THE KAFKA-ESQUE CASE OF SHEIKH MANSOUR LEGHAEI: THE DENIAL OF THE INTERNATIONAL HUMAN RIGHT TO A FAIR HEARING IN NATIONAL SECURITY ASSESSMENTS AND MIGRATION PROCEEDINGS IN AUSTRALIA

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I INTRODUCTION

In Franz Kafka's novel *The Trial*, an ordinary man finds himself trapped inside the byzantine processes of a shadow justice system. When he asks what he has done wrong, the bureaucrats reply: 'It's not our job to tell you that.'[1] When he goes to court, he and his lawyers are not allowed to see any of the evidence against him. His faceless accusers always remain unknown to him. Inevitably, in a system such as this – with the individual confused, disempowered, out-manoeuvred, and unable to oppose the State on fair terms – he is found guilty. Kafka's story is a terrifying glimpse into a world which, on the surface, claims to be ruled by law, but in reality is one where the modern bureaucratic State exercises total control over the individual and extinguishes the individual's right to be treated decently in favour of an unknown greater good.

Kafka was writing about rising authoritarianism in early 20th century Europe, but he could well have been describing Australia's current migration and security laws and their application to Dr Sheikh Mansour Leghaei. This article examines the near-total denial of fair hearing rights under Australian law to non-permanent resident non-citizens who are suspected by the authorities of being a national security risk to Australia. This article illustrates the legal issues through a close analysis of the case of Dr Leghaei, an Iranian national expelled from Australia on security grounds in June 2010.

The themes raised by this article have wider relevance, however, given the similar denial of procedural fairness in a range of other cases, from asylum seekers suspected by the Australian Security Intelligence Organisation ('ASIO') of being security risks (for instance, in the case of Sri Lankans fleeing from areas previously controlled by the Tamil Tigers) through to the *cause celebre* of

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1 Franz Kafka, *The Trial* (Idris Parry trans, Penguin, 1994) 2.

American peace activist Scott Parkin, deported in 2005.[2] In 2008–09, for instance, ASIO completed almost 60 000 security assessments for visa applicants, around 13 000 of which were for permanent visas.[3] Relatively few resulted in adverse security assessments, with only two temporary visas refused out of 47 000 applicants.[4]

The article firstly concludes that the statutory elimination of procedural fairness rights under Australian security and migration laws – specifically, under the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') and the *Migration Act 1958* (Cth) ('*Migration Act*') – violates the international human right to a fair hearing in the expulsion of aliens under article 13 of the *International Covenant on Civil and Political Rights 1966* ('ICCPR').[5] Specifically, fair hearing rights are violated because an affected person is unable to enjoy any effective opportunity to see and test the essential allegations and evidence upon which an adverse security assessment is based. Further, unlike in Britain or Canada, no special procedures exist to enable an affected person's legal representatives to access or test the allegations or evidence, while administrative review tribunals and the federal courts are also precluded from any substantive role in testing the reliability of evidence on the merits.

Where an affected person is thus deprived of equality of arms in legal proceedings, it also cannot be rationally determined whether the person is indeed a risk to national security, or whether such decision is arbitrary or based on unreliable or inaccurate information. There is, in sum, a near-complete denial of the international right to a fair hearing, which puts Australian practice at odds with the more nuanced approach to balancing individual rights and security imperatives in comparable liberal democracies such as Britain, Canada and European states.

This article secondly concludes that the denial of fair hearing rights to non-permanent resident non-citizens, in contrast to the fuller rights accorded to citizens or permanent residents in the security assessment process, amounts to unjustifiable discrimination on the basis of 'national origin' or 'other status' (that is, temporary migrant status), contrary to the non-discrimination and equal protection guarantees in articles 2 and 26 of the ICCPR. Australia has not adequately justified such differentiation in fair hearing rights, since national origin or migration status is not a characteristic that is materially relevant to the security risk posed by a person.

Where an affected person is expelled from Australia on the basis of an adverse security assessment process which does not accord a fair hearing, in

2 See *Parkin v O'Sullivan* [2006] FCA 1413 (3 November 2006); *Parkin v O'Sullivan* [2007] FCA 1647 (2 November 2007); *O'Sullivan v Parkin* (2008) 169 FCR 283; *Parkin v O'Sullivan* (2009) 260 ALR 503. For a previous comment on the Leghaei case, see Caroline Bush, 'National Security and Natural Justice' (2008) 57 *AIAL Forum* 78.

3 ASIO, *ASIO Report to Parliament 2008–09* (12 October 2009) 20 <http://www.asio.gov.au/img/files/ASIOsReportToParliament08-09.pdf>.

4 Ibid.

5 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

individual cases there may also result violations of protected family rights under articles 14, 23 and 24 of the ICCPR and of children's rights under the *Convention on the Rights of the Child 1989* ('CRC').[6] The case of Dr Leghaei, for example, involved the forcible separation of family members where it remained unknown whether Dr Leghaei was, in fact, a security risk. Therefore it could not be established whether the separation of family members could be justified on national security grounds.

II THE FACTS OF THE LEGHAEI CASE 1994–2010

Dr Sheikh Mansour Leghaei is an Iranian national who came to Australia in 1994 on temporary business visa to be employed as a Halal meat supervisor.[7] In 1995 he was granted a temporary 'religious worker' visa,[8] which allowed him to work as a Muslim religious leader (sheikh) and to enter and leave Australia. In November 1996, Dr Leghaei applied for a permanent residency 'skilled' visa[9] and his family were included in the application as his dependants. In August 1997, a delegate of the then Australian Minister for Immigration and Multicultural Affairs ('Minister') refused to grant the visas, on the basis that Dr Leghaei was assessed by ASIO as a risk to Australia's national security.[10] The concept of 'security' is defined widely in Australian law.[11] Under section 36 of the *ASIO Act*, the usual guarantees of procedural fairness under Part IV of that Act do not apply to a person who is not an Australian citizen or permanent resident.

A Administrative Review Proceedings

In October 1997, the original decision was affirmed by the Migration Internal Review Office of the Department of Immigration ('Department'),[12] but again no

6 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

7 Then a subclass 672 Short Stay Business visa under the *Migration Act*.

8 Subclass 428 Religious Worker visa under the *Migration Act*.

9 Subclass 805 Skilled visa under the *Migration Act*.

10 The *Migration Regulations 1994* (Cth) excluded visa applicants if they were 'assessed by the competent authorities to be directly or indirectly a risk to Australian national security': *Migration Regulations 1994* (Cth) Sch 4, Public Interest Criterion 4002 ('PIC 4002'). ASIO was the relevant competent authority. Section 35 of the *ASIO Act* defines the meaning of a 'security assessment' and an 'adverse security assessment', including for the purpose of making recommendations about 'prescribed administrative action' such as visa decisions under the *Migration Act*.

11 Under 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 (iv) acts of foreign interference; whether directed from, or committed within, Australia or not; and (aa) the protection of Australia's territorial and border integrity from serious threats; 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) or the matter mentioned in paragraph (aa).

12 Migration Internal Review Office Decision of 17 October 1997 (copy on file with the author).

reasons were disclosed as to why Dr Leghaei was considered a risk to national security. In November 1997, Dr Leghaei applied to the Immigration Review Tribunal[13] ('Tribunal') for review of the decision to refuse his visa. After some delay, in March 2002 ASIO notified the Department that Dr Leghaei was assessed to be a direct risk to national security.[14] Dr Leghaei learned of that assessment in a letter to his lawyers from the Australian Government Solicitor in late July 2002, in the context of judicial proceedings brought by Dr Leghaei (explained below at Pt II(B)).[15] In March 2002, the Minister issued a 'conclusive certificate' under the *Migration Act*,[16] providing that it would be contrary to the national interest to change or review the decision.[17] In April 2002, the Tribunal accordingly advised Dr Leghaei that it had ceased its review.[18] Later in April a further conclusive certificate was issued.[19] Neither certificate disclosed any reasons or evidence. At no time was Dr Leghaei arrested or charged in any criminal proceeding, for instance, under the extensive espionage and other security offences in federal law.[20]

B Judicial Review Proceedings

In May 2002, Dr Leghaei commenced proceedings in the Federal Court against the Minister and the ASIO Director-General, seeking to set aside the Minister's decision to issue the conclusive certificates and ASIO's decision to issue the 2002 security assessment.[21] Among other things, Dr Leghaei claimed that the security assessment was void because procedural fairness was not provided to him.

During the proceedings, in July 2002 the Australian Government Solicitor informed Dr Leghaei's lawyers that ASIO had 're-examined' the information that had been taken into account in issuing the 2002 security assessment.[22] It noted that amongst the information taken into account in respect of that assessment were two documents that ASIO secretly obtained from Dr Leghaei's luggage while he was travelling through Sydney airport in 1995 and again in 1996.

The first document was a handwritten notebook in Persian, which ASIO erroneously claimed discussed 'how to fight a jihad'. In fact, ASIO's translation of the notebook was conceded in the Federal Court to be flawed and ASIO was

13 Reconstituted as the Migration Review Tribunal from June 1999.
14 Australian Government Solicitor letter of 29 July 2002 to Dr Leghaei's lawyers (copy on file with the author).
15 Ibid.
16 *Migration Act* s 339.
17 Ministerial certificate of 14 March 2002 (copy on file with the author).
18 Tribunal letter of 17 April 2002 (copy on file with the author).
19 Ministerial certificate of 29 April 2002 (copy on file with the author).
20 See, eg, *Criminal Code Act 1995* (Cth) Schedule Pt 5.2.
21 *Mansour Leghaei v Minister For Immigration and Multicultural and Indigenous Affairs and Director-General of Security* (Application No. ACD 21/2002) (copy on file with the author).
22 Australian Government Solicitor letter of 29 July 2002 to Dr Leghaei's lawyers (copy on file with the author).

ordered to pay one third of Dr Leghaei's costs.[23] Correctly translated, it was clear that the notes were Islamic teachings about the concept of jihad, but not inflammatory calls to violence as ASIO suggested.[24] The second document was a translated email from Dr Leghaei to the Organisation of Culture and Islamic Relations, regarding a sum of $4000 borrowed from friends which he was trying to recover through the Iranian Ambassador in Australia, so as to reimburse the Organisation. Dr Leghaei's explanation was that he was seeking consular assistance in the repayment of a debt.

