FEDERAL COURT OF AUSTRALIA

Leghaei v Director General of Security
[2005] FCA 1576

IMMIGRATION & CITIZENSHIP – national security – application for review of decision to furnish adverse security assessment to relevant Minister – where applicant was a lawful non-citizen and assessment was prepared and furnished with a view to possible cancellation of his visa – where applicant not informed of case he had to meet on grounds of public interest – whether breach of procedural fairness – whether jurisdictional error

STATUTES – interpretation – whether procedural fairness excluded under the *Australian Security Intelligence Organisation Act 1979* (Cth) – whether distinction made between citizens and non-citizens

Australian Security Intelligence Organisation Act 1979 (Cth), ss 4, 17, 36, 37
Migration Act 1958 (Cth), s 116

A & Ors v Secretary of State for the Home Department [2004] UKHL 56 (16 December 2004) cited
Alister v R (1984) 154 CLR 404 cited
Amer v Minister for Immigration, Local Government and Ethnic Affairs (No.s 1 and 2), Unreported, per Lockhart J, 18 and 19 December 1989 discussed
Annetts v McCann (1990) 170 CLR 596 followed
CIC Insurance Limited v Bankstown Football Club Limited (1997) 187 CLR 384 cited
Kioa v West (1985) 159 CLR 550 followed
Lu v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 340 cited
State of South Australia v Slipper (2004) 136 FCR 259 followed

Francis Bennion, *Statutory Interpretation,* 4th edition.
DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 5th edition.

MANSOUR LEGHAEI v DIRECTOR GENERAL OF SECURITY and MINISTER FOR IMMIGRATION MULTICULTURAL AND INDIGENOUS AFFAIRS

ACD 21 of 2004

MADGWICK J
CANBERRA (HEARD IN CANBERRA AND SYDNEY)
10 NOVEMBER 2005

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY **ACD 21 OF 2004**

DISTRICT REGISTRY

BETWEEN:	**MANSOUR LEGHAEI** **APPLICANT**
AND:	**DIRECTOR-GENERAL OF SECURITY** **FIRST RESPONDENT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **SECOND RESPONDENT**

JUDGE: **MADGWICK J**

DATE OF ORDER: **10 NOVEMBER 2005**

WHERE MADE: **CANBERRA (HEARD IN CANBERRA AND SYDNEY)**

THE COURT ORDERS THAT:

1. Until further order, the confidential part of this judgment is not to be disclosed to any person other than a Judge of the Court, Mr Peter Hanks QC, Mr Vince Sharma, appropriately security cleared legal representatives of the First Respondent and duly authorised officers or employees of the Australian Security Intelligence Organisation.

2. Federal Court Proceedings no. 21 of 2002 are formally dismissed.

3. The applicant is to file any submissions on costs by 31 January 2006.

4. The respondent is to file any response to those submissions by 14 February 2006.

5. The matter is to be listed for directions on Monday 6 December 2010 at 9:30 am for consideration of the maintenance of the restrictions on access to the confidential part of the judgment.

6. On that date, the appearance of the applicant is excused.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY DISTRICT REGISTRY

ACD 21 OF 2004

BETWEEN: **MANSOUR LEGHAEI**
APPLICANT

AND: **DIRECTOR-GENERAL OF SECURITY**
FIRST RESPONDENT

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
SECOND RESPONDENT

JUDGE: **MADGWICK J**
DATE: **10 NOVEMBER 2005**
PLACE: **SYDNEY (HEARD IN CANBERRA/SYDNEY)**

REASONS FOR JUDGMENT

1 This is an application pursuant to s 39B(1) and s 39B(1A) of the *Judiciary Act 1903* concerning an adverse security assessment made by the Australian Security Intelligence Organisation ('ASIO') in 2004 ('the Assessment') in respect of the applicant, pursuant to s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('the ASIO Act'), and the repercussions for the applicant's visa that flow from that assessment.

2 The applicant seeks the following relief:

(i) An injunction restraining the first respondent from furnishing the Assessment to the second respondent.

(ii) Declarations that the Assessment is void and inoperative, and that the second respondent's decisions, made on 26 July 2004, to cancel the applicant's Bridging Visa B and Bridging Visa E under s 116 of the *Migration Act 1958* (Cth) ('Migration Act'), are inoperative.

(iii) Orders quashing the Assessment, and prohibiting the second respondent firstly, from detaining, removing or deporting the applicant from Australia; and secondly, from giving effect to the decisions made by the second respondent on 26 July 2004 to cancel the applicant's bridging visas.

BACKGROUND AND HISTORY OF PROCEEDINGS

3 The applicant was born in Iran in 1962, is married and has four children, one of whom remains under the age of eighteen. Since 2003, his eldest two children have been granted permanent residency in Australia.

4 The applicant came to Australia in 1994 holding a subclass 672 Short Stay Business Visa to be employed as a Halal meat supervisor, which initially he was. In 1995, the applicant was granted a subclass 428 Religious Worker Visa, which allowed him to work as a Muslim religious leader (Sheikh) in Australia and to travel internationally.

5 On 1 November 1996, the applicant lodged applications for himself and for each member of his family for permanent residency visas (subclass 805). Bridging visas were granted while the applications were being considered, however these did not permit overseas travel. On 25 August 1997, the applicant was advised that he and his family had all been refused permanent residency visas on the grounds that he had been assessed as a risk to Australia's national security.

6 Between September 1997 and February 2002, the applicant pursued review proceedings and a formal assessment was carried out by ASIO, resulting in an adverse security assessment in early 2002, the substance of which was that he was 'directly or indirectly a risk to Australian national security'. Although the applicant was granted a Bridging Visa (Class B) early in 2002 (allowing him to travel overseas in February 2002 with one of his sons), on 11 April 2002, as a result of the adverse security assessment, that bridging visa was cancelled.

7 During April/May 2002, the applicant instituted administrative review proceedings on two further occasions (and was granted successive Bridging Visas (Class E) for that purpose), however, both proceedings were defeated by the fact that the second respondent ('Minister')

had issued Conclusive Certificates (dated 14 March and 29 April 2002), pursuant to s 339(a) of the Migration Act. Both certificates stated that the Minister believed it would be contrary to the national interest to change the decision of the review officer.

8 On 10 May 2002, the applicant commenced proceedings in the Federal Court seeking to quash the first respondent's 2002 adverse security assessment. Those proceedings have now been overtaken because, by way of a letter dated 26 May 2004, the applicant was advised that 'a fresh assessment' had been made in relation to him (the genesis of the present proceedings). The relevant part of the letter stated: 'Briefly, the Deputy Director-General of Security has decided to maintain the adverse security assessment against [the applicant]'.

9 Again, the consequence of the Assessment, if it is legally valid, is that the Minister is obliged to cancel the applicant's two Bridging Visas. The applicant was advised of the Minister's intention (by her delegate) to cancel those visas on 26 July 2004. The Minister indicated that the reason for the cancellation was that the 'competent Australian authorities have assessed you to be a direct risk to Australian national security.' Consequently, fresh proceedings were commenced in this Court in July 2004.

