

# Australian High Court further shreds due process in the name of “security”

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In a truly Kafkaesque ruling, Australia’s top court last week upheld the August 2018 cancellation of a visa of a long-time resident, originally from Lebanon, on “security” grounds under legislation that prohibited him from knowing the allegations against him.

By a 4 to 3 majority, the High Court judges declared there was no “minimal requirement” of procedural fairness in a court. This goes further than previous judgments in essentially nullifying the basic legal right of a person to know, and be able to respond to, evidence being used against them.

Led by Chief Justice Susan Kiefel, the majority judges dismissed a constitutional challenge by the man, identified only as SDCV, after the minister in charge of the domestic spy agency, the Australian Intelligence Security Organisation (ASIO), issued a certificate stating that disclosure of the relevant information would “prejudice the security of Australia.”

The ruling demonstrates the readiness of the judiciary at the highest level to rubberstamp such anti-democratic provisions under conditions in which another world war is being triggered, with Australia on the frontline.

Since taking office in May, the Labor government has been ramping up Australia’s involvement in the US-led war against Russia in Ukraine and Washington’s preparations for war against China.

Increasingly, this war drive and the accompanying acceleration of military spending at the expense of social programs and working-class conditions will fuel dissent and unrest, and that is the real target of such anti-democratic laws.

“Kafkaesque” is a reference to the dystopian novels of Franz Kafka, including *The Trial*, in a which a man, known only as K, is arrested, charged and ultimately executed for a crime without ever being able to discover the nature of the charges against him.

SDCV was stripped of his visa, and earlier denied citizenship, exposing him to the danger of deportation, despite being married to an Australian citizen, after ASIO declared him a security risk.

Throughout his case, first in the Administrative Appeals Tribunal (AAT), then the Federal Court and the High Court, SDCV and his lawyers were barred from knowing any of the secret “certificated matter” being used as evidence against him by ASIO and the government.

In fact, some of the evidence was produced in “closed sessions” of the AAT, from which SDCV and his lawyers were excluded. The AAT even issued two rulings. One was based on the “open” evidence, in which the tribunal said it could not form a view of ASIO’s security assessment. The other was based on the “closed” material, which the tribunal said did justify ASIO’s adverse assessment.

The only known accusations against SDCV related to his use of a “covert phone” with an “encrypted messaging app” to communicate with his brother based in Syria and various relatives who had been convicted of terrorism offences.

The majority judges acknowledged that SDCV had not been accused of any offences himself. “Some of the appellant’s relatives were convicted of and sentenced to imprisonment for attempted terrorism offences committed in Australia,” they noted. However, “ASIO investigated the appellant as to whether he was involved in those terrorism offences but he was not found to have been involved.”

Nevertheless, the judges ruled that legislation, such as the ASIO Act, could override any requirement for a court to provide a person with the “minimum” of “a fair opportunity to respond to evidence on which [an] order might be made.”

The majority said the legal right of procedural fairness did not even require the affected person to be given the “gist” of the evidence, or to have special advocates appointed to represent their interests.

ASIO’s powers, and those of the government to politically exploit them, are sweeping and arbitrary because the ASIO Act defines “security” in terms that go far beyond combatting terrorism.

The definition covers many forms of anti-war and other political activity that could be targeted during war or the buildup to war, labelled as espionage, sabotage, “politically motivated violence,” “promotion of communal violence” or “foreign interference.”

“Security” also extends to “the carrying out of Australia’s responsibilities to any foreign country” in relation to any of these categories. That means, above all, any activity regarded as a threat to the interests of US imperialism and its partners, such as the UK and other members of anti-China alliances like AUKUS, the Quadrilateral Security Dialogue (Quad) or the “Five Eyes” intelligence network.

Last week’s High Court ruling is not the first of its kind. In 2007, it rejected an appeal from an Islamic cleric, Mansour Leghaei, who was then deported after being similarly denied the right to know why ASIO had declared him a “security” risk. Many other attempts to legally challenge adverse ASIO assessments have failed.

But this is the first time that the court has gone so far in backing legislation that expunges procedural fairness altogether in court proceedings. Three judges dissented. Their primary concern was that the ruling would undermine the credibility of the courts. In their words, courts “may cease to be seen as an institution of justice.”

Over the past two decades, since the Bush administration declared the “war on terror” after the September 11, 2001 attacks in New York and Washington in order to invade Afghanistan and Iraq, Australian governments—both Labor and Liberal-National—have imposed more than 120 packages of legislation eviscerating fundamental legal and democratic rights.

These have handed unprecedented surveillance powers and resources to ASIO and other intelligence agencies and even permitted criminal trials to take place secretly behind closed doors. In 2019, it was

revealed that an ex-soldier and intelligence officer, known only as “Witness J,” had been convicted and imprisoned in Canberra for 15 months via a criminal trial that was completely hidden from public knowledge, let alone scrutiny.

The assault on basic legal and democratic rights, conducted with the complicity of the judiciary, mirrors the vicious methods being used in the persecution of Julian Assange, the WikiLeaks founder. With the backing of successive Australian governments, he remains incarcerated in the UK in a maximum security prison, facing extradition to the US on “espionage” charges for exposing the war atrocities and anti-democratic conspiracies of the US government and its allies, including those in Canberra.

This offensive goes beyond covering up the past crimes of the Australian military and intelligence apparatus, which extend from Afghanistan to East Timor. It is being driven by the unfolding of even greater crimes. Amid Washington’s increasingly provocative economic and military confrontations against its rivals, the Australian Labor government has committed itself to joining any war against China.



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