For reasons inferred by Madgwick J to be 'at least in part' prompted by these proceedings,[25] ASIO undertook a fresh security assessment which was indirectly notified to Dr Leghaei in May 2004 in the course of Federal Court proceedings. Once again, Dr Leghaei was never provided with a copy of it, nor information about its contents. The Federal Court later indicated that the assessment was as bare as follows: 'Briefly, the Deputy Director-General of Security has decided to maintain the adverse security assessment against [Dr Leghaei]'.[26] In the course of proceedings, it transpired that the assessment appeared to concern purported (but unspecified) 'acts of foreign interference' within the statutory definition of 'national security'.[27] The effect of the fresh security assessment was to cancel the bridging visas granted to Dr Leghaei and his dependants.

In July 2004, Dr Leghaei commenced new proceedings in the Federal Court,[28] which were dismissed by Madgwick J in November 2005. In a written decision which excluded confidential parts, the Court observed that under the *ASIO Act*, non-citizen non-permanent residents are not entitled to the procedural fairness rights enjoyed by citizens and permanent residents,[29] namely, rights to receive a statement of reasons for an adverse security assessment, to be notified of an assessment, and to review and to procedural fairness at the review level.[30]

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23 *Mansour Leghaei v Minister for Immigration and Multicultural and Indigenous Affairs and Director-General of Security* (Application No 21 of 2002) (copy on file with the author).

24 To give one brief example, ASIO's translation added a highly prejudicial sentence as follows, which did not exist at all in the original: 'It is a Moslem's basic duty to wipe out the above classes' (copy on file with the author).

25 *Mansour Leghaei v Minister for Immigration and Multicultural and Indigenous Affairs and Director-General of Security* (Application No 21 of 2002) (copy on file with the author): see *Leghaei v Minister for Immigration* [2004] FCA 1118 (27 July 2004) [5].

26 *Leghaei v Director-General of Security* [2005] FCA 1576 (10 November 2005) [8].

27 Under s 4 of the *ASIO Act*:

> acts of foreign interference' means: '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.

28 Dr Leghaei sought an injunction restraining ASIO from providing the fresh assessment to the Department, declarations that the assessment was void and inoperative, and a declaration that the decision to cancel Dr Leghaei's bridging visa was inoperative: *Mansour Leghaei v Director-General of Security and Minister for Immigration and Multicultural and Indigenous Affairs* (Application No ACD 21/2004).

29 Under *ASIO Act* s 36.

30 *Leghaei v Director-General of Security* [2005] FCA 1576 (10 November 2005) [70]–[73].

There is, however, an indirect right to receive notification of the existence of the assessment under the *Migration Act* where an adverse security assessment is the basis for cancelling a visa.[31] Where the visa would be directly threatened by an adverse security assessment, the Federal Court found that there is a duty at the primary decision making phase to afford 'such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security'.[32] Such obligation will be 'discharged by evidence of the fact and content of such genuine consideration by the [ASIO] Director-General personally'.[33] The Court found that Parliament had determined that the ASIO Director-General must be trusted to be fair to those against whom an adverse security assessment had been made:

> 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…) 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.[34]

The Federal Court affirmed that in contrast to ASIO, '[c]ourts are ill-equipped to evaluate intelligence'[35] and accordingly the Court was not in a position to contradict the opinion expressed in confidential affidavit evidence from ASIO. As the Court stated, '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'.[36]

On the facts of Dr Leghaei's case, 'having read and had debated the confidential material' before the judge, the Federal Court concluded that 'genuine consideration' was given by ASIO to disclosure, but that the prejudice to national security meant in his case that 'the content of procedural fairness is reduced, in practical terms, to nothingness'.[37] Dr Leghaei was thus found to have been accorded such degree of fairness as was permitted by national security.[38]

In January 2006, Dr Leghaei appealed to the Full Federal Court, which dismissed the appeal in March 2007.[39] Again parts of the judgment remain confidential. However the Full Court accepted authority that the balancing of the individual's entitlement to know the case against them with national security interests may in some cases produce the 'unsatisfactory' feature that the content of an assessment is withheld from the affected person[40] – and reduce procedural

31 Ibid [73].
32 Ibid [83].
33 Ibid [86].
34 Ibid [87].
35 Ibid [84].
36 Ibid [92].
37 Ibid [88]. A similar approach was taken in *Soh v Commonwealth* (2008) 101 ALD 310, 328[93].
38 *Leghaei v Director-General of Security* [2005] FCA 1576 (10 November 2005) [88].
39 *Leghaei v Director-General of Security* [2007] FCAFC 37 (23 March 2007) (Tamberlin, Stone and Jacobson JJ).
40 Ibid [50].

fairness to 'nothingness'.[41] The Full Court acknowledged the risk of 'serious unfairness'.[42] It found, however, that there was no error of law by the primary judge, who 'did not simply rubber stamp the opinion' of ASIO but had 'satisfied himself that the Director-General had given personal genuine consideration to … whether disclosure would be contrary to the national interest'.[43]

All of the judicial and tribunal proceedings were limited to examining whether procedural fairness under domestic law had been afforded. It was not, however, possible for the Australian courts to directly apply international human rights to a fair hearing, given the absence of enforceable constitutional or statutory human rights providing such rights. While domestic public or administrative law notions of 'procedural fairness' often overlap with the 'fair hearing' requirements of the ICCPR, the peculiar common law and statutory modifications of procedural fairness in domestic law may depart considerably (upwards and downwards) from the requirements of international law.[44]

C Final 'Merits' Review before the Migration Review Tribunal

In May 2007, Dr Leghaei applied for special leave to appeal to the High Court, which was refused in November 2007.[45] The refusal of that application allowed the Migration Review Tribunal to proceed with its review of the visa refusal. In October 2009, the Tribunal invited Dr Leghaei to comment on ASIO's adverse security assessment.[46] Dr Leghaei responded by asking which assessments he should comment on and requested a copy of all assessments.[47] The Tribunal responded that it was inviting comment on the assessment of May 2004, which it did not have a copy of.[48]

Dr Leghaei responded in November 2009 that neither he nor the Tribunal had a copy of the assessment, nor did he know its contents or the evidence upon which it was based. He argued ASIO's assessment was mistaken; asked the Tribunal to place little weight on it because it contained no reasons or evidence which would allow the Tribunal to assess its validity; and testified to his good

41 Ibid [51].
42 Ibid [59].
43 Ibid [61].
44 For recent Australian public law cases considering the content of procedural fairness in particular areas of migration law, see, eg, *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627; *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489; *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448. For a recent analysis of the 'hearing rule' as an essential aspect of procedural fairness in Australian administrative law, see Linda Pearson, 'Procedural Fairness: The Hearing Rule' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 265–279.
45 *Leghaei v Director-General of Security* [2007] HCATrans 655 (8 November 2007).
46 Tribunal letter of 2 October 2009, under s 359A *Migration Act* (copy on file with the author).
47 Dr Leghaei's letter of 7 October 2009 (copy on file with the author).
48 Tribunal letter of 25 May 2004 (copy on file with the author).

standing in the Australian community for the last 16 years.[49] In February 2010, the Tribunal affirmed the original decision not to grant a visa to Dr Leghaei and his two dependants.[50] The Tribunal stated that while it 'is sympathetic to the primary applicant's predicament, it does not have the power to go behind or to examine the validity of the ASIO assessment'.[51]

D Request for Ministerial Intervention

Dr Leghaei and his dependant wife and 20 year old son remained lawfully in Australia on bridging visas while the Minister considered a request to exercise his personal, non-compellable, non-reviewable discretionary power to substitute a more favourable decision.[52] In May 2010, the Minister granted permanent residency visas to Dr Leghaei's wife and son. (His three other children had previously been granted independent rights to remain in Australia.) The Minister refused, however, to permit Dr Leghaei to remain. The courts have no jurisdiction to hear a challenge to such refusal.[53]

As a result, Australian law required Dr Leghaei to be removed from Australia 'as soon as reasonably practicable'.[54] Dr Leghaei was given six weeks to depart or face forcible deportation. Dr Leghaei, his wife, and his 14 year old daughter left Australia for Iran on 27 June 2010. While his wife and daughter were both entitled to remain in Australia, the Leghaei family chose to remain united in Iran rather than to be separated across two countries.

E The United Nations Communication in 2010

Once all domestic remedies had been exhausted, and in the absence of a constitutional or statutory bill of rights in Australia, Dr Leghaei's only remaining recourse to vindicate his fair hearing rights was on the international plane. In April 2010 Dr Leghaei and his family lodged a communication with the UN Human Rights Committee ('Committee') under the First Optional Protocol to the ICCPR.[55] The communication alleged that in its decision to deny permanent

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49 Written response of Dr Leghaei (copy on file with the author). Dr Leghaei remarked that he had been living in Australia with his family for 16 years and had been an active and respected member of the Australian community. He referred to his role as a director and cleric of the Imam Husain Islamic Centre and to his endeavours in that role to teach children to have a strong moral code not only to follow the ways of their religion but also to be good, law abiding citizens of Australia. He produced evidence about his community work and the fact that for a number of years he had been the Chair of the Multi Faith Forum, enjoying support from diverse range of Australians including prominent Christian leaders. With his response, Dr Leghaei submitted a copy of the transcript of an interview conducted with him by ASIO officers in 1999 and a statutory declaration he had made on 24 March 2004, giving details about his activities in Australia.