LEGISLATIVE FRAMEWORK

(i) The Minister's Position

10 On the furnishing to the Minister of an adverse security assessment, the Minister is obliged to cancel an applicant's visa. A complex of legislative provisions creates this obligation. Under s 116(1)(g) of the Migration Act, the Minister may cancel a visa if she is satisfied that 'a prescribed ground for cancelling a visa applies to the holder'. Pursuant to s 116(3), if the Minister may cancel a visa under subsection (1), she 'must do so if there exist prescribed circumstances in which a visa must be cancelled'.

11 The prescribed circumstances are set out in reg 2.43 of the Migration Regulations. The relevant ground prescribed is contained in reg 2.43(1)(b), namely 'that the holder of the visa has been assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security.'

12 Under s 119 of the Migration Act, if the Minister is considering cancelling a visa

under s 116, the Minister must notify the visa holder that there appear to be grounds for cancelling it and give particulars of those grounds (among other things). Under s 127 of the Migration Act, when the Minister decides to cancel a visa, she must notify the visa holder of the decision, and specify the ground for the cancellation.

13 I omit the criteria for Visa subclass 805 (which no longer exists) and the 'public interest' criteria (Migration Regulation 1.03 and Schedule 4 – 4002) because they relate to why the applicant was refused permanent residency – a question not relevant to the present proceedings.

(ii) Security Assessments by ASIO

14 The provisions in relation to security assessments are contained in Part IV (ss 35-81) of the ASIO Act. Section 35 provides for the following relevant definitions:

> '**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 interests of 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. ...*
>
> **prescribed administrative action** *means: ...*
>
> *(a) ...*
>
> *(b) the exercise of any power, or the performance of any function, in relation to a person under the Migration Act ... or the regulations under that Act; ...*
>
> **security assessment** *...means a statement in writing furnished by* [ASIO] *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.'*

15 An adverse security assessment may be furnished to a Commonwealth Agency (including a Minister) as part of the functions vested in ASIO by s 17(1)(c) and s 37(1) of the ASIO Act.

16 In order to ascertain 'whether the requirements of security make it necessary or desirable' for administrative action to be taken – in this case, for the applicant's visas to be cancelled – it is necessary to look to the definition of 'security'. In s 4 of the ASIO Act:

> *'**security** means:*
>
> *(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 subparagraphs of paragraph (a).'*

17 The phrase 'acts of foreign interference' in sub-par (vi) is also specifically defined in s 4 of the ASIO Act to mean:

> *'... activities relating to Australia that are carried on by or on behalf of, are directed or subsidised by or are undertaken in active collaboration with, a foreign power, being activities that:*
>
> *(a) are clandestine or deceptive and:*
>
> *(i) are carried on for intelligence purposes;*
>
> *(ii) are carried on for the purpose of affecting political or governmental processes; or*

(iii) are otherwise detrimental to the interests of Australia; or

(b) involve a threat to any person.

18 A significant feature of the ASIO Act for the present case is that pursuant to s 36, Part IV (which comprises ss 35 to 81), other than subsections 37(1), (3) and (4), does not apply to:

(a) ...

(b) a security assessment in relation to action of a kind referred to in paragraph (b) of the definition of prescribed administrative action in section 35 (other than an assessment made for the purposes of subsection 202(1) of the Migration Act ...*) in respect of a person who is not:*

(i) an Australian citizen;

(ii) a person who is, within the meaning of the Migration Act ..., *the holder of a valid permanent visa; or*

(iii) a person who holds a special category visa or is taken by subsection 33(2) of the Migration Act ... *to have been granted a special purpose visa.'*

19 Section 37 provides for the furnishing of security assessments as follows:

'(1) The functions of [ASIO] *referred to in paragraph 17(1)(c) include the furnishing to Commonwealth agencies of security assessments relevant to their functions and responsibilities.*

(2) An adverse or qualified security assessment shall be accompanied by a statement of the grounds for the assessment, and that statement:

(a) shall contain all information that has been relied on by [ASIO] *in making the assessment, other than information the inclusion of which would,* ***in the opinion of the Director-General****, be contrary to the requirements of security; and*

(b) shall, for the purposes of this Part, be deemed to be part of the assessment.

(3) The regulations may prescribe 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 of assessments of a particular class, and any such regulations are binding on [ASIO] *and on the Tribunal.*

(4) Subject to any regulations made in accordance with subsection (3), the Director-General shall, in consultation with the Minister, determine matters of a kind referred to in subsection (3) but nothing in this subsection affects the powers of the Tribunal.

(5) No proceedings, other than an application to the Tribunal under section 54, shall be brought in any court or tribunal in respect of the making of an assessment or anything done in respect of an assessment in accordance with this Act.' (Emphasis added.)

20 Thus, by virtue of s 36 and s 37, there is no requirement to provide a statement of the grounds for assessment in cases where the person who is the subject of the security assessment is not an Australian citizen, permanent resident or holder of a special category or purpose visa. (I will, for ease of expression, refer to such a category of persons as 'an Australian citizen or permanent resident' and to others as 'non-citizens etc'.)

21 Section 38(1) provides for people who are the subject of an adverse security assessment to be notified of that assessment where such assessment has been furnished to a Commonwealth agency (among others). Section 38(2) permits the assessment to be withheld from the person if the Attorney-General is satisfied that withholding the assessment is either essential to the security of the nation, or 'the disclosure to a person of the statement of grounds contained in a security assessment in respect of the person, or of a particular part of that statement, would be prejudicial to the interests of security.' Again, however, by operation of s 36, s 38 does not apply to non-citizens etc, so there is no initial obligation for such people to be notified that an assessment has even taken place in situations where the assessment is furnished to (among other bodies) a Commonwealth agency.

22 The ASIO Act must be read with the *Inspector-General of Intelligence and Security Act 1986* (Cth) ('the IGIS Act'), the objects of which (under s 4 of the IGIS Act) are:

'(a) to assist Ministers in the oversight and review of:

(i) the compliance with the law by, and the propriety of particular activities of, Australian intelligence or security agencies;

(ii) the effectiveness and appropriateness of the procedures of those agencies relating to the legality or propriety of their activities; and

(iii) certain other aspects of the activities and procedures of certain of

those agencies;

(b) to assist Ministers in ensuring that the activities of those agencies are consistent with human rights; ... '.

23 Section 8 of the IGIS Act provides for the inquiry function of the Inspector-General, relevantly as follows:

'(1) Subject to this section, the functions of the Inspector-General in relation to ASIO are:

(a) at the request of the responsible Minister, of the Inspector-General's own motion or ***in response to a complaint made to the Inspector-General****, to inquire into any matter that relates to:*

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

(ii) ...

