Australian Federal Court upholds Kafka-like powers to cancel passports and visas

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Two decisions handed down by the Australian Federal Court on July 15 confirmed the federal government's virtually unfettered power to revoke a citizen's passport or cancel a non-citizen's visa, without giving them reasons or access to any evidence, thus making legal challenges almost impossible.

In effect, the decisions mean that anyone can be stripped of the most basic legal and democratic rights—to live and work or study where one chooses, to travel and participate in social and political life—without even being able to find out what, if any, case exists against them.

The plight of the four applicants in the two cases resembles that of Josef K, the character in Franz Kafka's novel *The Trial*, who awakens one morning and, for reasons never revealed, is arrested and prosecuted for an unspecified crime.

Although each of the passport or visa cancellations took place under the previous Howard government, Kevin Rudd's Labor government has vigorously defended them in court, underscoring its determination to maintain and utilise all the repressive powers brought in by Howard under the banner of the "war on terror".

One decision, *Hussain v Minister for Foreign Affairs*, related to a young student, Syed Hussain, an Australian citizen whose passport was seized in 2005. Hussain was born in the United Kingdom in 1985, arrived in Australia in 1991 and became an Australian citizen in 1993. After finishing school, he completed one semester of a Bachelor of Medical Science at Melbourne's La Trobe University before winning a scholarship to the Islamic University of Medina, Saudi Arabia. He commenced study there in 2003, returned to Australia on holiday in 2005 and intended to go back to Saudi Arabia to continue his studies. In August 2005, however, he was interviewed by officers from the Australian Security Intelligence Organisation (ASIO).

Hussain was subsequently notified that Foreign Affairs Minister Alexander Downer had cancelled his passport. ASIO had issued an "adverse security assessment" alleging that if Hussain travelled overseas, there was a "significant risk" he would participate in, or support others who were involved in, "politically motivated violence" and thereby "prejudice the security of Australia" or a foreign country.

Hussain challenged the government's decision and the ASIO security assessment in the Administrative Appeals Tribunal (AAT). Under the AAT Act, however, the attorney-general may issue certificates ordering the exclusion of applicants from their own hearings, if the government deems its evidence would "prejudice security" if the applicants heard it. The attorney-general can also bar an applicant's lawyer from hearing the evidence or, if the lawyer is given access, prohibit disclosure to the applicant.

In February 2006, Attorney-General Phillip Ruddock issued a certificate against Hussain. The AAT proceedings began with an unidentified ASIO officer giving evidence before being cross-examined. Hussain was then ordered to leave the AAT hearing room while further evidence was given against him. The process was repeated the next day, with neither Hussain nor his lawyers permitted to remain in the hearing room.

The AAT conceded there was "no evidence" to suggest that Hussain would "engage in military jihad type activities" and stated that "his relations with people who may hold extremist views appear innocent". However, on the basis of the government's secret evidence, the AAT concluded Hussain had not been "honest" in responses he made in the hearing. It therefore formed the opinion that the decision to revoke Hussain's passport was correct.

A three-judge panel of the Federal Court refused to find any legal or constitutional basis to invalidate this Kafkaesque procedure. It declined to touch the question of whether the attorney-general's certificates were legally valid, since this question had not been raised in the AAT.

On the constitutional question, Julian Burnside QC, representing Hussain, argued that the AAT, which was presided over by a Federal Court judge, was made to act as a mere "rubber stamp" for decisions made by the executive in a process that would "damage public confidence" in the independence of the judiciary.

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The court upheld the process, even after acknowledging that the AAT could not question the attorney-general's certificate and that the applicant's presence at his own hearing was "dependent entirely" on the attorney-general's discretionary power to decide whether the disclosure of evidence would be "contrary to the public interest".

Stephen Gageler SC, representing the government, acknowledged that the hearing "could not be characterised as fair". Nevertheless, he insisted that it was not unconstitutional. The judges agreed with him, asserting, without substantiation, that "ordinary members of the community" would not think that judges would compromise their integrity by participating in such processes.

In reaching its decision, the court openly deferred to the executive, allowing it vast powers to take away citizens' rights based on secret information. The judges stated: "It should not be forgotten that the Attorney-General, as first law officer of the Commonwealth, is charged with the vital task of protecting the community from the threat of terrorism, and that much of the information relevant to that task will be highly confidential."

In the second case, *O'Sullivan v Parkin, Sagar and Faisal*, three judges formally rejected ASIO's appeal from an earlier ruling by a single Federal Court judge allowing the three applicants, all of whom were stripped of, or denied, visas after ASIO made "adverse security assessments" against them, to obtain discovery of the documents relied upon by ASIO.

However, the Full Court restricted the earlier verdict to the mere discovery, and not the production, of the relevant documents. "Discovery is not the same thing as production," the judges declared. "It may be that a litigant is entitled to know what documents exist that are relevant to a dispute, even if he or she cannot compel production of those documents." That is, the applicants could seek to identify the relevant documents, but the court, after reading the documents, could still decide not to give the applicants access to them if ASIO objected.

Scott Parkin, a United States citizen and antiwar, anti-corporate activist, was deported from Australia solely on the basis of his political views and activities. He entered Australia legally in June 2005 on a tourist visa. Before the visa expired, ASIO issued an adverse security assessment to the immigration minister and Parkin was summarily deported in September 2005, with no right or opportunity to challenge his removal (unless he remained in immigration detention until his appeal was heard).

Parkin was not accused of breaching any visa condition or committing a criminal offence. However, in August 2005 he took part in a series of publicly advertised demonstrations and workshops against the Iraq war, US corporate giant Halliburton, which has made billions of dollars out of the war, and a "Global CEO Conference" organised by *Forbes* magazine (see "Australian government to deport American antiwar activist").

Sagar and Faisal are both Iraqi asylum seekers who were detained in Australian immigration detention on the Pacific island of Nauru from September 2002. In September 2005, the immigration department finally recognised both men as refugees, but ASIO then issued adverse security assessments against them, and they were denied refugee protection visas.

Together with Parkin, the Iraqi applicants stated that they had no idea why ASIO had made its adverse security assessments. Parkin insisted that "no facts existed which could justify an adverse assessment". The judges accepted that the applicants had a genuine complaint, acknowledging that they "allege the absence of facts, the result of which, they say, is that the adverse security assessments could not have been made".

Nonetheless, the judges gave the applicants only a Pyrrhic victory, emphasising that there was no absolute right to discovery of documents, which may be refused or confined by a court if "national security" requires. Secondly, the judges ruled that even if discovery were granted, but the government objected to the actual production of the documents on "public interest" grounds, the applicant may not have the right to see them. Thirdly, even if production were ordered, a court could impose a "confidentiality order" excluding access to the applicant and restricting it to their lawyers.

Finally, it must be noted that each of these cases dates back to 2005. Three years on, the applicants are still tied up in the courts, and being denied their fundamental rights in the meantime. Moreover, ASIO, backed by the Rudd government, can still appeal to the High Court against the *Parkin, Sagar and Faisal* decision.

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