BARRIERS TO DEFENCE ACCESS TO WITNESSES FOR THE PROSECUTION – AN ANTIPODEAN PERSPECTIVE

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Abstract

The article presents a summary of legislative and practical barriers that New Zealand defence lawyers face in gaining access to witnesses for the prosecution. The right to confront one's accuser, almost absolute in the United States, is more readily curtailed in New Zealand (and other countries), and in particular, the actual or perceived threat of terrorism has seen the New Zealand Government, like many of its overseas counterparts, erect further barriers presenting a unique set of challenges to defence lawyers and others. The controversial case of Algerian Asylum seeker Ahmed Zaoui is used as a lens through which to assess these developments.

Introduction

1. In considering legislative and practical barriers to defence access to witnesses for the prosecution, the following paper presents an overview of New Zealand's regime, and uses one particular case as a lens through which to examine the impact of the war on terror on the right to confront one's accuser.

2. First, an overview of New Zealand's framework of rules regulating access to prosecution witnesses. The issue of secret witnesses and in camera hearings under New Zealand's security intelligence regime will then be considered through the case study of Algerian political refugee Ahmed Zaoui. Finally, some conclusions are forwarded.

The Right to Confront One's Accuser – a New Zealand Perspective

3. Section 25 of the New Zealand Bill of Rights Act 1990 ("BORA") provides minimum standards of criminal procedure. Section 25(f) provides:

> **25 Minimum standards of criminal procedure**
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> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights –
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> […]
>
> (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution.

4. Section 25(f) is based on art 14.3 of the International Covenant on Civil and Political Rights ("ICCPR")[1] and is similar to art 6(3)(d) of the European

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Convention of Human Rights ("ECHR").[2] Analogous protections are found in Canada,[3] the United Kingdom[4] and the United States.[5] The genesis of the New Zealand provision suggests that it is an incident of the general principle of equality of arms between the Crown and defence,[6] though it is also tied up with the principles of open justice and the fundamental right to a fair trial.

5. It is important to note, however, that unlike the US Constitution, BORA is not a supreme law bill of rights, and can neither apply to invalidate inconsistent legislation, nor override any contrary legislative provision.[7] Importantly, the rights guaranteed under BORA are subject to those limits justifiable in a free and democratic society. Accordingly, the reality in New Zealand (as for most of the common law world) is a less rosy picture than that presented by Justice Scalia in *Coy v Iowa*,[8] (quoting Shakespeare): "Call them to our presence – face to face, and

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1 ICCPR art. 14.3 "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him […]".

2 ECHR art. 6(3)(d): "Everyone charged with a criminal offence has the following minimum rights: to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him […]".In *Luca v Italy* (2003) 36 E.H.R.R. 46., the applicant was convicted of drug trafficking on the evidence of statements made to the police by a co-accused who subsequently invoked his right to silence when called to give evidence at trial. The European Court unanimously found that Luca's trial violated Art.6.

3 Section 7 of the Charter of Rights and Freedoms 1982 provides the right not to be deprived of life, liberty or security of the person without the observance of the principles of fundamental justice. Though differently worded, the Supreme Court of Canada has used this to provide similar protections.

4 See Schedule 1 to the Human Rights Act 1998, though compare the approach to hearsay in the Criminal Justice Act 2003. Section 26 of the Criminal Justice Act 1988 used to require the exclusion of documents created for the purposes of pending or contemplated criminal proceedings ("criminal process documents") unless a court determined that it was in the interests of justice that they be admitted. In *R. v Radak* [1999] 1 Cr.App.R 187, the Court of Appeal refused to permit the use of a witness statement of someone overseas who refused to attend the trial, but could have been examined on commission in the United States, where the defendants could cross-examine him. This provision has been repealed by the provisions of the Criminal Justice Act 2003. For a discussion see W. E. O'Brian, "The right of Confrontation: U.S. and European Perspectives", (2005) LQR 481.

5 The Sixth Amendment to the Constitution (1791) provides that an accused has the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favour".