50 *N0500729, N9701858* [2010] MRTA 327 (19 February 2010).

51 Ibid [46].

52 *Migration Act* s 351.

53 See *Applicant NAGM of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 395 (5 December 2002).

54 *Migration Act* s 198.

55 *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

residency to Dr Leghaei on national security grounds, Australia violated its obligation to provide Dr Leghaei with a fair hearing in proceedings concerning the expulsion of aliens under article 13 of the ICCPR. The communication acknowledges that '[i]t is not for the Committee to test a sovereign State's evaluation of an alien's security rating',[56] instead requesting only that the Committee find that Australia should provide him with a procedurally fair hearing before finalising its security evaluation.

In addition, the communication argues that the denial of fair hearing rights was unlawfully discriminatory because it unjustifiably differentiated against people who posed security risks on account of their migration status – a characteristic which is not relevant to the danger posed by a person. Further, the communication argues that the arbitrary expulsion of Dr Leghaei unlawfully interfered in his family rights under articles 14, 23 and 24 of the ICCPR. In requesting remedies, the communication urged the Committee to direct Australia to afford Dr Leghaei a fair hearing before deciding to refuse him permanent residency and excluding him from Australia.

The communication also requested 'interim measures'[57] restraining Australia from removing Dr Leghaei, to prevent 'irreparable harm' to Dr Leghaei's family life. While the Committee had previously tended to limit the threshold of 'irreparable harm' to risks of torture or death,[58] it was argued that the expulsion of Dr Leghaei and his wife would involve the virtual abandonment and traumatisation of a dependent minor, their 14 year old daughter, who was an Australian citizen born in Australia and who had lived her whole life in Australia. The effects of the removal of her parents could not be reversed by allowing them to subsequently return to Australia or by compensation. In late April 2010, the UN Committee issued interim measures,[59] appearing to accept these arguments but, as is customary, without providing reasons.

As noted above, in May 2010 the Minister then granted visas to Dr Leghaei's wife and son, thus allowing at least one parent to remain in Australia to care for their daughter. Australia announced, however, that it was proceeding with the expulsion of Dr Leghaei, despite the UN Committee's interim measures remaining in force, creating great uncertainty for the family. Such anxiety was heightened by Australia's legal position that interim measures are not binding –

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56 Human Rights Committee, *Views: Communication No 236/1987*, 33th sess, UN Doc CCPR/C/33/D/236/1987 (18 July 1988) [63] ('*VMRB v Canada*'); Human Rights Committee, *Views: Communication No 296/1988*, 35th sess, UN Doc CCPR/C/35/D/296/1988 (30 March 1989) [84] ('*JRC v Costa Rica*').

57 Human Rights Committee, *Rules of Procedure*, UN Doc CCPR/C/3/Rev.3 (24 May 1994) Rule 92.

58 At the same time, the Committee has stated that what may constitute 'irreparable damage' cannot be determined generally: Human Rights Committee, *Views: Communication No 538/1993*, 50th sess, UN Doc CCPR/C/50/D/538/1993 (18 March 1994) [7.7] ('*Stewart v Canada*'). The Committee further stated that relevant factors include the irreversibility of the consequences, the adequacy of compensation as a remedy, and whether a person would be able to return.

59 Letter from the UN Human Rights Committee to Dr Leghaei's counsel, of 21 April 2010 (copy on file with the author).

contrary to the view of the Committee[60] – and given the history of Australia's non-compliance with Committee decisions (on the merits) in immigration cases.[61]

In June 2010, Australia later requested the Committee to lift the interim measures given that circumstances had changed. Dr Leghaei responded that interim measures were still necessary, since his removal would result in the *constructive expulsion* from Australia of his wife and daughter because Dr Leghaei was the sole means of their support and because they were a close Muslim family which did not wish to be separated. Nonetheless, the Committee lifted interim measures on 15 June 2010, again without providing reasons.[62] The communication is proceeding on the merits, with Australia responding to the Committee in October 2010 and a decision by the Committee expected in 2011.

III THE RIGHT TO A FAIR HEARING IN THE EXPULSION OF ALIENS

In the context of Dr Leghaei's case, this article now examines whether Australian security and migration laws are compatible with Australia's international human rights obligation to provide a fair hearing in expulsion cases. The UN Human Rights Committee has previously found that the right to a fair hearing in a 'suit at law' under article 14 of the ICCPR – the general fair criminal

60 Human Rights Committee, *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 94th sess, UN Doc CCPR/C/GC/33 (5 November 2008) [19]: 'Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.' See also Human Rights Committee, *Views: Communication No 869/1999*, 70th sess, UN Doc CCPR/C/70/D/869/1999 (19 October 2000) [5.1]–[5.2], [5.4] ('*Piandiong v The Philippines*'); Human Rights Committee, *Views: Communication No 489/1992*, 51st sess, UN Doc CCPR/C/51/D/489/1992 (19 July 1994) [6.3] ('*Bradshaw v Barbados*'); Human Rights Committee, *Views: Communication No. 580/1994*, 74th sess, UN Doc CCPR/C/74/D/580/1994 (21 March 2002) [10.9] ('*Ashby v Trinidad and Tobago*'); Human Rights Committee, *Views: Communication No 839/1998*, 840/1998, 841/1998, 72nd sess, UN Doc CCPR/C/72/D/839/1998 (16 July 2001) ('*Mansaraj et al v Sierra Leone*'); Human Rights Committee, *Report of the Human Rights Committee,* UN GAOR, 49th Sess, Supp No 40, UN Doc A/49/40 (21 September 1994) [411].

61 For example, Australia has refused to comply with Committee 'views' that asylum seekers ought not be arbitrarily detained and those who have been arbitrarily detained ought to be paid compensation: see, eg, Human Rights Committee, *Views: Communication No 1050/2002*, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006) ('*D and E v Australia*'); Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (29 October 2003) ('*Bakhtiyari v Australia*'); Human Rights Committee, *Views: Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*'); Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*').

62 Human Rights Committee, Letter to the Australian Government of 15 June 2010 (copy on file with the author).

trial and fair civil hearing protection[63] – does not extend to extradition, expulsion and deportation procedures.[64] The reason is that article 13 of the ICCPR was instead intended to separately govern proceedings relating to an alien's expulsion.[65] Article 13 of the ICCPR provides that:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The essential purposes of article 13 is to prevent arbitrary expulsions[66] and to impose procedural constraints on the State's power to expel an alien. The Committee has clarified that its 'due process' guarantees apply not only to administrative decisions which lead to the expulsion of a person,[67] but also to judicial decisions about expulsion or deportation.[68] While procedural fairness protections appear more developed in article 14 than in article 13, in one sense article 13 is broader precisely because of its clear application to administrative decisions, whereas there has been some doubt about whether the notion of a 'suit at law' in article 14 extends to administrative decisions or proceedings which fall short of 'civil' litigation.

In the case of Dr Leghaei, international fair hearing rights would thus apply at a number of stages in the Australian decision-making processes: the administrative decisions to refuse a visa by the Department and subsequently by the Migration Review Tribunal; judicial review by Federal Court and High Court; the administrative issue by the Minister of 'conclusive certificates' in connection with the review proceedings; and the administrative refusal by the Minister to exercise the discretion to intervene.

ASIO's decisions to make adverse security assessments are not strictly or formally decisions about expulsion. However, the issue of such assessments

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63 See generally Human Rights Committee, *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007); David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 2001).

64 Human Rights Committee, *Views: Communication No 953/2000*, 89th sess, UN Doc CPPR/C/78/D/953/2000 (27 July 2003) [6.8] ('*Zundel v Canada*'); *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, UN Doc CCPR/C/GC/32, 90th sess (23 August 2007) [17].

65 *Zundel v Canada*, UN Doc CPPR/C/78/D/953/2000 [6.8].

66 Human Rights Committee, *General Comment No 15: The Position of Aliens under the Covenant*, 27th sess, UN Doc HRI/GEN/1/Rev.6 (11 April 1986) [10].

67 Human Rights Committee, *Views: Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (15 June 2004) [10.8] ('*Ahani v Canada*').

68 *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, UN Doc CCPR/C/GC/32 90th sess (23 August 2007) [62]. See also *Ahani v Canada,* UN Doc CCPR/C/80/D/1051/2002 [10.9]; Human Rights Committee, Communication No 961/2000, 81st sess, UN Doc CCPR/C/81/D/961/2000 (26 August 2004) [6.4] ('*Everett v Spain*'); Human Rights Committee, Communication No 1438/2005, 88th sess, UN Doc CCPR/C/88/D/1438/2005 (15 November 2006) [6.3] ('*Taghi Khadje v Netherlands*').

automatically binds immigration decision-makers to refuse visas on security grounds and departmental, tribunal or judicial decision-makers (but for the Minister's final discretionary power) have no discretion to autonomously review ASIO's assessments and to substitute a different view on security matters. Consequently, ASIO's decisions to issue adverse security assessments are so intimately connected to – and govern and pre-determine – the later steps in administrative decision making about expulsion that they too arguably fall within the due process protections of article 13.

Once the range of decisions to which article 13 applies is identified, the next issue is to identify the material scope of the due process protections themselves. First, article 13 requires that decisions must be 'reached in accordance with law'; secondly, a person is entitled to submit reasons against his or her expulsion; and thirdly, a person is entitled to be represented. In addition, the more extensive, elaborate and explicit fair hearing standards in article 14 have been imported into article 13 as a result of progressive interpretation by the UN Human Rights Committee.[69] As the Committee stated:

> The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14 and thus should be interpreted in the light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable ...[70]

A The Requirement of 'A Decision Reached in Accordance with Law'

The requirement of 'a decision reached in accordance with law' evidently demands that a decision is authorised and has a basis in law, such as pursuant to legislative or regulatory authority or in accordance with the common law doctrine of precedent. Much of the jurisprudence of the UN Human Rights Committee in individual cases has involved cases where the basis of legal authority is in question.