(iii) the propriety of particular activities of ASIO;

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

(v) ...

(b) ...

(c) ***at the request of the responsible Minister****, to inquire into the action (if any) that should be taken to protect the rights of a person* ***who is an Australian citizen or a permanent resident*** *in a case where:*

(i) ASIO has furnished a report to a Commonwealth agency that may result in the taking of action that is adverse to the interests of the person; and

(ii) the report could not be reviewed by the Security Appeals Tribunal;

and, in particular, to inquire into whether the person should be informed of the report and given an opportunity to make submissions in relation to the report; ... ' (emphasis added).

24 The reference to the 'Security Appeals Tribunal' in s 8(1)(c)(ii) of the IGIS Act is a reference to the provision made by s 54 of the ASIO Act for application to the Security Appeals Division of the Administrative Appeals Tribunal for review of an adverse security assessment. Again, that facility is only available in relation to Australian citizens and permanent residents, by virtue of s 36 of the ASIO Act.

25 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.

CURRENT APPLICATION

26 The applicant firstly claims that the Assessment was void and inoperative for jurisdictional error constituted by denial of procedural fairness. The applicant contends that the first respondent failed to provide to the applicant: (i) any notice of the particular grounds on which the first respondent proposed to make the Assessment; (ii) any specific issues to address as to why the applicant is believed to be a risk to Australian national security, other than 'whether the applicant has been involved in any "acts of foreign interference" as defined in s 4 of the Act'; or (iii) any response to the applicant's request for 'specific issues' to which the applicant might respond.

27 The applicant next claims that the Assessment was void and inoperative by reason of other jurisdictional error, in that the first respondent failed to consider and form an opinion on, or provide advice about, the essential question on which the Assessment depended. That essential question was whether the applicant's alleged acts and conduct that were the subject of the Assessment (i) meant that it was consistent with the requirements of security for prescribed administrative action to be taken in respect of the applicant, and (ii) supported the making of an adverse security assessment in respect of the applicant.

28 Next, the applicant claims that the Assessment is void and inoperative for jurisdictional error on the basis that the first respondent (i) misconstrued the definition of

'security' in a relevant respect and (ii) consequently took irrelevant considerations into account, namely, alleged acts and conduct of the applicant that were not inconsistent with the requirements of 'security'. The applicant contends that the Court cannot be satisfied that the same assessment would have been made had the first respondent not made those two errors.

29 If either the procedural fairness or other jurisdictional error grounds are made out, the applicant contends that the security assessment is of no legal effect, with the corollary that the Minister lacked authority to cancel the applicant's visas under s 116 of the Migration Act. Accordingly, the purported decision to cancel the applicant's visas was in excess of the Minister's jurisdiction, for want of fulfilment of a precondition to its exercise, and therefore also void and inoperative.

(A) PROCEDURAL FAIRNESS

30 The two issues here are, firstly, whether any right of the applicant to procedural fairness at the primary decision making stage had been statutorily excluded, as a matter of construction. Secondly, if it had not, did the factual circumstances nevertheless mean that such right was devoid of practical content, in that the nature of the materials considered by the ASIO was such that nothing more could be disclosed to the applicant than was disclosed?

(i) The Applicant's Submissions

31 Broadly, the applicant asserts a right to know the nature of the material that might form the basis of a decision seriously adverse to his interests, so that he may know the case he has to meet. If there were proper grounds (that is, evidence,) for invoking the interests of national security as a barrier to communicating the details of the case against the applicant, it is said that an outline, or the 'essential features', of the case against the applicant should nevertheless have been provided to him for comment and rebuttal.

32 The applicant's case in relation to procedural fairness depends on four contentions. The first is that, in accordance with general principles in the common law, the process of furnishing an adverse security assessment to a Commonwealth agency is subject to a requirement to accord procedural fairness, of a kind appropriate in the circumstances, to the person who would be affected by an adverse assessment. This is because of the potential for

serious adverse consequences for the person who is the subject of the adverse security assessment. In support of this, the applicant relies on *Kioa v West* (1985) 159 CLR 550 (*'Kioa'*) at 582-583, and *Annetts v McCann* (1990) 170 CLR 596 (*'Annetts'*) at 598-9 per Mason CJ, Deane and McHugh JJ.

33 In *Kioa*, Mason J said at 582:

> *'It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it... . The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.'* (References omitted.)

34 In *Annetts*, Mason CJ, Deane and McHugh JJ said (at 598-9):

> *'It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain* [statutory] *words of necessary intendment ... an intention on the part of the legislature to exclude the rules of natural justice was not to be assumed nor spelled out from "indirect references, uncertain inferences or equivocal considerations".*
>
> *...the critical question in the present case is ... whether the terms of the* [relevant legislation] *display a legislative intention to exclude the rules of natural justice and in particular the common law right of the appellants to be heard in opposition to any potential finding which would prejudice their interests.'* (References omitted.)

35 The second contention is that the ASIO Act does not exclude procedural fairness, because, following *Annetts*, the necessary intention to do so is not apparent from the terms of the ASIO Act. The applicant submits that, although Part IV of the Act expressly provides a degree of procedural fairness for some persons (namely Australian citizens and certain visa holders) in relation to the making of an adverse security assessment, that does not exclude a requirement for the basic elements of procedural fairness to be afforded to any other person who is the subject of a possibly adverse security assessment but who is excluded from most of Part IV of the ASIO Act. In this regard, the applicant relies on *Baba v Parole Board of NSW* (1986) 5 NSWLR 338, arguing that an intention to exclude procedural fairness in

certain respects is not to be inferred from the presence in the statute of rights which are commensurate with some of the rules of natural justice. In this context, the applicant also drew attention to *State of South Australia v Slipper* (2004) 136 FCR 259 ('*Slipper*') at [110] per Finn J: 'It is one thing positively to exclude merits review, particularly review of an expansive kind. It is another positively to exclude procedural fairness as such'.

36 The applicant further relies on the separate judgments of Gaudron, McHugh and Kirby JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. Gaudron J said (at [90]):

> '*...if natural justice is a common law duty, the question is whether the provisions of that subdivision manifest a clear intention that that duty be excluded. On the other hand, if the rules of natural justice are seen as implied by the common law, the question is whether the provisions ... manifest an intention that that implication not be made. Whatever approach is adopted, in the end the question is whether the legislation, "on its proper construction, relevantly (and validly) limit[s] or extinguishe[s] [the] obligation to accord procedural fairness."* ' (Footnotes omitted.)

37 McHugh J said (at [139]) that it was an error to –

> '...[infer] *from the presence of some matters concerned with natural justice that Parliament intended to exclude natural justice in all other respects*'.