6 See Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary*, (LexisNexis NZ, 2005), 23.8.

7 Section 4 provides that: No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights) – (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of this enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights. Section 5 provides that the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Section 6 provides a modicum of protection, requiring (like its UK counterpart s 3 of the Human Rights Act 1998) that when interpreting legislation, a rights-consistent interpretation is to be preferred where possible. Though, the New Zealand Supreme Court has taken a more conservative approach to rights-consistent interpretations than the House of Lords: compare *R v Hansen* [2007] NZSC 7 with *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557.

8 487 U.S. 1012.

frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ."

6. The position in the United States outstrips procedural protections enjoyed anywhere else. In *Crawford v Washington* ,[9] a majority of the Supreme Court determined that the Framers of the Constitution would not have allowed the admission of testimonial statements of a witness who did not testify at trial unless he was unavailable and the defendant had had a prior opportunity for cross-examination.[10] The Court emphatically rejected the proposition that the sixth amendment only confers a right to cross examine those witnesses that are present at trial.[11]

7. In New Zealand, the right is not so unqualified, and is regularly subject to limitation by competing social interests.[12] The common law presumption, driven by the perception that it is more difficult to lie to someone's face,[13] is regularly curtailed. Both New Zealand's old evidence regime[14] and its new evidence code (the Evidence Act 2006)[15] envisage limitations on the presumption of face-to-face confrontation, though in both cases where allowing a witness to testify in an alternative fashion, the judge must have regard to the need to ensure the fairness of the proceeding; the views of the witness, the need to minimise the stress on the witness, and the need to promote the recovery of a complainant from an alleged offence.

8. In *R v Hines*,[16] a majority of the New Zealand Court of Appeal[17] held that in the absence of legislative provisions to the contrary, the common law presumption

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9 124 S. Ct. 1354 (2004) (Sup Ct (US)).

10 Effectively overruling the "Roberts test" laid down in *Ohio v Roberts* 448 U.S. 56, 65-66 (1980), which was predicated on the twin notions of reliability and unavailability now codified in New Zealand's new general exception to the hearsay rule. The new rule in the US is still subject to the sole exception where the unavailability of the witness is the fault of the accused, however, which would cover situations where witnesses refuse to testify out of fear of the defendant. For a discussion see R.D. Friedman, "Confrontation: the Search for Basic Principles", (1998) 86 Geo. L.J. 1011.

11 124 S. Ct. 1354, 1370 (2004) (Sup Ct (US)).

12 Particularly where there is a perceived threat of danger to an accused. Child witnesses in sexual abuse cases are another example.

13 Rishworth et al, *The New Zealand Bill of Rights Act*, (Oxford University Press; 2003), at p. 695. See also the New Zealand Law Commission's Preliminary Paper 29 *Evidence Law: Witness Anonymity*, Wellington 1997.

14 Section 13G(2) of the Evidence Act 1908 provided: "In considering whether to give directions concerning the mode in which the witness is to give his or her evidence at the preliminary hearing or trial, the Judge must have regard to the need to protect the witness while at the same time ensuring a fair hearing for the defendant." Section 23D(4) provided: "In considering what directions (if any) to give under section 23E of this Act, the Judge shall have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused."

15 Under s 103(3) a court may order that a witness may give evidence in an alternative way on the grounds of: (a) the age or maturity of the witness; (b) the physical, intellectual, psychological, or psychiatric impairment of the witness; (c) the trauma suffered by the witness; (d) the witness's fear of intimidation; (e) the linguistic or cultural background or religious beliefs of the witness; (f) the nature of the proceeding; (g) the nature of the evidence that the witness is expected to give; (h) the relationship of the witness to any party to the proceeding; (i) the absence or likely absence of the witness from New Zealand; (j) any other ground likely to promote the purpose of the Act.