The requirement is not limited to the formal identification of a valid legal source. It also involves a *qualitative* aspect. The comparative jurisprudence of the European Court of Human Rights is instructive in this regard. Article 1 of Protocol No 7 to the *European Convention on Human Rights* ('*ECHR*')[71] is similar in terms to article 13 of the ICCPR and can assist in the interpretation of

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69 As will be demonstrated further below, this flexible practice of transposing or importing the higher standards of certain provisions into apparently less protective provisions has also recently become a feature of the jurisprudence of the European Court of Human Rights and the UK House of Lords in the regional European human rights system.

70 *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, UN Doc CCPR/C/GC/32, [62]. See also *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002 [10.9]; *Everett v Spain*, UN Doc CCPR/C/81/D/961/2000 [6.3].

71 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

article 13. The European Court held in *Lupsa v Romania* that the requirement concerns

> not only the existence of a legal basis in domestic law, but also the quality of the law in question: it must be accessible and foreseeable and also afford a measure of protection against arbitrary interferences by the public authorities with the rights secured in the Convention.[72]

Such protection against arbitrariness requires independent merits review of national security decisions, as the European Court observed in *Al-Nashif v Bulgaria*:

> Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information ...
>
> The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.[73]

In a number of national security deportation cases, the European Court has found that deportation decisions were not made 'in accordance with law' where the reasons for deportation were not disclosed to the person, their lawyer, or an independent body.[74] Many of those cases have involved bare assertions by national authorities that a person is a risk to national security, based on secret intelligence information, without the provision of any factual evidence or summary of the evidence to the affected person.[75] In such cases, where the national authorities are in sole possession of the adverse evidence, it is impossible for the affected person to present their case adequately in response to highly generalised allegations.[76]

The European Court has found further that a purely formal review of a national security deportation decision by judicial bodies will not be a sufficient safeguard against arbitrariness, where the judicial bodies cannot review the

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72 European Court of Human Rights, Application No 10337/04, 8 June 2006 [55].

73 (2002) 36 EHRR 655, 684–5 [123]–[124]. See similarly *Lupsa v Romania* (European Court of Human Rights, Application No 10337/04, 8 June 2006) [38]; and *CG v Bulgaria* (European Court of Human Rights, Application No 1365/07, 28 April 2008) [40]; *Nolan v Russia* (European Court of Human Rights, Application No 2512/04, 12 February 2009) [70].

74 *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, 685[126]; *Lupsa v Romania* (European Court of Human Rights, Application No 10337/04, 8 June 2006) [40]–[42], [56]; *Nolan v Russia* (European Court of Human Rights, Application No 2512/04, 12 February 2009) [72], [115].

75 See, eg, *CG v Bulgaria* (European Court of Human Rights, Application No 1365/07, 28 April 2008) [46]; *Nolan v Russia* (European Court of Human Rights, Application No 2512/04, 12 February 2009) [70]; *Lupsa v Romania* (European Court of Human Rights, Application No 10337/04, 8 June 2006) [40].

76 See, eg, *CG v Bulgaria* (European Court of Human Rights, Application No 1365/07, 28 April 2008).

evidence on the merits.[77] The requirement of legality expressly articulated in article 13 of the ICCPR, which safeguards against arbitrariness, is supplemented by other fair hearing rights recognised by the Committee as protected under article 13.

B Fair Hearing Rights under Article 13

As noted above, article 13 of the ICCPR imports the guarantee of equality from article 14(1), including the principles of impartiality, fairness and equality of arms implicit in that guarantee. The requirement of equality of arms means that 'the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant'.[78] It also 'demands … that each side be given the opportunity to contest all the arguments and evidence adduced by the other party'.[79]

The Committee's jurisprudence is supported further by that of the European Court of Human Rights. Under the *ECHR*, the right to a fair hearing under article 6 of the *Convention* (functionally equivalent to article 14 of the ICCPR) similarly does not apply directly to deportation proceedings, since article 1 of Protocol No 7 (1984) to the *European Convention* (equivalent to article 13 of the ICCPR) provides procedural rights in the expulsion of aliens.[80] The European Court has held that the procedural guarantees of article 1 of Protocol No 7 require that any review proceedings by judicial bodies must allow the person 'to have his case genuinely heard and reviewed in the light of reasons militating against his expulsion' and not involve a 'purely formal examination' without access to the evidence.[81]

The security exception to due process rights under article 13 requires careful attention. Article 13 of the ICCPR allows that 'where compelling reasons of national security otherwise require', certain aspects of the right may be restricted, including the right to submit reasons against expulsion and to have the case reviewed by a competent authority and to be represented before it. The Committee accepts that the State enjoys a 'wide discretion' in the 'assessment of whether a case presents national security considerations bringing the exception

77 *Lupsa v Romania* (European Court of Human Rights, Application No 10337/04, 8 June 2006) [41]; *CG v Bulgaria* (European Court of Human Rights, Application No 1365/07, 28 April 2008) [47]; *Nolan v Russia* (European Court of Human Rights, Application No 2512/04, 12 February 2009) [72], [115].

78 *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, UN Doc CCPR/C/GC/32 90th sess (23 August 2007) [13].

79 Ibid. See also Human Rights Committee, *Views: Communication No 846/1999*, 71st sess, UN Doc CCPR/C/71/D/846/1999 (3 April 2001) [8.2] ('*Jansen-Gielen v The Netherlands*'); Human Rights Committee, *Views: Communication No 779/1997*, 73rd sess, UN Doc CCPR/C/73/D/779/1997 (24 October 2001) [7.4] ('*Äärelä and Näkkäläjärvi v Finland*').

80 See *Maaouia v France* (2001) 33 EHRR 1037, 1044 [35]–[36].

81 *CG v Bulgaria* (European Court of Human Rights, Application No 1365/07, 28 April 2008) [74]; *Lupsa v Romania* (European Court of Human Rights, Application No 10337/04, 8 June 2006) [60]; *Nolan v Russia* (European Court of Human Rights, Application No 2512/04, 12 February 2009) [115].

contained in article 13 into play'.[82] As ASIO explains, there are weighty reasons for limiting the disclosure of evidence on national security grounds; not only it is necessary to protect the identity of ASIO personnel or assets,[83] but

> 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.[84]

However, the Committee has established that where a domestic procedure *does* allow a person to provide limited reasons against his or her expulsion and to receive a degree of review of the case, it would be 'inappropriate' to accept that 'compelling reasons of national security' existed to exempt the State party from its obligation under article 13 to provide procedural protections.[85] Thus where a procedure has been provided in national security cases, it must still be fair within the meaning of article 14(1), the guarantees of which are imported by article 13.

Where national security considerations are relevant, article 13 accordingly does not permit the right to a fair hearing to be so reduced or restricted so as to practically eliminate the right. The situation might be different where a State has properly notified the existence of a public emergency under article 4 of the ICCPR, in which case the suspension of article 13 rights may be necessary and proportionate in certain circumstances.[86] But ordinarily, even where security concerns are engaged, the national security exception may only justify certain restrictions on the right to a fair hearing (such as protecting some classified information), without negating the right in its entirety. A balance must be struck between the competing public interests in the individual's right to a fair hearing and national security and that balance cannot be resolved wholly in favour of one or other interest.

At a minimum, under article 13 a person must be entitled to a redacted summary of facts and evidence that is capable of reasonably informing the person of the claims against him or her, and to be able to present his or her own case in response to the allegations and to cross-examine witnesses, as was the situation in the case before the Committee in *Ahani v Canada.*[87]

C Application of Article 13 to Dr Leghaei's Case

In the case of Dr Leghaei, it is strongly arguable that the decision to expel him was neither 'reached in accordance with law' nor pursuant to the procedural guarantees (including equality of arms) of article 13 of the ICCPR. In sum, Dr

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82 Human Rights Committee, *Views: Communication N. 1416/2005*, 88th sess, UN Doc CCPR/C/88/D/1416/2005 (25 October 2006) [11.10] ('*Alzery v Sweden*').

83 See *Lodhi v The Queen* (2006) 65 NSWLR 573, 578 [13]; see also *Parkin v O'Sullivan* (2009) 260 ALR 503, 506 [10].

84 *Leghaei v Director General of Security* [2005] FCA 1576 (10 November 2005) [46].

85 *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002 [10.8].

86 Australia has not notified the existence of any public emergency under 4 of the ICCPR so as to enable it to suspend the procedural protections of article 13.

87 *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002.

Leghaei was not protected against an arbitrary decision by the Australian authorities because: (1) he was provided with only a bare assertion that he was a national security risk, was given no further details of the case against him; (2) he was thus unable to adequately contest the evidence; and (3) all proceedings in Australian review tribunals and courts were 'purely formal' and could not provide substantive merits review of the expulsion decision.

More specifically, on the first point, Dr Leghaei was never provided with a copy of the ASIO security assessment of 2004 upon which the decision to refuse his visa was based and only learnt of it indirectly through correspondence in court proceedings. Even that indirect knowledge of the assessment disclosed only the bare assertion that he was considered a security risk. Dr Leghaei was never provided with even a redacted summary of the case against him,[88] nor adequate or detailed reasons for the adverse security assessment. Nor was he provided with access to any of the documentary or witness evidence upon which the adverse security assessment was based.

As such, while Dr Leghaei was formally offered an opportunity to respond to the allegations by the Migration Review Tribunal (but not, it must be emphasised, by ASIO itself), he did not know what were the allegations or the evidence upon which they were based. The only inkling he had of ASIO's suspicions arose from questions put to him by ASIO and the documents revealed to him in the earlier court proceedings (including the mistranslated notebook), but nothing there revealed any specific allegations of wrongdoing and Dr Leghaei provided full explanation of those matters.