38 Speaking of the Migration Act and its provision of a code of procedure for dealing fairly, efficiently and quickly with visa applications, Kirby J said (at [181]):

> '*...because the obligation to conform to the rules of natural justice is so deeply entrenched in the assumptions upon which our law is based, it can normally be treated as implicit in legislation enacted by the Parliament. It would require much clearer words ... to convince me that the provisions of the Code exhaust the applicable rules of natural justice, although not mentioned and however important such requirements might be in the particular case.*' (Footnotes omitted.)

39 Thirdly, the applicant contends that, given that the requirements of procedural fairness have not been excluded, the minimum content of procedural fairness required that the affected person's attention be brought to the critical issue or factor on which the decision is likely to turn: *Kioa*; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 233, per Gummow J. The applicant accepts that the content of procedural fairness depends upon the circumstances: *Mobil Oil Australia Pty Ltd v Federal*

Commissioner of Taxation (1963) 113 CLR 475 at 514, but submits that such a requirement is fundamental, on the basis that 'the concern of procedural fairness is to avoid practical injustice': *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37].

40 Fourthly, the applicant rejects the claim by the first respondent that the public interest in the maintenance of national security prevents ASIO from notifying the applicant of the nature of the allegations against him, even if only in summary form. In this regard, the applicant argues that there must be credible evidence, rather than mere assertion, to establish that there are national security interests involved: *CSSU v Minister for Civil Service* [1985] AC 374 at 406G-H, 420E-F; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at 184, 193.

41 The applicant further submits that those interests did not effectively reduce the content of procedural fairness to such an extent that ASIO was not required, before making the adverse security assessment, to give the applicant sufficient information about the objections raised against him to enable him to answer them. The applicant acknowledges that procedural fairness interests may be adjusted downwards in the course of protecting another public interest, but, relying on *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314 ('*Chu*') at 329G, per Carr and Sundberg JJ, argues that the countervailing interests are such that ASIO should not be released from a minimum requirement that the person whose interests are at stake be alerted to the critical issue or issues, or informed of the 'essential features' of the adverse, but confidential, information.

42 In *Chu*, Carr and Sundberg JJ said (at 328):

> *'The question which the appellant wants answered by way of judicial review is whether the delegate fairly disclosed to him all that could properly be disclosed of the material which is both personal and adverse to him, consistent with the protection of the public interest in maintaining confidentiality about the source of the information. ... It seems to us that a balance can be struck between preserving* [the public interest in protecting the source of information by the imposition of secrecy] *and ensuring that there has been procedural fairness, by the Court examining the confidential material and assessing whether the summary is a fair one. We do not see this as any reflection upon the integrity of the decision-maker. ... Judicial review of the confidential material might be seen simply as the price payable ... for adjusting procedural fairness requirements downwards in the course of protecting another public interest.'*

43 Their Honours went on to state (at 329):

> *'In our opinion, ...the applicant was given "...sufficient information of the objections raised against him such as to enable him to answer them" to adopt the language of Lord Denning MR in* R v Gaming Board for Great Britain; Ex parte Benaim *[1970] 2 QB 417 at 431. See also* Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic *(1990) 21 FCR 193 at 223; 92 ALR 93 at 124. We consider that the appellant was quite clearly accorded procedural fairness. A comparison of the* [summary] *and the confidential material demonstrates that the respondent went to considerable lengths to achieve that end.'*

44 Specifically addressing the evidence of what was put to the applicant, the applicant says that an invitation 'to comment on the issue of whether he is a threat to security generally and, specifically, that he may have engaged in acts of foreign interference' is too vague. The applicant says that he was questioned by ASIO officers on some matters, however, these questions did not amount to allegations, so that no 'case' against the applicant was disclosed to him, nor does he know whether the matters on which he was questioned are or form any significant part of those of current concern to ASIO.

45 The applicant asserts that because ASIO failed to provide an outline of the case against him before making the adverse security assessment, such an assessment is vitiated by a denial of procedural fairness and is therefore void. Consequently, the Minister's decision to cancel the applicant's visa, based as it was on the Assessment, is also void.

(ii) Respondents' Submissions

46 The primary submission for the respondents is that the public interest in protecting national security precluded the applicant being given *any* notice of the particular grounds on which the first respondent proposed to make the Assessment. The respondents contend that it would be prejudicial to Australia's national security, and thus against the public interest, for confidential information relied on in the Assessment, as well as ASIO's discussions of and conclusions drawn from that material, to be disclosed to the applicant. The reasons given for such a contention include that:

(1) it is in the public interest to maintain an organisation (ASIO) with the functions and responsibilities set out in s 17(1) of the ASIO Act (which include obtaining, correlating and evaluating intelligence relevant to security and advising Ministers and

authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities); and

(2) it is fundamental to the effective operation of the ASIO that the strictest possible secrecy be maintained in relation to its areas of interest, the identity of its targets, the extent of its ability to obtain intelligence in relation to these targets, its sources, investigative techniques and work methods, its successes and the information derived in relation to these targets.

47 As to the statutory regime, the respondents begin with the uncontentious submission that the general requirements of procedural fairness may be excluded by express words or necessary implication: *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-6 per Dixon CJ and Webb J (with whom Taylor agreed), affirmed in *Annetts* and *Kioa.*

48 There being no express exclusion of the requirement for procedural fairness, the respondents say that any such requirement has been excluded by necessary implication. In determining whether the statutory scheme impliedly excludes procedural fairness, the respondents submit that the kinds of matters necessarily or likely under consideration by a decision-maker are relevant. Those matters may be, by their nature, irreconcilable with the existence of an obligation to accord procedural fairness. Among other cases, the respondents cite *Marine Hull & Liability Insurance Co Ltd v Hurford and Anor* (1985) 10 FCR 234, in which Wilcox J accepted that procedural fairness will be excluded in cases where the legislature contemplates that a power will always be exercised in circumstances of urgency.

49 The respondents say that the present statutory regime is such a case. It is argued that, given the distinctive features of the ASIO legislation, it would be inconsistent with the statutory purposes to superimpose a free-standing, but unstated, 'ambulatory obligation' to accord procedural fairness at the original decision-making stage. The respondents refer particularly to the following features:

(1) Part IV of the ASIO Act sets up an *ex post facto* regime of procedural fairness for the benefit of Australian citizens and permanent residents, but not others. An obligation to accord procedural fairness at an earlier stage – the original decision-making stage – for the remaining classes of persons would therefore be inconsistent.

(2) Section 36(1) was intended to reduce, rather than increase, some persons' rights to procedural fairness. An implied obligation to accord procedural fairness to persons who are not citizens etc. would be anomalous because it would increase and enlarge the rights of such persons under the ASIO Act over those of citizens etc., which is unlikely to have been the parliamentary intention.

(3) If the procedural fairness obligation contended for by the applicant were to be accorded under the ASIO Act, this would confound the operation and purposes of s 36(1).

