Secret evidence used in Australian “terrorist” trial

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In a development without precedent in Australia, secret evidence is being heard in closed sessions, with access denied to the public, the media and even the accused man and his lawyer, in a hearing of terrorist-related offences currently underway in Sydney. A magistrate has granted wide-ranging secrecy and suppression orders, in the first test of the Howard government’s latest “national security” legislation.

After months in a maximum security prison awaiting trial, Faheem Khalid Lodhi, a 34-year-old architect, was brought before the Central Local Court last week on nine charges, most alleging a conspiracy to commit terrorist acts in Sydney. The committal hearing will determine whether the Pakistani-born Australian citizen is sent for trial. On the opening day, the prosecution dropped a further charge of attempting to recruit a young student to a terrorist organisation.

Lodhi was bundled into the court building in shackles, in full view of the media. The display was intended to convey the impression that he is a violent and highly dangerous individual. Like several other Muslim men charged with terrorist offences in Australia over the past year, Lodhi has been denied bail and held in virtual solitary confinement in a “super max” prison, cut off from family and friends. Under state and federal “counter-terrorism” laws, the traditional presumption in favour of bail has been scrapped. It will only be granted in “exceptional circumstances”.

On receiving a confidential affidavit from the Commonwealth, Magistrate Michael Price imposed a number of secrecy orders despite vigorous objections by lawyers for Lodhi and by media organisations. The orders mean that the affidavit itself will remain suppressed, and the media is barred from disclosing even the general nature of the material relied upon in it.

Lodhi’s barrister, Phillip Boulten SC, opposed the government’s secrecy application as “completely unacceptable practice” and “extraordinary” and argued it would seriously disadvantage his client’s case. Much of what he said was heard in closed court, so it went unreported.

Dawid Sibtain, a lawyer representing four major media groups, criticised the affidavit as “hopelessly imprecise”. “It’s a blanket order [which] travels far beyond the issues necessary and far beyond that which is prescribed”, he told the court. He said the government’s argument would allow a baseless prosecution, motivated by “state and federal political interests”, to override the constitutional principles of open justice and freedom of communication.

Speaking for the Howard government in reply, Commonwealth counsel Tom Howe dismissed the constitutional right to have facts heard in court as “nonsense on stilts”. As a general rule, he insisted, national security should prevail when it conflicted with the right to an open trial.

This sweeping assertion, and the magistrate’s acceptance of it, illustrates the far-reaching and draconian character of the National Security Information (Criminal Proceedings) Act, which was pushed through federal parliament this month with the backing of the opposition Labor Party.

The Act permits trials on terrorism, espionage, treason and “other security-related” charges to be held in complete or partial secrecy. In closed court sessions, judges can allow government witnesses to testify in disguise via video and, in some circumstances, exclude defendants and their lawyers from trial proceedings. If a lawyer refuses or fails to obtain a security clearance, for example, a judge can exclude them from secret sessions, and from viewing transcripts.

If Lodhi or any other alleged “terrorist” is committed for trial, juries can be asked to convict them without seeing key evidence. With the judge’s permission, the prosecution can withhold testimony or other material from the accused and present it to the jury in summarised and censored form, preventing defence lawyers from questioning its credibility.

These provisions violate some of the most fundamental legal rights of an accused person, won in centuries of struggle against absolutist regimes. These include the right to hear all the prosecution’s evidence, cross-examine its witnesses to test their veracity and credibility, and expose its case to public scrutiny. The legislation flouts international human rights law, including the International Covenant on Civil and Political Rights, which enshrines an accused’s right to access, and respond, to all material being used against them.

The Act also rides roughshod over previous judicial rulings in Australia. For example, in March this year the country's supreme court, the High Court, rejected as “misconceived” a government application for a closed hearing of an appeal by a young man, Simon Lappas, who was jailed for trying to sell classified information to a foreign government. In Lappas’ case, an Australian Capital Territory Supreme Court judge also stayed one of the indictments against him after the prosecution claimed that key documents not be disclosed in the trial, on the basis of “public interest immunity”. The judge described the process as “redolent with unfairness”.

Speaking in the Senate on December 8, Labor’s spokesman, Senator Joe Ludwig, declared that the new Act provided the “right checks and balances”. In reality, it places enormous powers in the hands of the federal government and its political intelligence service, the Australian Security Intelligence Organisation (ASIO), which provides official assessments of national security and conducts security clearances.

The scope for political exploitation of these powers is multiplied by the extraordinarily wide definitions in the barrage of “anti-terrorism” laws introduced by the Howard government, with Labor’s assistance, over the past three years. Terrorism includes any conduct undertaken for a political, ideological or religious purpose, with the intention of coercing any government or section of people, which threatens to seriously damage or disrupt any official property or public infrastructure. This definition can cover legitimate forms of protest, including strikes, pickets, blockades and mass demonstrations.

In addition, no intention to aid terrorism needs to be proven. Being “reckless” about the likelihood of assisting terrorism can suffice and, in some instances, the onus of proof is effectively reversed, requiring the

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accused to prove that their actions were innocent.

Lodhi, for example, was charged with attempting to recruit Izzhar ul-Haque, a 21-year-old medical student, to a Pakistan-based organisation, Lashkar-e-Toiba (LeT) between March 2001 and April 2003, while being "reckless" as to whether LeT was a terrorist organisation. This charge was designed to convict Lodhi without proving any criminal intent; he could be convicted simply on the basis that he should have realised that LeT was engaged in terrorism. But at that time the government itself had not listed LeT—an Islamic group fighting against Indian control of Kashmir—as a terrorist group. This week's dropping of the recruitment charge suggests that a key part of the prosecution against both men has collapsed.