Those questions and documents also related to the earlier security assessments which were withdrawn by ASIO, such that Dr Leghaei never came to know what evidence was relied upon by the 2004 security assessment, which was the basis of his expulsion. In consequence, Dr Leghaei was unable to explain or adequately challenge the adverse allegations, evidence and witnesses, because he was unaware of the particulars or even the broad sweep of the case again him. In such circumstances, Dr Leghaei was therefore unable to test whether the reliability and accuracy of the evidence or whether it was obtained illegally or improperly.

Dr Leghaei's lawyers in the Federal Court proceedings were 'security cleared' and shown some limited confidential information. This contrasts with many other Australian cases 'in which access has been denied to legal advisers who have offered undertakings on the ground that the risk to national security flowing from inadvertent disclosure is simply too high'.[89] However, Dr Leghaei's lawyers were given a very limited amount of time to read the material; were not able to make notes on it; and it remains unknown whether any of that material disclosed the substance of the allegations. Australia did not disclose to Dr Leghaei even the form or broad nature of that information provided to his lawyers – for example, whether it comprised any substantive evidence

88 In contrast to the situation in *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002.
89 *Parkin v O'Sullivan* (2009) 260 ALR 503, 510 [29].

whatsoever, or mere assertions; or whether it only comprised a copy of the ASIO security assessment (amounting to a single sentence) but without any reasons or substantiating evidence attached to it. It therefore remained unknown to the affected whether the security clearance of his lawyers played any real role in the provision of a fair hearing.

Further, the confidentiality requirements upon Dr Leghaei's security cleared lawyers meant that he was unable to instruct his lawyers in their dealings with whatever evidence they may have seen, including challenges to its reliability, alternative explanations for any assertions alleged against him, or requests for further particulars. Even if Dr Leghaei's lawyers had seen substantive evidence (which Australia has not acknowledged), that alone would not have been sufficient to provide Dr Leghaei with a fair hearing where he cannot properly instruct even the most ardent defence lawyers.

The denial of a fair hearing occurred not only in ASIO and departmental decision-making, but also in administrative review tribunals and before the federal courts. In the words of the Migration Review Tribunal itself – supposedly the 'merits' tribunal responsible for assessing the facts – it 'did not have the power to go behind or assess the validity of the ASIO assessment'.[90] Thus not only was Dr Leghaei unable see let alone to test the evidence, but the administrative 'merits' review tribunal was also unable to independently test the merits of the evidence on its own initiative (for instance, by utilising the flexible inquisitorial powers enjoyed by such a tribunal).

In addition, at the judicial stage, the Federal Court was similarly unable to review the evidence on the merits because its power was limited to a narrow judicial review of questions of law (specifically, on grounds of 'jurisdictional error'). As the Court stated, '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'.[91] In the words of the Federal Court, 'the content of procedural fairness is reduced, in practical terms, to nothingness'.[92]

The Federal Court further stated that 'as to how much if any of the reasons for the Assessment could be safely exposed to the applicant, I have expressed concerns about my own ability to make an assessment of whether the [ASIO] Director-General's concerns truly are reasonably based on probative materials'.[93] Moreover, the primary judge observed that he could not even offer 'such sanguinity of consolation' as may flow from a judge inspecting secret evidence and reaching a view about it on the merits, which in this case were not a matter for the court to decide upon.[94] He concluded that 'the degree of comfort the

90 *N0500729, N9701858* [2010] MRTA 327 (19 February 2010) [28].
91 *Leghaei v Director General of Security* [2005] FCA 1576 (10 November 2005) [91].
92 Ibid [88].
93 Ibid [91].
94 Ibid [91].

applicant and interested members of the public may take' from his inspection of confidential evidence was accordingly 'regrettably limited'.[95]

In so finding, the Federal Court espoused a notion of deference to executive expertise in security matters that is so wide as to approach a kind of non-justiciability doctrine. Such deference is typically grounded in a concern for the separation of powers in circumstances where the legislature has entrusted sensitive expert judgments to particular executive decision-makers. At the same time, it also reflects ideas about the recognition of the limits of judicial power, in the sense that judges may not be sufficiently equipped with the relevant expertise to make such judgments.

The former justification concerning the separation of powers is stronger than the latter, for judges routinely evaluate evidence concerning all manner of other expert areas, from complex corporate transactions to elaborate taxation schemes to highly structured trust arrangements. One rarely hears courts objecting that they lack expertise in complex areas of commercial litigation, taxation, or mergers and acquisitions deals. There is sometimes a seemingly arbitrary selection by courts of the matters which they feel comfortable with versus the zones of untouchability – which may be less about expertise and more about political sensitivity. One might also expect the judiciary to acquire the expertise necessary in a given case to properly discharge its exercise of judicial power, including by utilising the court's inherent judicial powers to control proceedings accordingly. At the same time, the 'democracy argument' does not fully explain how it is more legitimate to entrust 'unelected' public servants in ASIO with security judgments over 'unelected' judges who are appointed under a democratic constitution precisely to ensure the accountability of the executive within a theory of responsible government.

Compounding the inability of the federal courts to review the merits of security assessments is the non-publication of significant aspects of judicial reasoning relating to such evidence as was seen and considered by the court. Substantial portions of the reasons given by both a single judge of the Federal Court and by the Full Court remained confidential, as is evident from a cursory inspection of the heavily redacted Full Court judgment.[96] While redacted judgments are sometimes necessary and appropriate, their use where the applicant and his lawyers have been denied access to any of the evidence only adds to the unreasonableness of the process, since there is no fair procedure for testing the evidence underlying the redacted reasons.

One consequence is that the confidence of the applicant and of the public in the fair administration of justice is deeply undermined. The judgment of a supposedly independent federal court, enjoying the constitutional trappings of judicial power, cannot be read and evaluated by the affected person or by the critical public. It may be impossible, indeed, to appeal, for one does not know the substance of the decision and reasoning purportedly supporting it. Ultimately, the

95 Ibid [90].
96 Ibid [99]; *Leghaei v Director-General of Security* [2007] FCAFC 37 (23 March 2007) (as redacted).

judiciary may be seen to perform as an extension of the executive – legitimising executive decisions by security agencies, lending them a veneer of respectability drawn from their apparent endorsement by the exercise of purportedly independent judicial power. Such a process goes perilously close to an improper exercise of judicial power.

Where neither the merits tribunal nor the court of review is able to test the evidence upon which the security assessment is based, the fair hearing right of the affected person to test the evidence assumes special importance in safeguarding against arbitrary decisions. In such a system, unless the affected person can see and test the evidence, the whole machinery of justice – from administrative review to judicial scrutiny – becomes little more than a framework for endorsing executive assertions. The virtual elimination of Dr Leghaei's right to a fair hearing plainly entailed 'actual disadvantage or other unfairness' to him.[97] In such circumstances, it cannot be genuinely assessed whether Dr Leghaei's expulsion is necessary on security grounds, or whether the security case is wrong and expulsion arbitrary.

IV COMPARATIVE HUMAN RIGHTS JURISPRUDENCE

With increasing global attention to terrorism over the past decade, adjustments to fair hearing procedures to protect national security interests have taken place in many legal systems in a range of different contexts, such as in relation to immigration proceedings, administrative detention, control orders, and criminal trials. Such adjustments have frequently raised concerns about the precise scope of fair hearing rights under human rights law. Such developments have generated comparative jurisprudence which can be fruitfully drawn upon to inform discussion about the scope of international fair hearing rights in national security cases involving the expulsion of aliens.

In Britain, the exclusion from review of deportation cases involving national security was successfully challenged on human rights grounds,[98] resulting in a new and fairer process before the Special Immigration Appeals Commission ('SIAC').[99] Information cannot be disclosed where it would be contrary to national security[100] and the affected person and their lawyers can be excluded from proceedings. In such circumstances, SIAC may appoint a 'Special Advocate'[101] with 'disclosure' and 'representative' functions.[102] The Special

97 *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, UN Doc CCPR/C/GC/32 90th sess (23 August 2007) [13].

98 *Chahal v United Kingdom* (1997) 23 EHRR 413.

99 Under the *Special Immigration Appeals Commission Act 1997* (UK) c 68.

100 Or certain other public interests such as the international relations of the UK, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.

101 *Special Immigration Appeals Commission Act 1997* (UK) c 68, s 6.

102 See generally Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73(5) *Modern Law Review* 836, 838.

Advocate is appointed to advise SIAC and is not the person's lawyer, although the role is designed to protect his or her interests.

The 'disclosure' function enables the Special Advocate to challenge the Secretary of State's objection that disclosing material to the affected person would prejudice security. The Secretary of State is not required to disclose material or a summary of it to the person where directed to do so by SIAC, but where disclosure is refused such information then cannot be relied upon in the proceeding. The 'representative' function empowers the Special Advocate to view, examine and challenge confidential material which is not disclosed the affected person, including material which SIAC has not requested to be disclosed to the affected person.

The key drawbacks of the procedure include that the Special Advocate cannot disclose any confidential material to the affected person or receive instructions from them about how to deal with it, thus limiting the person's ability to test any adverse evidence. Further, Special Advocates have 'no access to independent expertise and evidence' and 'lack the sources of an ordinary legal team for the purpose of conducting a full defence in secret and they have no power to call witnesses'.[103]

The process nonetheless provides a considerably fairer hearing than in Australia, where there is no provision for a Special Advocate; the person's lawyers may be excluded from viewing confidential material (in both proceedings about whether to disclose material to the person, as well as in testing the substance of the evidence); and the affected person may be denied access to any evidence or summary of it. Further, SIAC performs a more active role in decision-making about disclosure of the material or a summary of it, compared with the more passive, deferential approach of Australian courts and tribunals towards executive judgments about non-disclosure. A similar procedure has also been adopted in Canada,[104] again as a result of human rights challenges to the fairness of former procedures.[105]

A An 'Irreducible Minimum' of Disclosure?