16 [1997] 3 NZLR 529.

that Crown witnesses must provide their identities to the court applies. The two dissenting judges, Gault and Thomas JJ, commented on the relationship between s 25 and witness anonymity. Gault J argued that the right in s 25 to examine the witnesses for the prosecution "extends to the right to know the names and addresses of prosecution witnesses so that they may be investigated to enable effective exercise of the right of cross-examination."[18] However, Gault J did not see this as an absolute right, arguing that it must be balanced against the witness's rights under the BORA, such as the right to life or the right not to be subjected to cruel or degrading treatment.[19] Thomas J also argued against construing the right as absolute, and noted that in certain circumstances, witness anonymity would qualify as a "reasonable limit" on the right for the purposes of BORA s 5.[20]

9. *Hines* was overturned by the Evidence (Witness Anonymity) Amendment Act 1997. Under s 13B(4), a judge can issue a pre-trail witness anonymity order if he or she believes on reasonable grounds that the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed prior to the trial; and withholding the witness' identity until the trial would not be contrary to the interests of justice.

10. Similarly, s 13C(4) empowers a judge to issue a witness anonymity order for a High Court trial if satisfied that the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed, and either (a) there is no reason to believe that the witness has a motive or tendency to be untruthful or (b) the witness's credibility can be tested properly without disclosure of their identity, provided that the order would not deprive the accused of a fair trial. When considering an application under the section, the judge must have regard to the right of an accused to know the identity of witnesses as well as the principle that witness anonymity orders are justified only in exceptional circumstances. They must consider whether it is practical for the witness to be protected by any means other than an anonymity order, and whether there is other evidence which corroborates the witness's evidence.

11. The reversal of *R v Hines* by statute mirrors Parliament's earlier overruling of *R v Hughes*.[21] In *Hughes* it was held that with no contrary legislation on the matter, the common law rules of evidence require undercover police officers (as with all witnesses) to divulge their true identity. The ruling was overturned by the insertion of s13A into the Evidence Act 1908, which allowed undercover police officers to testify under assumed names in certain circumstances.

12. The Courts have also used the inherent jurisdiction to limit the common law presumption of face-to-face confrontation. In *Accused v Attorney-General*,[22] the Court of Appeal held that s25(f) (nor the related rights to a fair trial or the observance of natural justice) did not prevent the Court using its inherent

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17 Following *R v Hughes* [1986] 2 NZLR 129 (CA).

18 [1997] 3 NZLR 529, 551.

19 Ibid., 551.

20 Ibid., 572.

21 [1986] 2 NZLR 129 (CA).

22 (1997) 15 CRNZ 148

jurisdiction to allow fearful witnesses at a preliminary hearing to testify from an undisclosed location through closed-circuit television.[23] The Court of Appeal elaborated a test for the use of its inherent jurisdiction in this way, creating a reasonably high threshold for the displacement of confrontation:[24]

> The Court must be satisfied first, that there is a substantial risk of serious harm; second, the risk should not be undertaken; third, there are no reasonably practicable alternative means of avoiding the risk, or of lessening it to an acceptable level. The second and third factors will require assessment bearing in mind any possible detrimental effect which may result to an accused or defendant by the particular order envisaged.

13. These developments have been adopted in New Zealand's new Evidence Act 2006, a purportedly comprehensive codification of the common law of evidence in New Zealand. On that front, New Zealand's new exception to the rule against hearsay permits admission where the circumstances in which the statement was made provide a reasonable assurance of the statement's reliability.[25] As the American jurisprudence suggests, the constitutional right of confrontation is a powerful limitation on the uses of hearsay. Although the Evidence Act 2006 only came into force in August this year, it is predicted that the new regime will ultimately let in a lot more hearsay.

14. All in all, therefore, New Zealand's protections fall quite significantly short of the US model, and defence counsel can often find themselves battling with the rules of evidence as well as the discretion of courts to gain access to prosecution witnesses. In short, the right to confrontation is not a right in New Zealand at all, but rather something short of a right, which can be displaced where a court is satisfied that competing social interests so mandate. Those competing social interests usually boil down to fear of intimidation, but also include the desire to encourage the victims of sexual offences, particularly child victims, to testify.

15. But what about those circumstances where the competing social interest is a desire to retain good relations with a foreign security intelligence agency?