50 In the course of argument, counsel for the respondents drew the Court's attention to the wide discretion in relation to disclosure reposed in the Director-General by s 37 of the ASIO Act and in the Attorney-General by s 38 of the ASIO Act. The respondents argued that the vesting by the Parliament of *discretionary* decisions as to disclosure in the Director-General and in the Attorney General meant that it would be inconsistent for there to be an *obligation* of disclosure by an ASIO decision-maker, pursuant to the rules of procedural fairness, at the primary stage before a decision was made.

51 Attention was also drawn to the 'safeguards' listed in the Fourth Report of the Royal Commission on Intelligence and Security, Parliamentary Paper No. 248/1977 ('the 1977 Royal Commission Report') under the heading 'Accountability to the Parliament and people'. The only relevant safeguard listed is: 'In respect of many matters where the rights of individuals are involved, there will be a right of review by an independent tribunal.' The respondents say it is noteworthy that the Commissioner, Hope J, made no reference to procedural rights to be heard before the primary decision.

52 In the event that the rules of procedural fairness are found to remain applicable to the statutory scheme, the respondents accept that ordinarily, there is a requirement that the *substance* of the adverse material be disclosed to the person affected. I permitted an adjournment so that the respondents could place before the Court confidential evidence confirming that consideration has been given to whether any part or summary of the grounds for the Assessment might be disclosed to the applicant, without undue prejudice to national security. The Director-General's further evidence was to the effect that that could not be done, for reasons he gave.

53 The respondents have therefore maintained the position that no part or summary of the grounds for the Assessment could have or should now be provided to the applicant. Counsel rely on two well-recognised exceptions as applying in the present case, the first being that procedural fairness does not require disclosure of confidential information if to do so would harm the public interest on national security grounds: *Salemi v McKellar [No 2]* (1977) 137 CLR 396 (*'Salemi'*); *Slipper*; *Amer v Minister for Immigration, Local Government and Ethnic Affairs (Nos 1 and 2),* Unreported per Lockhart J, 18 and 19 December 1989; *Fernando v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 975; *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562; *Chu.*

54 In *Salemi* at 421 Gibbs J said:

> *'Reasons of security may make it impossible to disclose the grounds on which the executive proposes to act. If the Minister cannot reveal why he intends to make a deportation order, it will be difficult to afford the prohibited immigrant a full opportunity to state his case, for he may not know what it is that he has to answer. This is not to say that it might not be practicable for the Parliament to provide a procedure for the review of deportation orders ... but the Parliament has not done so.'*

The respondents further rely on the remarks of Brennan J in *Kioa* (at 616):

> *'There are occasions when, as Gibbs J. pointed out in* Salemi [No. 2], *reasons of security may make it impossible to observe the principles of natural justice in ordering deportation ...the need for peremptory exercise of that power on occasions is no more than a factor to be borne in mind in determining whether the legislature intends to exclude entirely the application of the principle of natural justice. To determine whether the legislature's intention is to condition the exercise of a statutory power upon observance of the principles of natural justice – the threshold question – one must have regard to the text of a statute creating the power, the subject-matter of the statute, the interests which exercise of the power is apt to affect and the administrative framework created by the statute within which the power is to be exercised.'*

55 It is also relevant to note his Honour's previous comments at 615:

> *'...the intention to be implied when the statute is silent is that observance of the principles of natural justice conditions the exercise of the power although in some circumstances the content of those principles may be diminished (even to nothingness) to avoid frustrating the purpose for which the power was conferred.'*

56 This passage was later cited in *Johns v Australian Securities Commission* (1993) 178

CLR 408, where McHugh J said at 472:

> *'The need to protect the confidentiality of the [Commission's] investigation does not exclude procedural fairness, but reduces its content, perhaps in some circumstances to nothing.'* (Footnotes omitted.)

57 The second exception relied on by the respondents is that procedural fairness does not require the giving of notice, provision of information, or of a right to be heard where to do so would frustrate the purpose for which a particular power has been conferred: *Kioa* per Mason J at 586; *Johns* per Brennan J at 431; *Slipper* per Finn J at [113(ii)].

58 The respondents point to the practical effect of requiring decision-makers to balance competing public and private interests in areas concerning national security, submitting that such a requirement would impose an intolerable burden upon them. Further, those who review their decisions (such as judges) are not well placed to assess the harm to Australia's national security, which may arise from disclosure. The protection afforded to matters of national security should be identical to that afforded to the confidentiality of Cabinet deliberations.

59 In *Alister v R* (1984) 154 CLR 404, Wilson and Dawson JJ said (at 435):

> *'The outstanding feature of the claim to immunity is the nature of the public interest which the Minister seeks to protect. Questions of national security naturally raise issues of great importance, issues which will seldom be wholly within the competence of a court to evaluate. It goes without saying in these circumstances that very considerable weight must attach to the view of what national security requires as is expressed by the responsible Minister'.*

60 In that same case, Brennan J also acknowledged (at 455) that a court is 'ill-equipped itself to evaluate pieces of intelligence obtained by ASIO'.

61 Finally, the respondents submit that, although the seriousness of the consequences occasioned to a person by the exercise of power will also usually be relevant to the question of whether procedural fairness is excluded by necessary implication, in the present case the weight that may properly attach to this factor is much less than usual, because of the interaction of the provisions in the present statutory regime.

(iii) Consideration

62 The principles to be applied in relation to the legislative exclusion of procedural fairness were summarised by Finn J in *Slipper* at 279-280 (with whom Branson and Finkelstein JJ agreed at [71] and [148]) and I respectfully adopt the following summary by his Honour:

> *(i)* ***when a statute confers a power on a public official the exercise of which affects a person's rights, interests or expectations, the rules of procedural fairness regulate the exercise of that power unless those rules are excluded by express terms or by necessary implication…;***
>
> *(ii)* ***a legislative intention to exclude the rules will not be assumed or spelled out from indirect references, uncertain inferences or equivocal considerations…;***
>
> *(iii) an intention to exclude should not be inferred merely from the presence in the statute of rights which are commensurate with some of the rules of procedural fairness…;*
>
> *(iv) while the rules may be excluded because the power in question is of its nature one to be exercised in circumstances of urgency or emergency… urgency cannot generally be allowed to exclude the right to natural justice… although it may in the circumstances reduce its content…'.* (Emphasis added, references omitted.)

63 In the absence of any such express words under the ASIO Act, s 15AB of the *Acts Interpretation Act 1901* (and see also *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408) permits resort to extrinsic materials in the exercise of statutory construction. Such an approach is required to consider whether procedural fairness was, in the circumstances, excluded by *necessary* implication under the ASIO Act. The provisions that may give rise to any such implication do not exist in a vacuum – they are part of a statutory framework.

64 The current provisions of the ASIO Act have their genesis in two Bills: the Australian Security Intelligence Organisation Bill 1979 (the 1979 ASIO Bill) and the Australia Security Intelligence Organisation Amendment Bill 1986 (the 1986 ASIO Bill).

