

## **Attorney-General's Department response to a question on notice regarding processes for providing information to the subject of an adverse security assessment in other jurisdictions**

### **United Kingdom**

The Special Immigration Appeals Commission (SIAC) deals with appeals in cases where the Secretary of State for the Home Department (Home Office) exercises statutory powers to deport, or exclude, someone from the UK on national security grounds, or for other public interest reasons.

The Secretary of State may wish to rely on material which he or she objects to disclosing to the appellant or their representative for reasons of national security or public interest. In such cases, a Special Advocate may be appointed to represent the interests of the appellant in an appeal hearing before the SIAC. The functions of a Special Advocate are to cross-examine witnesses, make written submissions and to make submissions at any hearings from which the appellant parties have been excluded.

### **Canada**

Canada utilises a security certificate process within the *Immigration and Refugee Protection Act* to remove non-Canadians who have no legal right to be there and who pose a serious threat to Canada and Canadians.

The Minister of Public Safety and the Minister of Citizenship and Immigration review and sign security certificates. Once signed, security certificates are referred to the Federal Court. The *Immigration and Refugee Protection Act* allows the federal government to use, and a judge to consider, classified information in closed proceedings. During closed proceedings, a special advocate has the ability to challenge claims that the disclosure of information used to support the security certificate would be injurious to national security or would endanger the safety of any person. The special advocate is authorised to cross-examine witnesses and make submissions to the Court. The special advocate is able to communicate with the subject of a security certificate without restriction until such time as they see the confidential information upon which a certificate is based.

An unclassified summary of the case is provided to the subject to inform the person and their counsel of the case against them. The summary must include sufficient information to reasonably inform the individual of the circumstances giving rise to the certificate, but it does not include anything, in the opinion of the judge, that would be dangerous to national security or the safety of any person if disclosed.

### **New Zealand**

In New Zealand, a visa or entry permission may not be granted to any person who the Minister has reason to believe is, or is likely to be a threat or risk to security, public order or public interest, or is a member of a terrorist entity.

A written statement of reasons must be given where a decision has been made relying on classified information, and the decision is prejudicial to the person concerned. However, reasons are not required to the extent that providing reasons would involve a disclosure of classified information that would be likely to prejudice security, or for decisions in relation to applicants for visas made in an immigration control area. An immigration control area includes an area for processing people arriving in and departing from New Zealand.

The Immigration and Protection Tribunal can hear appeals against decisions to decline to grant residence visas, decisions in relation to recognition as a refugee or protected person, decisions to

cease to recognise a person as a refugee or protected person, decisions to cancel the recognition of a New Zealand citizen as a refugee or a protected person, and liability for deportation. A special advocate is appointed to represent a person who is the subject of a decision made involving classified information or proceedings involving classified information. In a situation where a prejudicial decision is made against an individual in reliance on classified information, the individual must be informed, if appeal rights exist, of his or her right to a special advocate.

### **Australia**

The Independent Reviewer of Adverse Security Assessments provides independent review for those assessed to be a refugee but not granted a permanent visa as a result of an ASIO adverse security assessment. All refugees in immigration detention who are the subject of an adverse security assessment have access to this independent review option.

The Reviewer examines the materials used by ASIO and provides a recommendation to the Director-General of Security as well as reporting these findings to the Attorney General and the Minister for Immigration and Citizenship and the Inspector General of Intelligence and Security.

When an eligible person makes a request for independent review, they will be provided with an unclassified written summary of reasons for the decision to issue an adverse security assessment. The reasons will include information that can be provided to the eligible person to the extent able without prejudicing the interests of security.

The Reviewer will also conduct a regular 12 month periodic review of adverse security assessments for refugees in immigration detention.

The independent review mechanism takes into account the need to afford appropriate procedural fairness, while also protecting sensitive national security information, and applicants will be entitled to legal representation. It would therefore appear to be unnecessary for special advocates to play a role in the review of adverse ASIO assessments. The Reviewer has access to all information relied on by ASIO, and is able to seek additional information and briefing. This information may reveal confidential details of ASIO sources, capabilities and methodologies and it will not be made available to the review applicant or their legal representatives. The Reviewer has been appointed to provide independent review of the material and she may engage with the applicant where appropriate.

We note that international experience with special counsel and special advocates has shown them to be of some value, but they are not without their drawbacks. For example, a special advocate under UK legislation represents the excluded party's interests, but does not 'act' for the party and the party is not the client. Once the special advocate has received classified information they are barred from communicating with the party and the party's legal representative unless special permission is gained from the court. Another issue with the special advocate system is that as there are usually only a small number of special advocates conflict of interest issues may arise.