Lodhi remains charged with committing an act in preparation for a terrorist attack and "recklessly" making documents to facilitate a terrorist act. The court was told that Lodhi planned to bomb a "major infrastructure facility"—the national electricity grid—because he used an assumed name to request maps of the grid from the Electricity Suppliers Association. The maps are freely available to the public.

Months before his arrest, ASIO secretly installed a tracking device on Lodhi's computer at his workplace, a Sydney architecture firm. He reportedly accessed a government planning web site to obtain satellite images of city buildings and transport infrastructure. But this is hardly a crime—the web site, called *iplan*, is also publicly available in order to facilitate the work of urban planners, architects and others.

The prosecution further alleged that Lodhi dumped aerial photographs of Sydney military installations, including the Holsworthy army base, in a park rubbish bin near his home. He is also accused of faxing an inquiry to a chemical company about purchasing urea nitrate—a fertiliser—using a false company name, and of using a false name to obtain a mobile phone number.

From what has been produced in public, the case against Lodhi is flimsy and circumstantial. When ASIO raided his home, officers allegedly found military training manuals, files relating to "Islamic extremism", a video promoting "violent jihad" and 15 pages of notes written in Urdu, the Pakistani language, on how to make explosives, invisible ink and cyanide gas, among other poisons.

Detectives also found 100 rolls of toilet paper, which the prosecution claims could have been used to extract a low-density explosive, nitrocellulose. On the face of it, this charge seems absurd. Nitrocellulose is found—usually in higher concentrations—in many other commonly used products, including medications, photographic supplies, table tennis balls and magicians' "flash paper".

The case against Lodhi relies upon an alleged conspiracy involving French citizen Willie Brigitte, who arrived in Australia in May 2003 and was deported on visa violation charges five months later. According to the prosecution, Brigitte's subsequent interrogation sessions in France revealed that he went to Australia to plan a bombing attack. But Brigitte has not been called as a witness and there is no independent confirmation that he has made such admissions. French law has permitted the authorities to imprison him, without trial, on a vaguely-worded charge of "associating with a group with a view to preparing an act of terrorism".

Magistrate Price approved the giving of evidence via video-link by alleged terrorist prisoners held in custody in the United States and Singapore. However, the first of these witnesses, Ibrahim Ahmed al-Hamdi, admitted under cross-examination that US authorities had stopped asking him to testify in cases because he had been discredited.

Speaking from a Kentucky prison, Hamdi acknowledged that he had lied and fantasised in giving evidence about conditions in a LeT camp in Pakistan. Al-Hamdi, who is originally from Yemen, is serving 15 years for weapons possession and visa breaches. He was arrested in February 2003, and charged with conspiracy to commit a terrorist act in Chechnya. That was dropped by the FBI on a plea bargain, on condition he gave evidence against former associates.

In an apparent move to prevent the second video witness, Arif Naharudin, from being similarly discredited, Howe, the government's barrister, applied for, and was granted, a second set of suppression orders, also on the basis of confidential affidavits that were only shown to the defence in censored form. Howe obtained "public interest immunity" from disclosing details of Naharudin's interrogation in Singapore—where he has been held for two years without charge—as well as an order blocking any public cross-examination of the witness.

Howe tendered two additional "open" affidavits—from Australian Federal Police Commissioner Mick Keelty, and ASIO director-general Dennis Richardson—stating that their terrorism investigations would be "seriously compromised" if the information were disclosed to Lodhi's defence. But Boulten, Lodhi's barrister, told the court there was ample reason to assume that the suppressed information related to pressure applied to Naharudin to testify in return for more favourable treatment by the Singapore authorities.

In other words, having had its first star witness demolished, the government sought to exploit the secrecy provisions to block the defence from doing the same to Naharudin. Nevertheless, the magistrate granted the prosecution's requests.

Without access to the evidence, it is impossible for the *World Socialist Web Site* to judge with any certainty the allegations against Lodhi. But the fact that the prosecution is relying upon such witnesses suggests that the case is weak.

As with other Islamic men brought before courts in recent months—ul-Haque, young Sydney man Zeky "Zac" Mallah, Jack Roche in Perth and Joseph Thomas in Melbourne—Lodhi was arrested many months after his alleged activities and following protracted contact with ASIO. In some instances, the defendants had even volunteered to ASIO the evidence cited against them, seeking to cooperate with authorities.

There is no doubt that, with the assistance of a willing media, the Howard government and ASIO are using these cases to whip up public fears of supposed "terror cells" and justify further draconian measures in the "war on terror". Since September 11, the government has seized upon the "war" declared by US President George Bush for both domestic and international purposes. It has provided the pretext for the criminal invasions of Afghanistan and Iraq, diverted attention from mounting economic and social problems at home and legitimised previously unthinkable police state-style measures, including semi-secret trials.

All the time, longstanding legal norms and basic democratic rights are being overturned. The secret trials bill was just one of four "counter-terrorism" measures pushed through parliament's brief post-election sitting this month—each with Labor's support. The other new laws give ASIO and police forces vast secret surveillance powers, allow them to intercept emails and mobile phone SMS messages, and provide for ASIO vetting of all applicants to use ammonia nitrate, an agricultural fertiliser. Attorney-General Philip Ruddock has foreshadowed further, unspecified, measures for the New Year.

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