65 The Second Reading Speech for the 1979 ASIO Bill in the House of Representatives on 22 May 1979 indicated:

'These reforms were recommended by the Royal Commission on Intelligence and Security constituted by Mr Justice Hope after a thorough and searching examination of the needs of the nation for a security service. ...

This legislation enacts these reforms and substantially follows the recommendations of the royal commission which are set out in the reports tabled on 25 October 1977. ...

The statutory procedures for notification of security assessments and for rights of appeal in large part implement the recommendations of Mr Justice Hope. They represent the first attempt, at least in a common law country, to provide a comprehensive statutory framework regulating the making of security assessments of individuals and providing a right of appeal to an independent judicial tribunal. They therefore represent one of the most important steps taken in this Parliament for many years directed to the protection of the rights of individuals.'

66 The reasoning of the Royal Commissioner is therefore significant in understanding Parliament's intentions in relation to procedural fairness under the statute. In the Second Report of that Royal Commission, Parliamentary Paper No. 247/1977, Hope J said (at [134], [136]):

'The understandable desire of individuals to have all the rules of natural justice applied to security appeals must be denied to some extent, unfortunate though this may be. The extent of the denial may vary in different cases. I do not think, however, that a ***security appeals system*** *in which the appellant always had the right to hear all the evidence and to cross-examine all the witnesses, without restriction, would be either possible or desirable.* ***In some cases, it may not be possible to inform the appellant of the whole of the cases against him, although he must always be told as much of that case, and all the rules of natural justice must be applied as fully as is consistent with the national interest.*** *...*

...

In some cases*, in addition to the protection of sources,* ***the security issue involved in the case may be so sensitive that to give any information concerning it to the appellant will be impossible. This situation would not arise in many cases.*** *But it is apparent that counter-espionage or counter-intelligence considerations may preclude the giving of any warning by way of notification to a person that he is the subject of an adverse assessment. Such a proposition cuts more across the rules of natural justice than do the propositions described above. But it too is justified by the same considerations.'* (Emphasis added.)

67 The comments of the Royal Commissioner specifically refer to a possible security

appeals process, however the policy reflected in the passage is clear: at the review level, the rules of procedural fairness should apply as fully as is consistent with the national interest. Where the national interest in protecting security is inconsistent with the provision of information in accordance with procedural fairness principles, the protection of the national interest prevails.

68 There appears to have been no discussion in the Report of what rights should exist in relation to the matters occurring prior to any right of review arising, (and before the making of the actual assessment). It is, however, fair to say that Hope J seems to have assumed that the demands of security would necessarily be inconsistent with any express prescription of a right to be heard at first instance. There are problems about the validity of that assumption and, in any case, about using an indirect inference from such silence to ground or support an indirect inference which, admittedly with some degree of force, arises from the Act. Thus, if a person has a feasible right to be told as much of the case as the interests of national security will allow at a review level, then the same right might reasonably be said to exist at the initial assessment stage. Further, the task to be undertaken is not to consider whether there is any clearly positively implied intention that procedural fairness requirements apply; rather, it is to consider whether there is a *necessary* implication that such requirements do *not* apply. In this regard, I respectfully agree with Finn J's comment in *Slipper* at [111]:

> *'...against the background of a clearly recognised need to "strike a balance" between private and societal interests, one would have expected the legislature to have spoken with unmistakable clarity if it was to deny rights of procedural fairness that could otherwise have been made available...'.*

69 In my view, the 'unmistakable clarity' that procedural fairness was to be denied under the ASIO Act is lacking.

70 The respondents' argument that the necessary implication arises from, among other things, the discretion given to the Director-General and Attorney General on matters of disclosure after the assessment has been made has considerable force. However, the starting position created by the legislation is that an Australian citizen (or permanent resident) who is the subject of an adverse security assessment is ordinarily entitled to notification of that fact and to a statement of reasons. The fact that a discretion exists to *exclude* those requirements of procedural fairness does not necessarily *require* the exclusion of an appropriate degree of

procedural fairness at an earlier stage of the assessment process for non-citizens. Ultimately, any effective content for the presumed requirement of procedural fairness at the primary decision-making stage may be overridden by national security concerns, but it is not *necessary* that it be so excluded from the outset.

71 That is not, however, the end of the issue. In the 1977 Royal Commission Report, under the heading 'Appeals', Hope J said:

> *'The recommendations in my second report as to a right of appeal for Commonwealth employees to a special tribunal should be applied* mutatis mutandis *to any person who is the subject of an adverse or qualified security assessment in relation to an entry permit, deportation, citizenship, or passport application or is acting as a citizenship agent or immigration agent who is either*
>
> - *an Australian citizen or*
> - *a person whose continued presence in Australia is not subject to any limitation as to time imposed by law.*
>
> *Australian citizens and permanent residents should have a right of appeal whether or not they are in Australia at the time of the security assessment, the lodging or the hearing of the appeal, or at any of those times.* ***The claim of non-citizens who are not permanent residents but who are in Australia to be entitled to such an appeal is difficult to justify, particularly as they have no general appeal. I shall recommend that they have no such right.'*** (Footnotes omitted, emphasis added.)

72 This shows a policy, consistent with s 36 of the ASIO Act, that non-citizens etc. who do not hold permanent residency visas (such as the applicant) will not have access to a right of review, nor to the aforementioned procedural fairness requirements *at the review level* as a consequence. There are now also generally available to all non-citizens etc. elaborate rights of administrative appeal to the Migration Review Tribunal and the Refugee Review Tribunal. The ASIO Act should, in the latter regard, be seen as 'always speaking'. As Bennion (*Statutory Interpretation,* 4th ed,) puts it (at 762):

> *'It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as* always speaking. *This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.'*

The possible difficulties noted by Pearce and Geddes (*Statutory Interpretation in Australia*, 5th ed., at 95) as to consistent application of this notion (earlier judicial interpretation of a statutory term, and a statutory codification of the law) do not arise here.

73 Also, by the operation of s 36 of the ASIO Act, non-citizens have no right to receive a statement of reasons for the assessment, nor indeed any statutory right to be notified of an assessment. However, pursuant to s 119 of the Migration Act, a non-citizen whose visa was to be cancelled as a result of an adverse security assessment would necessarily be informed of the reason for cancellation (c.f. s 127 Migration Act) and so, when a security assessment is to be used to end his/her continued lawful presence in Australia, does have an indirect right to receive notification of the fact of the assessment. Indeed, the Minister, pursuant to the Migration Act, has an express obligation to afford the non-citizen who is present in Australia natural justice, the content of which is statutorily defined – see ss 118A to 127. That the Minister has no obligation to give 'non-disclosable information' (s 120(1)) (which term is defined to include material the disclosure of which would, in the Minister's opinion, prejudice Australian security) goes only to the practical content of the natural justice rule in the circumstances, not its basic existence.