National Security and the Right of Confrontation

16. In the early 1970s, following a wave of sectarian violence after the arrival of British troops in Northern Ireland, a Commission of Enquiry was established. The Commission, chaired by Lord Diplock, considered issues surrounding the administration of justice in Northern Ireland in light of the threat of terrorism.[26] One of the problems considered by the Commission was the threat of intimidation of informers, and it determined that proceedings in camera were acceptable where the interests of public order or national security so require.[27] In a passage that could have been written in 2002, let alone 1972, and in the shadow

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23 Compare the views of Walden J in *Hansberger v. Florida* 321 So 2d 577, 582: "a procedure allowing the identity of an informant to remain anonymous would totally contravene the Sixth Amendment and be akin to the dreaded Star Chamber Proceedings. How would witnesses then be protected – would they testify from behind a screen? That would be unthinkable."

24 Ibid., 156.

25 See ss 17 and 18 of the Evidence Act 2006.

26 *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (Cmnd. 5185, 1972).

27 Ibid., at para 20.

of the European Convention, the Commission considered that the threat of terror called for a drastic curtailment of fundamental rights:[28]

> until the current terrorism by extremist organisations of both factions in Northern Ireland can be eradicated, there will continue to be some terrorists against whom it will not be possible to obtain convictions by any form of criminal trial which we regard as appropriate to a court of law.

17. The Commission paid lip service to an ideal world where "even where the hearing takes place in camera, they call for the accused to be informed in detail of the nature of the accusation against him and to examine or have examined witnesses against him",[29] but considered that the exigencies of Britain's then war on terror required otherwise:[30]

> Even if the witness' identity were not disclosed to the accused's counsel the details, elicited in cross-examination, of how the witness came to see or hear that to which he testified might often suffice to identify him to the accused. Apart from this, the accused's counsel would be gravely handicapped in testing the witness' credibility unless he were informed who the witness was. To disclose this to counsel but to prohibit him from communicating it to the accused would expose him to a conflict between his duty to his client and his duty to the State inconsistent with the role of the defendant's lawyer in a judicial process. In any event, in the current polarisation of political views in Northern Ireland no witness would believe that the lawyers defending a terrorist of either faction would not disclose to their client all they learnt about the identity of those who gave evidence against him.

18. The Northern Ireland (Emergency Provisions) Act 1973 and its consequential amendments[31] saw a range of procedures (including hearings in camera) designed to protect civilian witnesses from intimidation.[32] Ironically, these had the effect of virtually eliminating ordinary civilian witnesses from the security trials in Northern Ireland.[33] Instead, the state moved on to the even more invasive information gathering techniques that the so called "Diplock Courts" have become most famous for: the widespread use of detention as a device for gathering information;[34] the use of confessions to obtain convictions;[35] and so forth.

19. Times don't change much. And, as the saying goes, those who can't learn from history's mistakes are bound to repeat them.

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28 Ibid., at para 27.

29 Ibid., at para 20.

30 Ibid., at para 20.

31 See the Northern Ireland (Emergency Provisions) Amendment Acts 1975 and 1978.

32 See J. D. Jackson, "The Northern Ireland (Emergency Provisions) Act 1987" (1988) 39 N.I.L.Q. 235.

33 See Gilbert Marcus, "Secret Witnesses" (1990) PL 206.

34 Primarily for information gathering purposes rather than with a view to ultimately pursuing conviction: See D. Walsh, "Arrest and Interrogation" n A. Jennings (ed.) *Justice under Fire: The Abuse of Civil Liberties in Northern Ireland* (1988), pp. 35-36.

35 Giving rise to the allegations of abuse that were ultimately substantiated in the Baker Report: see Sir George Baker in his *Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978* (Cmnd. 9222).

The Zaoui Case

20. Zaoui was elected to represent the Algerian Islamic Front for Salvation (FIS) in December 1991. The new government was overthrown in a military coup in January 1992, however, and he fled to Europe. He had been accused of being associated with the militant Armed Islamic Group (GIA), but has consistently denied any such involvement. He arrived in New Zealand in December 2002 and sought refugee status. Having travelled with fake documents, he was taken to one of Auckland's prisons where he was refused asylum.

