granted a visa?

(b) Was the security assessment soundly based given Mr Parkin's public assertions that he is a non-violent activist in the tradition of Thoreau, Gandhi and King?

(c) If Mr Parkin is a non-violent activist, was there influence from the interests of which Mr Parkin was critical and/or other outside influence in the development and issuing of the security assessment?

(d) Was Mr Parkin given an adequate opportunity to respond to allegations against him?

16. I should note that the context for (c) is that among Mr Parkin's concerns are "the illegal occupation of Iraq" and "war profiteering" by companies such as Halliburton. He is associated with a group in the US which aims "to pressure Halliburton out of Iraq" and end "the illegal occupation of Iraq".

Methodology

17. I scrutinised all relevant records in ASIO, interviewed officers including two interviews under oath or affirmation as provided for in section 18 of the IGIS Act, viewed open-source material and spoke with the Commissioner of the AFP.

18. One of the difficulties of inquiring into intelligence and security matters and reporting outcomes is that much material is, by its nature, very sensitive. The protection of collection methodologies and various sources means that there are appropriately circumstances in which disclosure cannot be made. In balancing security aspects against natural justice considerations, there are circumstances where it has traditionally been accepted that it is in the overall public interest for security considerations to be given precedence. The current situation is one such occasion.

19. While the precepts of natural justice would point to providing Mr Parkin with the details of the security assessment and allowing him to respond and suggest ways in which the evidence and considerations might be tested, security considerations of the kind described above would appear to reasonably preclude this. Even to attempt to allude in general terms to the elements of the security assessment would be problematic in this way.

20. I appreciate that Mr Parkin and others with doubts about his treatment will most likely find this vexing, but it is inevitable given the nature of the matter being examined.

Events and relevant legislation

21. Mr Parkin arrived in Australia at the end of May 2005 having been granted a six-month Tourist – long stay visa early in April 2005. At that time there was nothing in ASIO's holdings, or records available from other authorities, which would have justified refusal of his request for a visa.

22. Sometime after his arrival in Australia Mr Parkin's activities in the country came to ASIO's attention. This prompted ASIO to actively gather additional information on Mr Parkin.

23. In early September 2005, ASIO rang Mr Parkin and asked if he was prepared to speak to them. As was his right, Mr Parkin declined this opportunity.

24. Relevant staff in ASIO then drafted a security assessment on Mr Parkin and referred this to the Director-General of Security for consideration.

25. The Director-General issued an adverse security assessment in respect of Mr Parkin and recommended to DIMIA that Mr Parkin's visa be revoked in accordance with section 116 of the *Migration Act 1958* (Migration Act).

26. Section 116 of the Migration Act provides that the Minister for Immigration can cancel a visa if he or she is satisfied that a prescribed ground for cancelling a visa applies to the holder. Regulation 2.43 of the Migration Regulations 1994 prescribes grounds for the purpose of section 116, and one ground is where "...the holder of the visa has been assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security".

27. I should note that “Australian national security” is a concept which covers Australia’s security, defence, international relations and law enforcement interests.

28. The ASIO Act provides for ASIO to issue security assessments and assessments. Section 17 lists the functions of ASIO and one function is to advise authorities of the Commonwealth “in respect of matters relating to security”. “Security” is defined in the ASIO Act as “the protection of, and of the people of, the Commonwealth and the several States and Territories from”, various specified threats. One specified threat is politically motivated violence (PMV).

29. Security assessments and assessments are defined in section 35 of the ASIO Act in the following way:

“Security assessment or assessment is defined as 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 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 recommendations, opinion or advice, being a qualification or comment that relates or that could relate to that question.”

30. Prescribed administrative action is defined as including:

“b) the exercise of any power, or the performance of any function, in relation to a person under the Migration Act 1958 or the regulation under that Act.”

31. Security assessments can be “qualified” or “adverse”. The latter are defined as follows:

“Adverse security assessment means a security assessment in respect of a person that contains:

a) Any opinion or advice, or any qualification of any opinion or advice, or any information that is or could be prejudicial to the person; and

b) A recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person.”