The courts in the United Kingdom ('UK') have held, however, that the SIAC procedure in immigration matters does not require the disclosure of an 'irreducible minimum' of information to the affected person themselves[106] (in addition to whatever is seen by the Special Advocate). The key reason is that the fair hearing provision of the *ECHR*, article 6, was not designed to cover immigration proceedings, which are separately covered by Protocol No 7 (to which the UK is not a party).[107] Even so, the UK approach still provides a considerably fairer hearing than that available in Australia, which lacks the

103 Ibid 838.

104 *Immigration and Refugee Protection Act*, SC 2001, c 2, s 85.

105 See *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350.

106 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898 (29 July 2010); see also *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512.

107 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898 (29 July 2010) [32].

Special Advocate procedure. As noted earlier, while Australian courts sometimes accept undertakings of confidentiality from the affected person's lawyers, such undertakings are also frequently rejected as too risky. Where they are accepted, the lawyers are still not necessarily able to see and test all of the relevant evidence, but rather only such material as is provided to them.

In contrast to immigration proceedings in the UK, other proceedings in Britain involving security issues – concerning administrative detention of terrorist suspects, and 'control orders' – *have* recognised a requirement to provide an 'irreducible minimum' of information to the affected person, nothwithstanding that a Special Advocate procedure may be available. In *A v United Kingdom*,[108] the Grand Chamber of the European Court of Human Rights held that the 'dramatic impact' of lengthy and potentially indefinite administrative detention of non-citizen suspected terrorists demanded the importation of the fair hearing guarantees of a criminal trial (under article 6 of the *ECHR*, equivalent to article 14 of the ICCPR) into proceedings challenging the lawfulness of detention.[109] Thus non-criminal proceedings which severely impact upon a person's rights were found to attract the higher procedural protections applicable to a criminal trial.

The UK House of Lords drew upon that European Court of Human Rights decision to specify the minimum disclosure necessary for a fair trial in anti-terrorism 'control order' proceedings. In *Secretary of State for the Home Department v AF*,[110] the House of Lords found that the more stringent standard of fairness applicable in criminal trials applied to control order proceedings, even though such proceedings did not involve a criminal penalty. It held that '[t]he requirements of a fair trial depend, to some extent, on what is at stake in the trial'.[111]

In this sense, there is a converging standard of minimum fair hearing rights in certain non-criminal national security cases, which may demand the higher level of procedural protections recognised in criminal trials due to the serious adverse consequences of detention or control orders. The approach of the European Court of Human Rights dovetails in this regard with the views of the UN Human Rights Committee that the fuller due process protections of article 14 of the ICCPR apply to expulsion decisions under article 13.

In this regard, is arguable that expulsion decisions should attract the highest level of procedural fairness because of the often serious consequences of expulsion for a person who is severed from their settled life, employment, family and community. As the Canadian Supreme Court has observed, the consequences of issuing security certificates, which may include expulsion to another country, 'are often more severe than those of many criminal charges'[112] or, indeed, control orders or limited preventive detention. Such processes place 'the individual in a

108 *A v United Kingdom* (European Court of Human Rights, Application No 3455/05, 19 February 2009).
109 Otherwise governed by art 5 of the ECHR which is equivalent to article 9 of the ICCPR.
110 *Secretary of State for the Home Department v AF* [2009] 3 WLR 74, 98 [57].
111 Ibid.
112 *Charkaoui v Canada (Citizenship and Immigration)* [2008] 2 SCR 326, [54].

critically vulnerable position vis-à-vis the state' and 'confirm the need for an expanded right to procedural fairness, one which requires the disclosure of information'.[113] In refusing to guarantee an 'irreducible minimum' of disclosure in immigration cases, British judges themselves have acknowledged the resulting unfairness: '[t]here is no doubt that to deprive anyone, including an alien, of even the essence of the case put against him as to why he is a threat to national security goes against the basic concept of a fair trial'.[114] In the case of Dr Leghaei the Federal Court commented on the serious consequences involved:

> He is a religious leader who … 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.[115]

Once the kinds of proceedings (such as detention or control order cases) to which higher fair hearing standards apply are identified, the European and British cases proceed to elaborate on the content of a fair hearing in such cases. According to the Grand Chamber, the protection of classified information may be justified to protect national security, but it must be balanced against the requirements of procedural fairness and a fair trial.[116] The starting point is that it is 'essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others'.[117]

Where 'full disclosure' is not possible, however, a person must still enjoy 'the possibility effectively to challenge the allegations against him'.[118] The Grand Chamber observed that 'where all or most of the underlying evidence remained undisclosed', 'sufficiently specific' allegations must be disclosed to the affected person to enable that person to effectively provide his representatives (including security-cleared counsel) 'with information with which to refute them'.[119] The provision of purely 'general assertions' to a person, where the decision made is based 'solely or to a decisive degree on closed material' will not satisfy the procedural requirements of a fair hearing.[120] On the facts, the Grand Chamber held that a number of the affected persons' hearings had been unfair because the case against them had largely been contained in closed material and the open case was insubstantial.[121]

The UK House of Lords has followed the European Court's requirement of an 'irreducible minimum' of disclosure to the affected person in control order

113 Ibid [55].
114 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898 (29 July 2010) [43].
115 *Leghaei v Director General of Security* [2005] FCA 1576 (10 November 2005) [79].
116 *A v United Kingdom* (European Court of Human Rights, Application No 3455/05, 19 February 2009) [217]–[218].
117 Ibid [218].
118 Ibid [218].
119 Ibid [220].
120 Ibid [220].
121 Ibid [223]–[224].

cases. In *Secretary of State for the Home Department v AF*, the House of Lords similarly stated (in respect of control order hearings) that:

> The controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.[122]

The test propounded in the above cases reflects suitable 'best practice' to guide the interpretation of fair hearing rights under article 13 of the ICCPR. While the UK courts have not provided an 'irreducible minimum' of information to affected persons in immigration proceedings, that is explained by other, parochial legal factors. As intimated earlier, under the *ECHR*, deportation proceedings are not regarded as 'civil' matters which attract fair hearing rights within the meaning of article 6. Rather, Protocol No 7 to the *ECHR* provides for a fair hearing in immigration decisions, but the UK is not a party to it.

This contrasts with the position under the ICCPR, which contains fair hearing provisions, in the same instrument, for both 'suits at law' (article 14) and expulsion decisions (article 13). Thus, if a fair hearing under article 13 of the ICCPR requires the provision of an 'irreducible minimum' of information to an affected person in expulsion cases, the current UK approach may be consistent with its *ECHR* obligations but *not* its ICCPR obligations. As noted earlier, the Committee regards article 14 as informing the scope of article 13. Since article 6 of the *ECHR* is functionally equivalent to article 14 of the ICCPR, it is appropriate to refer to the European jurisprudence on the scope of article 6 (in control order and detention cases) to inform a contemporary understanding fair hearing rights under article 14 of the ICCPR, and in turn of such rights in expulsion cases under article 13 of the ICCPR.

To apply this 'best practice' or 'convergence' approach to the situation of Dr Leghaei, at a minimum, Dr Leghaei ought to have been furnished with 'sufficiently specific' allegations so as to allow him to effectively instruct his lawyers in dealing with those allegations.[123] The provision of the purely general assertion to Dr Leghaei that he is a national security risk is not sufficient where the security assessment is based solely on closed material. Human rights law accepts that there are legitimate reasons why certain security-sensitive sources or evidence cannot be disclosed. Yet, as the European Court noted in *Chahal v United Kingdom*,[124] the use of confidential material might be unavoidable where

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122 [2009] 3 WLR 74; 98 [57].

123 Even if the procedural protections of a criminal trial are not extended to him by following the jurisprudence of the European Court of Human Rights and House of Lords in interpreting the ICCPR, the requirement of equality of arms in civil hearings under art 14 (including the right to see and test the evidence), which the Committee has already imported as the due process standard under art 13, still demanded that sufficiently specific evidence be disclosed to Dr Leghaei.

124 (1996) 23 EHRR 413, 468–9 [130]–[131].

national security is at stake, but that does not mean that the executive can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.

V NON-DISCRIMINATION AND EQUAL PROTECTION IN FAIR HEARING RIGHTS

Consistent with articles 2 (non-discrimination) and 26 (equal protection) of the ICCPR,[125] fair hearing rights under article 13 must be applied in a non-discriminatory manner. Article 2(1) prohibits discrimination in the provision of ICCPR rights and would thus apply where article 13 is applied in a discriminatory manner in expulsion cases. In contrast, article 26 is not limited to the non-discriminatory provision of other ICCPR rights, but applies more widely as an equal protection clause to prohibit 'discrimination in law or practice in any field regulated and protected by public authorities.'[126] Its protection would thus apply to the issue of security assessments by ASIO even outside the expulsion context, given that ASIO also issues assessments for Australian citizens (who cannot normally be expelled from Australia).[127]

For the purposes of articles 2 and 26, the ICCPR safeguards against discrimination 'of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' The UN Human Rights Committee accepts that '[n]ot all differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.[128] The ICCPR thus imposes a two-step analysis: first, whether a measure prima facie differentiates on an enumerated ground; and secondly, whether such interference is justifiable.

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125 Article 2(1) of the ICCPR provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 26 of the ICCPR provides: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

126 Human Rights Committee, *Views: Communication No. 172/84*, 42nd sess, UN Doc Supp No 40 (A/42/40) (9 April 1987) [12.3] ('*SWM Brooks v The Netherlands*'); see also Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.6 (10 November 1989) [12].