21. In March 2003, the New Zealand Security Intelligence Service (SIS) briefed then Immigration Minister Lianne Dalziel on "classified information" relating to Zaoui. In April that year, at the request of the SIS, the Minister issued a "Security Risk Certificate" against Zaoui, which stated that Zaoui was a threat to national security in terms of provisions of the Immigration Act 1987 and art 33.2 of the United Nations Convention Relating to the Status of Refugees 1951.[36] This determination displaced all other legal action except the asylum appeal.

22. In August 2003 the Refugee Status Appeals Authority declared Zaoui a genuine refugee. The Minister, however, had made a preliminary decision to rely on the risk certificate, effectively enabling Mr Zaoui's deportation notwithstanding his refugee status.[37] He appealed the decision.

23. The Inspector General of Security and Intelligence (the watchdog for the SIS) issued a preliminary decision stating that his role in the review was to consider the plaintiff's security risk rather than international conventions as to refugees, civil and political rights, and torture. The Inspector General considered further that Zaoui had no right to a summary of allegations underlying the risk certificate because classified security information could not be divulged to him. The Immigration Act defined "classified security information" as including information as to a threat to security posed by an individual which was held by the SIS and which, in the opinion of the Director of Security, could not be divulged because it might identify the source or provide details of the operational methods of the service and would prejudice the security of New Zealand or the entrusting of information in confidence by another government.[38] Zaoui sought a review of the decision.[39]

24. In November 2003, the High Court ruled that the Director of Security, Richard Woods, who issued the security risk certificate, must take the stand and be cross-examined during a review of Zaoui's security risk certificate. The provisions of the Immigration Act did not prohibit a summary of classified security information which complied with prohibitions on disclosure. Furthermore, s 27(1) of the New Zealand Bill of Rights Act provided that the right to natural justice in the determination of his case. Zaoui was granted declarations that he was entitled

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36 Pursuant to s 114D(1) in Part IVA of the Immigration Act 1987.

37 See ss 114H and 114I of the Immigration Act 1987.

38 See s 114B of the Immigration Act 1987.

39 Zaoui sought declarations that: (a) the ruling was unlawful, ultra vires and in breach of the right to justice under s 27(1) of the New Zealand Bill of Rights Act 1990; and (b) that Part IVA of the Immigration Act 1987 was inconsistent with the New Zealand Bill of Rights Act.

to a summary of allegations provided that classified security information was not divulged.[40]

25. On appeal to the Court of Appeal, the Court was unanimous in holding that it was for the Inspector-General to decide whether the security risk certificate was properly made[41] and for the Minister of Immigration to decide whether to remove or deport in reliance on the certificate, which included issues such as the risk of indirect refoulement to torture or persecution.[42] However, the Inspector-General was required to consider whether there were reasonable grounds for regarding the person as a danger to the security of New Zealand in terms of art 33.2 of the Refugee Convention.[43] Two of the justices, Anderson P and Glazebrook J, held that this required objectively reasonable grounds based on credible evidence that Zaoui represented a danger of substantial threatened harm to the security of New Zealand of such gravity that it would justify sending him back to persecution. Their Honours held further that there had to be a real connection between Zaoui and the danger to national security and an appreciable alleviation of that danger through deportation.[44]

26. On appeal once more, the Supreme Court held that Article 33 placed an obligation on the government not to expel a refugee whose life or freedom might be threatened in certain circumstances, but that notwithstanding that prohibition, the government was empowered them expel a refugee for endangering national security.[45] The Court held that to fall within art 33.2, the person in question must be thought on reasonable grounds to pose a threat of substantial harm to the security of New Zealand, that threat being both substantial and based on objectively reasonable grounds.[46] The Inspector-General was entitled to see material that had not been before the Director of Security and to substitute his decision for that of the Director if it appeared that the certificate should not be confirmed, but that did not mean that the Inspector-General was concerned with questions wider than the security criteria.[47]

27. In December 2003, it was held that Zaoui was entitled to a summary of the secret information the SIS claimed to have on him, and that the Inspector-General should take Zaoui's human rights into account when reviewing the risk certificate.[48] His application for discovery was allowed because the provisions of the Inspector-General of Intelligence and Security Act 1996 did not prohibit discovery and an allegation of apparent bias did not render unnecessary or irrelevant documents which would equip the informed observer with all relevant facts and circumstances.[49]

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40 *Zaoui v Attorney-General* [2004] 2 NZLR 339.