32. The risk to security assessed by ASIO as relevant to Mr Parkin’s case was PMV. PMV is defined in section 4 of the ASIO Act as including:

“a) Acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of government, whether in Australia or elsewhere;”

33. The ASIO Act requires the Attorney-General to give by notice in writing to the Director-General, guidelines to be observed in relation to the performance of ASIO’s functions in respect of PMV. These guidelines are not classified and are publicly available (see www.asio.gov.au). Included in the extant guidelines are:

“(3.4) ASIO’s functions are concerned with protection of Australia from PMV, or the carrying out of Australia’s responsibilities in relation to such conduct. As such, they are required to be anticipatory in nature. The intelligence that ASIO collects needs only be relevant to a risk that such conduct may be engaged in, or to a reasonable apprehension that it is being engaged in.

...

(3.12) ASIO is not to make inquiries into demonstrations or other protest activity unless –

a) There is a risk of serious premeditated violence for the purpose of influencing government acts or policy;

...

(3.16) When investigation has reasonably established that a person or group is involved in or planning activities defined in sub-paragraph (a) of PMV... ASIO might properly advise appropriate Ministers and authorities that the person or group is acting in a manner prejudicial to security.”

34. Section 37(4) of the ASIO Act requires, in relation to security assessments, that the Director-General of Security determine matters that are to be taken into account, the manner in which those matters are to be taken into account, and matters that are not to be taken into account, in the making of assessments or assessments of a particular class.

35. The extant determination under this provision was issued on 27 February 1990 and is a classified document. It was applied by ASIO in making the assessment in respect of Mr Parkin.

Consideration of issues

36. One of the questions publicly ventilated was why Mr Parkin was originally granted a visa to enter Australia if he posed a direct or indirect risk to security. In paragraph 21 above, I noted that there was no material available at that time to ASIO which indicated it should recommend that the visa not be granted.

37. Another question ventilated was whether there had been outside influence on the process of developing and settling the adverse security assessment. It was speculated that those in the US government with connections to Halliburton or the Australian government's commitment to action in Iraq, may have lead to an attempt to mute Mr Parkin.

38. Closely related to this is the question of whether ASIO approached the task with a proper consideration of the evidence and the drawing of conclusions from it.

39. Detailed comments on the security assessment are contained in a separate classified document “Comments on ASIO security assessment in respect of Mr Scott Parkin”. For the reasons outlined in paragraph 18 it is not possible to put these into the public domain.

40. However, I can say in this report that I am satisfied that there is no indication whatsoever of outside influence on the ASIO process.

41. The actions taken by staff and the records kept are entirely in accordance with normal processes. There is no evidence (or even hint) of outside influence or any attempt at this. The two officers I formally interviewed under oath or affirmation were unequivocal in rejecting any suggestion that there had been outside influence or any attempt at such.

42. Given the appearance of normalcy and the absence of indications even suggestive of outside influence, as well as the firm sworn evidence, it must be concluded that outside influence was not attempted and did not occur.

43. I can also say that ASIO had reliable and credible information (assessed by established procedures) that Mr Parkin was involved in activities which come within the definition of PMV in the ASIO Act.

44. The assessment did not accept uncritically all the material gathered. Some of the material was expressly not given any weight. I discuss some of the detail of the assessment in the classified document "Comments on ASIO security assessment in respect of Mr Scott Parkin". My overall conclusion is that the legislative requirements were met.

45. There is then the procedural matter that information was not obtained from Mr Parkin himself. ASIO did telephone Mr Parkin and ask if he was prepared to be interviewed. Mr Parkin declined this offer as he was entitled to do.

46. I have reflected on whether more should have been said to Mr Parkin about the possible consequences of not accepting the interview offer, but the considerations recorded on ASIO files weigh up the degree of information which could be given against operational considerations.

47. The approach actually taken is understandable and I do not think ASIO can be criticised for treading a fine line between giving Mr Parkin an opportunity to speak but not compromising operational requirements.

Conclusions

48. In summary, I have reached the following conclusions on the central issues:

(a) ASIO did not have, at the relevant time, information which would have justified recommending against the grant of a visa and took a close interest in Mr Parkin because of information received about his activities once in Australia.

(b) There is no evidence or reason to think that ASIO's security assessment in respect of Mr Parkin was influenced from elsewhere within the Australian Government or by external bodies.

(c) The security assessment was based on credible and reliable information and the legislative requirements were met.

(d) ASIO did not act improperly in the course of speaking to Mr Parkin about the possibility of an interview with him.

Recommendations

49. The only recommendation I would make is that the Director-General consider whether the 1990 Determination issued pursuant to section 37(4) of the ASIO Act, should be reviewed.

50. While application of this 1990 Determination to Mr Parkin's case did not raise concerns, it is a useful practice to periodically review key guidance documents and refine them in the light of experience and current circumstances.

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