74 The question thus arises whether, by providing in the ASIO Act for non-citizens etc. not to have the rights of review, of notice and of reasons available to citizens, Parliament must be taken to have intended to deny such persons any right at all to procedural fairness. Put another way, did Parliament intend to distinguish between citizens and non-citizens in relation to *any* obligation to afford any degree of natural justice?

75 In *Kioa*, Gibbs CJ said (at 564):

> *'The Court of course recognized the fundamental principle that anyone within the territory of Australia – including an alien who is a prohibited immigrant – is entitled to the protection of the laws, including, in appropriate cases, the application of the principles of natural justice: see* Salemi...*at...420.'*

76 In the same case, Mason J said at (583-585):

> *'It has been said on many occasions that natural justice and fairness are to be equated: see, e.g.* Wiseman v Borneman...Bushell v Secretary of State for the Environment.... *And it has been recognized that in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to*

accord procedural fairness. ...

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary [statutory] *intention.*

... The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?' (Footnotes omitted.)

77 Such expositions of the law by their Honours command respect and adherence. In the absence of express words, for the requirements of procedural fairness at the primary decision-making stage not to apply to non-citizens under the ASIO Act, the Court must be able to discern or impute a plain and unmistakable intendment to that effect by the Parliament. Otherwise, following *Kioa*, the presumption is that both citizens and non-citizens in Australia are entitled to the protection of Australian laws, including the requirements of procedural fairness.

78 It may be thought that an intention to exclude procedural fairness at the *primary* decision-making stage would logically arise from the fact that non-citizens have no right to be notified of a decision, since it may be difficult to maintain that people owed no obligation to be told that a decision has even been made, have a right to be heard before the making of that decision. Counsel for the applicant submitted, however, that it was precisely because non-citizens had no recourse to the review procedures available to citizens, nor any express right to reasons or notification, that a procedural right to be heard in relation to the case to be met at the primary decision-making stage is of crucial importance in the operation of the statute. In any case, as indicated above (see [73]), non-citizens *in the applicant's position* – that is to say, where an adverse assessment is likely to be used as a basis for cancellation of their visas – do have a right to be, and will be, informed of the decision. When it is in contemplation that an adverse security assessment is to be used in relation to the cancellation of a visa, the position may therefore be different from that where the assessment is undertaken for other purposes.

79 Further, the gulf in what might be thought to be the circumstances, as between citizens etc. on the one hand, and other persons lawfully here, on the other, that might activate

Parliament to consider whether and how to afford people fair treatment may not necessarily be so great as, at first blush, might be assumed. The present case affords an example. The applicant has lawfully resided in Australia for over a decade. He is a religious leader who, whatever other circumstances may affect his position, appears to have performed valuable community services by reason of his multi-lingual capacities and his degree of religious leadership. He has children who have become Australian citizens. His deportation may well cause hardship to utterly blameless Australian citizens and permanent residents. In the face of a statutory scheme providing for security assessments that will automatically make persons in such a position liable to deportation, as well as others with fewer community ties, it is my view that the negation of the presumption of procedural fairness for non-citizens, in the sense suggested in *Kioa* (above), would require more than the indirect negative implications which can be drawn from the ASIO Act.

80 That the subject matter of a security assessment involves consideration of a national security issue, and that such an assessment will probably often rely on material the disclosure of which might prejudice national security are, in themselves, important considerations. But decision-makers in Australian agencies concerned with national security are unlikely to be less prone to mistakes than those decision-makers (and final givers of advice) in our larger and longer practised allies, or in non-security agencies of many kinds. In *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004), Lord Hoffman commented (at [94]) on the 'widespread scepticism which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destruction'. Indeed, the capacity for avoiding error may be thought to grow in the sunlight of the opportunity for correction by affected persons (and, where possible, of public scrutiny), and to wither where secrecy and unreviewability reign.

81 Nor is it inevitably the case that an adverse security assessment will depend on material that of its nature or by reason of its sources demands confidentiality. Some foreign powers are strident about their ambitions even when Australia might regard them as nefarious. Some ideologically motivated individuals who advocate and are prepared to promote revolution, insurrection, terror or communal violence likewise do not hide their light under a bushel. At least where public conduct of a security-assessed person is relied on, there is no point, based on protection of confidential materials or sources, in denying a right to be heard.

82 I accept that there may be a degree of potential 'hazard' to effective public administration, as counsel for the respondents put it, created by obliging the primary-decision maker (the Director-General or relevant delegate), to estimate what a court may later regard as being sufficient or insufficient disclosure. A consequence may be that, because of material security considerations which *de facto* may be unreviewable, a great deal of responsibility must rest with the Director-General or his/her delegate in assessing what may be disclosed. However, it is my view that an obligation positively to consider what concerns and how much detail might be disclosed to the subject visa holder to permit him/her to respond, without unduly detracting from Australia's national security interests, is minimally necessary to ensure a fair decision-making process. Further, on balance, such a requirement is not sufficiently clearly shown to have been excluded by necessary statutory implication. Any extra burden on the Director-General, in that regard, is not likely to be significant when compared with his/her other very weighty responsibilities. As appears below, it seems inescapable that, even where the Director-General's assessment of the necessary extent of confidentiality might be challenged in a court, the court will, in practice, be very dependent on the Director-General's views and especially so in urgent cases.

83 Thus, in relation to a lawful non-citizen etc, such as the applicant, whose visa would be directly threatened by an adverse security assessment, there was, in my view, a duty to afford such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security, at the primary decision-making stage.

84 The question remains, then, whether the duty was discharged in the present case. The difficulty of making findings in relation to disclosure, without the assistance of an independent expert, was canvassed with counsel during the proceedings but no such evidence was adduced, nor was there any subsequent application to me on that subject (c.f. Federal Court Rules, O 34 r 2). Mindful in a general way of Lord Hoffman's remarks, but without the benefit of countervailing expert evidence in the present case, I am not in a position to form an opinion contrary to those expressed in the confidential affidavit evidence in relation to disclosure. I reiterate the general point made by Wilson, Dawson and Brennan JJ in *Alister* (above) that Courts are ill-equipped to evaluate intelligence. More recently in *A & Ors*, and in the context of United Kingdom anti-terrorism legislation, Lord Nicholls of Birkenhead said (at [79]):

> *'All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.'*

85 Similar considerations have weight in relation to deciding whether and how such material in security assessments, involving judgments about alleged activities, circumstances and/or relationships to foreign governments or organisations, which material has been treated as strictly confidential, ought now to remain so treated, even at the cost of risking unfairness of a serious kind to an individual.

86 In consequence, in this case and no doubt often (but not, I should think inevitably), the obligation referred to in [83] will be discharged by evidence of the fact and content of such genuine consideration by the Director-General personally. If the court should find, with or without countervailing expert opinion, that such a task has not been adequately undertaken, the result would appear to be that consideration must be given to that issue *de novo* by the court.