127 Except in very limited cases of certain naturalised dual citizens.

128 *General Comment No 18: Non-discrimination*, UN Doc Supp No 40 (A/42/40) [13].

A The Grounds of Discrimination

In the case of Dr Leghaei, it is arguable that he experienced differential treatment on account of a protected status under the ICCPR, and such differentiation was unjustified. ASIO is statutorily empowered to issue security assessments in relation to, inter alia, Australian citizens, permanent residents, and non-citizens without permanent residency status. In the issue of security assessments, Australian citizens and permanent residents are entitled to key elements of a fair hearing, as detailed earlier, although it is notable that those rights too can be limited in certain ways.[129] By contrast, non-Australian citizens and non-permanent residents comprise a class of persons who may be expressly denied key elements a fair hearing in the issuance of security assessments.

A fair hearing is thus denied on the basis of a combination of non-citizen status (that is, 'national origin' in the language of the ICCPR) and temporary residency. Nationality per se is not, however, the exclusive basis of differentiation since permanent residents (who do enjoy procedural fairness) are also not Australian citizens. It is also evident that 'non-permanent migration status' is not an explicit ground protected against discrimination under articles 2 or 26 of the ICCPR. That does necessarily mean, however, that differentiation based on migration status is not precluded by reference to other expressly prohibited grounds.

In the first place, migration status is intimately connected with nationality and 'national origin' is a prohibited basis of discrimination under the ICCPR. In other contexts, some governments have accepted that there is a close correlation between residency periods for non-citizens under national immigration law and the ground of 'national origin' for the purpose of non-discrimination under human rights law. For example, the Hong Kong Government, which imposes a seven year residency requirement on non-citizens for eligibility for social security, has stated that while 'the length of residence in a region is not the same as birth or national origin it may be regarded as being closely connected with a person's place of birth or national origin',[130] such as to attract non-discrimination protections on that basis. That view involves a purposive, flexible interpretation

129 Such as through the Attorney-General's discretion to issue public interest certificates: see Kieran Hardy, 'ASIO, Adverse Security Assessments and a Denial of Procedural Fairness' (2009) 17(1) *Australian Journal of Administrative Law* 39. For example, some cases involving passport cancellations have also been 'inherently unfair to an applicant': see, eg, the Full Federal Court's statements in *Hussein v Minister for Foreign Affairs* (2008) 169 FCR 241, 281. On the jurisdiction of the Administrative Appeals Tribunal concerning security assessments in areas other than migration, see Garry Downes, 'The Security Appeals Division of the Administrative Appeals Tribunal: Procedural Fairness, Hearings and Decision-Making in the Security Context of the Administrative Appeals Tribunal' (Paper presented at the Australian Government Solicitor Administrative Law Symposium, Sydney University, 26 March 2010).

130 Hong Kong Health Welfare and Food Bureau/Department of Justice, LegCo Panel on Welfare Services, *Compliance of the Seven-Year Residence Requirements for Comprehensive Social Security Assistance and Social Security Allowance with the ICESCR as applied to Hong Kong*, Paper No. CB(2)1616/03-04(02), (March 2004) [9] <http://www.legco.gov.hk/yr03-04/english/panels/ws/ws_swb/papers/ws_swb0310cb2-1616-2e.pdf>.

of the scope of 'national origin', which gives freedom from discrimination on the basis of nationality a wide protective ambit.

By analogy, in Dr Leghaei's case, the denial of the right to a fair hearing to non-citizen, non-permanent residents is similarly closely connected with the affected person's place of birth and national origin. The Committee has made clear that the protection of aliens against discrimination is an important value:

> each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike.[131]

In addition, or alternatively, another basis of discrimination in the denial of a fair hearing is Dr Leghaei's 'other status' under the ICCPR – that is, as a member of a class of persons defined by their non-citizenship and non-permanent residency. There is no closed list of groups which may qualify for protection on the basis of 'other status'. The South African Constitutional Court has, for example, recognised new bases of discrimination where a measure has 'an adverse effect on the dignity of the individual, or some other comparable effect'.[132] In that case, foreign citizens were characterised as 'a minority in all countries' who enjoy 'little political muscle'.[133] Such approach is also supported by regional human rights jurisprudence. *Advisory Opinion OC-18/03* of the Inter-American Court of Human Rights confirms that discrimination on account of migration status is not permitted under general international law, except where any distinction is 'reasonable, objective, proportionate and does not harm human rights'.[134] Further, the Court has indicated that any decision to expel migrants – whether administrative or judicial – must guarantee due process.[135]

In the case of Dr Leghaei, it is arguable that he was targeted on account of his 'other status' as a non-citizen non-permanent resident, where members of such group frequently lack the political power necessary to overcome unequal treatment and discrimination at law, rendering them vulnerable to discriminatory treatment. Given that Dr Leghaei was prima facie denied a fair hearing in the security assessment process, whether on account of his 'national origin' or 'other status', the key question becomes whether such restrictions are necessary and justified by a legitimate aim, and whether they are proportionate to any such aim.

B The Differentiation is Not Objectively Justified by a Legitimate Aim

The purpose of ASIO security assessments is to identify any person who poses a direct or indirect risk to the national security of Australia, as defined in the *ASIO Act*, and to provide those assessments to a range of Australian

131 *General Comment 15: The Position of Aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.1 [2].
132 *Khosa Others v Minister of Social Development*, 2004 6 SA 505 (Constitutional Court) [70].
133 Ibid [71].
134 *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, Inter-American Court of Human Rights (17 September 2003) [119].
135 Ibid [119]–[125].

government agencies or decision-makers (including in the immigration context, but also for other purposes). Any person may potentially pose a security risk, which depends upon a person's conduct rather than their nationality, country of origin or migration status, race, religion or some other such characteristic.

The British security case of *A v Secretary of State for the Home Department* is instructive.[136] In that case, the UK House of Lords declared that a special regime of potentially indefinite detention for *foreign* suspected terrorists was unlawfully discriminatory (under equivalent provisions of the *Human Rights Act 1998* (UK) c 42 and *ECHR*), since dangerous UK *citizens* suspected of terrorism were not treated similarly. As Lord Bingham stated: 'What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another.'[137] In *A v United Kingdom*, the European Court of Human Rights agreed that the UK's derogating measures (to detain non-nationals only) discriminated unjustifiably on the basis of nationality.[138]

Just as it makes little sense to detain foreign terrorists but not local ones, so too in the Australian context does it make little sense to deny a fair hearing to certain migrant security risks but not to citizens or permanent residents who threaten security. Nothing inherent about foreigners makes them more dangerous to national security than others (such as citizens) similarly suspected of being a security risk on objective, evidence-based grounds. To the contrary, it could be argued that citizens (including, for instance, 'home grown terrorists') present a greater security risk precisely because they are socially and politically well-networked in the community, and are often subject to less legal scrutiny, controls and law enforcement suspicion than foreigners. Further, nothing about foreigners *without* permanent residency makes them inherently more dangerous than foreigners *with* permanent residency, or with dual citizenship. As the Committee has observed: 'Discrimination may not be made between different categories of aliens in the application of article 13'.[139]

Moreover, Australia has not presented any legitimate or compelling justification for the necessity of imposing greater restrictions on the fair hearing rights of non-permanent resident non-citizens than on citizens or permanent residents. At most, in the Leghaei case, the Federal Court observed that a 1977 Royal Commission Report, which influenced the content of the *ASIO Act*, stated that it 'is difficult to justify' extending the right of appeal to non-citizen, non-permanent residents subject to adverse security assessments.[140]

However, no cogent reasons were provided for that conclusion, which appears based on an arbitrary assumption that temporary migrants are entitled to lesser rights, either as an incident of sovereign immigration control or because they are not 'settled' members of the Australian community. The Royal

136 [2004] UKHL 56.
137 Ibid [68].
138 (European Court of Human Rights, Application No 3455/05, 19 February 2009) [190].
139 *General Comment 15: The Position of Aliens Under the Covenant*, UN Doc HRI/GEN/1/Rev.1 [10].
140 *Leghaei v Director General of Security* [2005] FCA 1576 (10 November 2005) [71]–[72].

Commission's view also reflects outdated notions about the scope of application of public law rights, from an era when reserving legal rights for citizens was more common and notions about the universal application of fundamental rights had not fully penetrated domestic law.

There is no basis in international human rights law for such differentiation in the provision of the basic elements of the right to a fair hearing in security assessments and related expulsion processes and judicial proceedings. If restrictions on fair hearing rights are necessary to meet legitimate security aims, then such restrictions should apply equally to all similarly situated persons – that is, to the class of persons subject to security assessments. Consequently, in the case of Dr Leghaei, Australia's denial of a fair hearing, on account of his migration status as a non-citizen and non-permanent resident, was discriminatory because there was no legitimate justification for according him a lesser degree of procedural fairness than that received by similarly situated citizens or permanent residents subject to adverse security assessments.[141]

VI INTERFERENCE WITH FAMILY RIGHTS UNDER THE ICCPR

The legal consequence of the refusal of Dr Leghaei's visa was his forced removal to Iran. Before the ministerial grant of visas to his remaining dependants – his wife, Marzieh Tabatabaei Hosseini, and his 20 year old son, Mohammad Ali Leghaei – the refusal of Dr Leghaei's visa would have had the practical effect of separating him and two dependents from his three remaining adult children who have Australian citizenship (twin sons, Mohammad Reza Laghaei and Mohammad Sadegh Laghaei, aged 27 years, and his daughter, Fatima Leghaei, aged 14 years). Particular hardship would result from depriving the 14 year old minor Australian citizen child from both of her parents. After the grant of visas to his dependants, issues still arose concerning the separation of some family members from others.