87 This is not to suggest that a court must uncritically take the Director-General's reasoning for any non-disclosure entirely at face value, so as to delegate conclusive assessment of the balancing of the public interests in the fair treatment of individuals by administrative decision-makers and full and proper investigation of relevant facts by the courts against the public interest in the national security to the Director-General. It is merely to state that recognition and respect must be given to the degree of expertise and responsibility held by relevant senior ASIO personnel in relation to the potential repercussions of disclosure and the usual lack of such expertise on the part of judges (myself included, despite some degree of exposure to debate over the security implications of the disclosure of security-oriented confidential materials which is greater than that usual among judges) and that a degree of faith must, as a practical matter, be reposed in the integrity and sense of fair play of the Director-General. If this is unsatisfactory, the remedy lies in Parliament's hands.

88 In the circumstances of the present case, I am persuaded, having read and had debated the confidential material before me, that genuine consideration has been given, by the

Director-General, to the possibility of disclosure, but that the potential prejudice to the interests of national security involved in such disclosure appears to be such that the content of procedural fairness is reduced, in practical terms, to nothingness. In my view, expanded upon in my confidential reasons, the applicant was accorded procedural fairness to the extent that the interests of national security permitted. For the reasons given by the then Director-General in confidential material before the Court, it appears that it was not possible to put even a summary of the case against the applicant to him without compromising the interests of national security. It follows also that the content of the reasons for assessment is such that the public interest in national security prevents any useful part of them from being shown to him or made public.

89 Accordingly, the requirements of procedural fairness were satisfied in this case, with the result that the ground based on a supposed denial of such fairness fails.

90 I should not leave this aspect of the matter without recording my view that the degree of comfort the applicant and interested members of the public may take from the fact of a judge having carefully and, so far as possible, critically read the relevant material before coming to the decisions I have is regrettably limited. In *Amer v Minister for Immigration, Local Government and Ethnic Affairs (No 1)* Unreported, 18 December 1989, Lockhart J said:

> *'In my opinion, having carefully considered submissions of counsel, the competition between the interests of justice to the applicants on the one hand and the interests of national security on the other calls for the documents not to be disclosed to counsel for the applicant or any other person on behalf of the applicant. Accordingly, I decline to allow that inspection.*
>
> ...
>
> *There is no perfect solution to a problem such as has arisen here. For the Court not to have inspected the documents would have placed the applicants in an invidious position. At least they have the comfort of the fact that a judge has inspected them and reached the view which I have indicated.'*

91 With respect to that distinguished judge, I offer no such sanguinity of consolation. In the first place, the merits and validity of ASIO's assessment that the applicant is a risk to Australia's national security are not a matter that, in a judicial review proceeding like this, are for the court to pass upon. Secondly, as to how much if any of the reasons for the Assessment could safely be exposed to the applicant, I have expressed concerns about my own ability to

make an assessment of whether the Director-General's concerns truly are reasonably based on probative materials. I have simply done what I regard as my inadequate best. The reasons, or lack of them, for public confidence in the Director-General's assessment are only very marginally affected by my consideration of the matter, if at all.

92 I hasten to say that I have no positive reason to doubt the Director-General's evidence and opinions nor should anything I say be taken as indicating any reason for lack of public confidence in them. It is simply that even a sceptical judge out to defend civil liberties and human rights, but without either independent expert assistance or considerable and recent experience of security cases, is not in as good a position as is desirable to make a judgment on the matter.

(B) OTHER JURISDICTIONAL ERROR

93 I now turn to consider the claim that the Assessment was void and inoperative by reason of other jurisdictional error. The issues are the first respondent's alleged failure firstly, to construe correctly the definition of 'security', and secondly (and consequently), to consider whether the applicant's acts and conduct met the essential requirements of being 'acts of foreign interference'.

94 The arguments in relation to these grounds were entirely addressed in confidential submissions by the applicant and the respondents, and in closed court proceedings.

95 For the reasons given in the confidential part of my reasons, I have formed the view that the decision-maker's approach to the definition of 'security', was not infected by jurisdictional error.

96 I am also satisfied that there was no jurisdictional error in relation to whether the applicant's acts and conduct met the essential requirements of being 'acts of foreign interference', again for the reasons given in the confidential part of the reasons.

97 As the claims against the second respondent are dependent upon the success of any or all of the claims against the first respondent, it follows that the applicant has also been unsuccessful in establishing his claim against the second respondent.

DISPOSITION

98 The application will be dismissed. Further submissions on costs will be received.

99 It will already be apparent from these reasons that there is an additional part of this judgment that is to be kept confidential. I will hear submissions as to how, in respect of whom and for how long, that confidentiality is to be maintained. The additional part contains some material that could, without harm, be made public but it is either meaningless or adds nothing to the publicly available materials without the context of the other material in that part which, in my opinion and having regard to the undisputed evidence from the Director-General, should remain confidential. When the meat of the additional part is to remain confidential, there is, perhaps, little point in putting the wrapping paper on display, merely for the sake of excessively emphasising my anxious desire to have as much as is practicable published.

Addendum: Security considerations in relation to the proceedings

100 The considerable efforts made by the representatives of the parties and the Court in relation to the preservation of the confidentiality of certain documents and parts of these proceedings should be documented, for whatever possible value this experience might have for other cases.

101 At the instigation of the first respondent, counsel for the applicant and the applicant's instructing solicitor, of their own volition, after giving appropriate undertakings as to confidentiality, underwent a process of obtaining a security clearance, in order that they might obtain, in accordance with my direction or by consent (as the case may be), access to the confidential material put before the Court. The granting of such access to counsel for the applicant and his instructing solicitor proved, as one would expect, a beneficial arrangement.

102 As proposed by the first respondent, employees and legal representatives of the first respondent facilitated the transport and storage of the confidential material, including the confidential transcripts and associated court documents.

103 A secure computer, printer and office facilities were provided for the applicant's legal

representatives to produce their confidential submissions, and a secure computer, printer, briefcase and appropriate safe were provided to the Court for the purpose of storing documents and preparing the judgment.

104 Arrangements were made for the attendance of an appropriately security-cleared court officer and transcript staff to assist with the closed court proceedings. Having complete confidence in my Associate, I declined to direct that she undergo a security clearance process, although she was willing to consent to such a procedure. She was, however, as indeed all in-Court staff were, closely briefed in relation to procedures as to accessing confidential information and storage procedures etc. to allow her to assist me with the preparation of this judgment.

105 The publication of these reasons was withheld until any alleged security concerns in relation to the release of the public part of this judgment had been addressed.

I certify that the preceding one hundred and five (105) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Madgwick

Associate: V. McWilliam

Date: 10 November 2005

Counsel for the applicant:	Mr Peter Hanks QC
Solicitors for the applicant:	Deacons
Counsel for the respondents:	Mr N Williams SC / Mr T Howe
Solicitors for the respondents:	Australian Government Solicitor
Dates of Hearing:	22 & 23 November 2004, 3 & 4 March 2005
Date of Judgment:	10 November 2005