In such circumstances, a question arises whether Australia unlawfully interfered in family rights under articles 17, 23 and 24 of the ICCPR.[142] The Committee has previously considered those ICCPR family rights (articles 17, 23, and 24) in combination.[143] The Committee has previously found that a State's refusal to allow one family member to remain in its territory may involve

141 Regardless of whether those assessments are connected with immigration proceedings, given that citizens may also be subject to security assessments for various purposes.

142 Article 17(1) provides: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' Article 23(1) provides: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Article 24(1) provides: 'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.'

143 See, eg, Human Rights Committee, *Views: Communication No. 930/2000*, 72nd sess, UN Doc CCPR/C/72/D/930/2000 (26 July 2001) ('*Winata v Australia*').

interference in a person's family life.[144] At the same time, allowing one family member to stay and requiring others to leave does not necessarily involve unlawful interference.[145] The key issue is whether the interference is justified or would be arbitrary.

In the case of in *Byahuranga v Denmark*, the Committee provided guidance on whether an interference with the family under article 17 was arbitrary and unlawful, in circumstances where Denmark decided to deport the father of a family with two minor children and forced the family to choose whether they should leave with him or stay in Denmark.[146] In order to determine whether or not the interference was arbitrary and unlawful under article 17, the Committee noted the following:

> It recalls that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances. In this regards, the Committee reiterates that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reason for the removal of the person concerned, and, on the other hand, the degree of hardship the family and its members would encounter as a consequence of such removal.[147]

In a previous case against Australia, *Winata v Australia*, 'interference' with the family occurred due to a decision by Australia

> to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents … at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case.[148]

In next determining whether such interference was arbitrary and unlawful under article 17, the Committee stated that:

> It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances.[149]

On the facts of that case, the Committee found that the removal of both parents from Australia would constitute an arbitrary interference in the family and violate articles 17 and 23, as well as article 24 in relation to their dependent

144 Ibid [7.1]. See also Human Rights Committee, *Views: Communication No 1011/2001*, 81st sess, UN Doc CCPR/C/81/D/1011/2001 (26 August 2004) [9.7] ('*Madafferi v Australia*').

145 *Madafferi v Australia*, UN Doc CCPR/C/81/D/1011/2001.

146 Human Rights Committee, *Views: Communication No. 1222/2003*, 82nd sess, UN Doc CCPR/C/82/D/1222/2003 (9 December 2004) [11.6] ('*Byahuranga v Denmark*').

147 Ibid [11.7].

148 UN Doc CCPR/C/72/D/930/2000 [7.2].

149 Ibid [7.3].

minor child.[150] In another case, *Madafferri v Australia*, the Committee found that the deportation of a father with a family of four minor children would impose considerable hardship on the family which was not outweighed by the justification for removing the father on the basis of his prior criminal convictions in Italy.[151] The interference in family life was regarded as arbitrary and unlawful in those circumstances.

In the case of Dr Leghaei, his removal from Australia resulted in considerable hardship to his family and to his wider community. First, although his wife was ultimately permitted to remain in Australia, in effect she was *constructively removed* from Australia because her husband was the family's sole source of income and his removal would have left her without any means of support in Australia. Further, as a close Muslim family unit, Dr Leghaei and his wife were unable to tolerate being separated by her remaining alone in Australia.

Secondly, Dr Leghaei's 14 year old daughter, an Australian citizen, was also constructively removed from Australia because as a minor she was dependent upon her parents and joining them in Iran was, according to the family, a lesser evil than remaining parentless in Australia. Her constructive removal to Iran, in the middle of her teenage years and when she does not speak the Persian language, was extremely disruptive to her adolescent development, interfering with her schooling, separating her from her friends, and removing her to a foreign country where she cannot communicate. Such removal was certainly not in her 'best interests' as a child, which is a relevant consideration under article 24 of the ICCPR.[152]

Thirdly, Dr Leghaei's three other young adult sons, who are lawfully resident in Australia, were left without their parents and younger sister in Australia, causing considerable hardship to the family as a whole. The distance and expense involved in the sons visiting them in Iran makes it impractical to properly maintain the quality of family life protected by international law.

Fourthly, Dr Leghaei's removal broke the deep bonds his family had established in the Australian community over 16 years of residency. Dr Leghaei was recognised as a leading moderate religious authority at the Imam Hussein Islamic Centre in Sydney, with a congregation of 1 200 Muslim Australians, as well as being a prominent interfaith leader of national significance.[153] The European Court of Human Rights has recognised that 'the solidity of social,

150 Ibid [7.3].

151 UN Doc CCPR/C/81/D/1011/2001 [9.8].

152 *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002 [9.7].

153 As noted earlier, the Federal Court observed that: 'He is a religious leader who … 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': *Leghaei v Director-General of Security* [2005] FCA 1576 (10 November 2005) [79].

cultural and family ties with the host country' is a relevant factor in evaluating deportation decisions which threaten family rights.[154]

Further, the removal of their spiritual leader caused consternation among Dr Leghaei's congregation, which was disturbed that he could be summarily removed from Australia and his community without a fair hearing. Such treatment generated deep distrust of law enforcement authorities among a minority religious community, when relations between Muslims and the authorities are already strained due to perceptions that Muslims have been unfairly targeted since the 9/11 terrorist attacks.

While the separation of family members may be justified by imperative reasons of security under international law, such justification can only be lawfully established where an expelled person has been accorded the necessary procedural rights under article 13 of the ICCPR. In the case of Dr Leghaei, Australia did not lawfully establish that the interference in his family life was objectively justified, because the basis of the allegations against him remained unknown and untested and his expulsion was thus not 'in accordance with law' and the interference in his family life was arbitrary. Numerous decisions of the European Court of Human Rights, for instance, have found that the separation of family members is contrary to protected family rights where the affected person has not been adequately informed of the case against them and where review authorities have not been able to independently test the merits of the security reasons for deportation.[155]

VII CONCLUSION

Most legal systems enshrine a basic concept of a fair hearing in legal proceedings that affect the fundamental rights or interests of individuals, even if its content varies from context to context and may be justifiable restricted in certain circumstances. Yet, in well functioning legal systems grounded in a reasonable conception of the rule of law, seldom are fair hearing rights eliminated altogether. To do so invariably sublimates the individual to executive fiat – a realm of pure, unstructured power where the individual becomes a passive object of the State's unbounded discretion to adversely affect them.

Where a person is denied knowledge of the allegations and evidence against them, it is impossible for the affected person to test the truth and reliability of the State's assertions. In Dr Leghaei's case, all he was ever told by the Australian authorities is that he was regarded as a risk to national security. He never

154 Under art 8 of the *ECHR*: see, eg, *Üner v The Netherlands*, (European Court of Human Rights Grand Chamber, Application No 46410/99, 18 October 2006) [58]; see also *Zakayev and Safanova v Russia* (European Court of Human Rights, Application No 11870/03, 11 February 2010) [41].

155 Under article 8 of the *ECHR*: see *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, 685 [126]; *Lupsa v Romania* (European Court of Human Rights, Application No 10337/04, 8 June 2006) [40]–[42]; *CG v Bulgaria* (European Court of Human Rights, Application No 1365/07, 28 April 2008) [46]–[49]; *Nolan v Russia* (European Court of Human Rights, Application No 2512/04, 12 February 2009) [70]–[72].

received particulars of the allegations or any evidence or summary of evidence to substantiate them. Absurdly, he even received letters from the authorities asking him to answer the allegations against him, when he had no idea what they were. In such circumstances, no-one, including the decision-maker, any court, or the wider public interested in the quality of justice, can have any real confidence that the decision-making process was fair or that the outcome of the decision was, in fact, accurate or correct. It is difficult for any person in Australia – let alone the affected person, their family and community – to have confidence in the legal system or indeed in the country's security where such security decisions amount to little more than untested, executive assertions that something is so.

No doubt many public officials are motivated by right intentions in making decisions about other people where fair hearing rights are denied by the law. But, of course, it is inevitable that decision-makers may make mistakes; sources and informants may be unreliable or bear grudges; identification evidence may be erroneous; seemingly incontrovertible guilt may have innocent and plausible explanations, and so on. As a dissenting judge of the United States Supreme Court once wrote of secret, untested evidence, it may be 'a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected'.[156] It is these kinds of errors that fair hearing rights are partly designed to expose and correct.

In this regard, fair hearing rights are not only about guaranteeing a sense or sentiment of procedural fair play for those affected by legal decisions. Fair hearing rights are also about ensuring that substantive outcomes in decision-making are correct, so that the legal system avoids miscarriages of justice. Ultimately, fair hearing rights are concerned with ensuring that public officials responsibly exercise the vast regulatory powers at the disposal of the modern State. Nowhere is this more important that in relation to those at the periphery of the law and the social order it constructs. The combination of a person's migration status and national security concerns renders such people particularly vulnerable to marginalisation in the legal system.

The Australian approach is also at odds with much of the liberal democratic world. In Britain and Europe – which arguably face greater security threats than Australia given their relatively greater importance in international affairs – regional and national human rights law requires that a person always be told the substance of the allegations. Sources and informants and other sensitive information can still be protected, but an affected person must always receive a summary of the reasons or evidence. That delicate balancing of interests is a sign of living in a fair and civilised society bound by the rule of law and by human rights values.

By contrast, the absence of a bill of rights in Australia potentially allows the authorities to deal summarily and arbitrarily with people in Australia, bounded only by whatever political morality constraints governments or parliaments of the

156 *Knauff v Shaughnessy*, 338 US 537, 551 (Jackson J) (1950), cited in Australia by Kirby J in *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 571 [254].

day, and by whatever sense of propriety and good grace animates individual security officials. That is hardly a recipe for good public administration, the maintenance of national security, or the pursuit of a rational legal order founded on the rule of law. Dr Leghaei's request of Australia in his UN communication is not radical: tell him what he has supposedly done; let him explain it; and only then deport him if the allegations are true.