41 *Zaoui v Attorney General* [2005] 1 NZLR 690 (CA).

42 Under s 114K of the Immigration Act 1987.

43 Under s 114C(6)(a) of the Immigration Act 1987.

44 [2005] 1 NZLR 690 (CA) at paras [24]-[26].

45 *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289.

46 See paras [25]-[29], [42]-[52].

47 See paras [57]-[73].

48 *Zaoui v Greig* [2005] 1 NZLR 105.

49 See para [62].

28. In December 2004, Zaoui was released on bail by the Supreme Court to live in Catholic community in Auckland in the Dominican Priory.[50]

29. To further complicate matters the Inspector General, Laurie Greig, was required to step down in April 2004. Salmon and Harrison JJ found apparent bias in certain of his comments to the media in relation to the Zaoui case.[51] Ex-judge Grieg was replaced as Inspector General by former Solicitor General and ex-judge Paul Neazor.

30. The review of the security risk certificate by the Inspector General, due to start in August 2006, was delayed in July 2006. After Zaoui's family was refused entry to New Zealand by now Immigration Minister David Cunliffe in February 2007, the review began in July 2007.

31. The situation as it now stands is that two "special advocates", Stuart Grieve QC and Chris Morris, have been appointed to look at the classified material on Zaoui's behalf. The special advocates were then allowed to summarise the material for Zaoui without including all of the detail, particularly the sources of the allegations that he was linked to terrorist organisations in Algeria. A second hearing will then be held during which Zaoui and his counsel can be present. That hearing will consider only those parts of the classified material which Zaoui is entitled to hear. Finally, a third hearing will be held, in which only the special advocate may appear, to consider the most classified material.

32. The case is not isolated. In Canada, a broadly analogous situation has emerged in the case of Mohammed Harkat,[52] and in the United States, similar concerns about intelligence information being made available to the public through open court processes played a role in the trial of 9/11's 20th hijacker Zaccharias Moussaoui.[53]

33. The case has generated much media and political attention. The Prime Minister, Helen Clark, has publicly affirmed the propriety of the in camera hearings, noting that "it's not a court. It is a review of a security risk certificate" and, in an eerie echo of Lord Diplock in 1972, "obviously it involves the use of classified

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50 *Zaoui v Attorney-General* [2005] 1 NZLR 577: The Supreme Court held unanimously that the inherent jurisdiction to grant bail was not confined to cases of detention of those charged with criminal offences.

51 In an interview with the *Listener*, Justice Greig implied that if it was up to him Mr Zaoui would be "outski" on the next plane, but that comment was discounted by the judges. Their Honours found another passage of concern, however, where Greig volunteered the view: "We don't want lots of people coming in on false passports that they've thrown down the loo on the plane and saying, 'I'm a refugee, keep me here'." See "Watching the watchers", Gordon Campbell, *Listener*, November 29-December 5 2003 Vol. 191 No 3316, p.3.

52 *Harkat v Canada (Minister of Citizenship & Immigration)* 2004 FCA 244, 325 N.R. 298. Mr. Harkat, who had a risk certificate issued against him, brought proceedings to compel an employee of the Canadian Security Intelligence Service ("CSIS") to testify at the hearing regarding a summary of evidence provided to Mr. Harkat pursuant to paragraph. This was declined. Instead, a process was established whereby Mr. Harkat could serve and file questions in order to clarify the facts and matters set out in the summary.

53 See *United States v Moussaoui* 382 F. 3d 453 (4th Cir 2004); *United States v Moussaoui* 365 F 3d 292 (4th Cir 2004); *United States v Moussaoui* 282 F Supp 2d (E.D. Va. 2003); The state had sought to restrain Moussaoui's access to confidential information held against him as well as access to al Qaeda suspects being held at Guantanamo Bay. His effort to obtain the confidential information was frustrated, but he was allowed access to prisoners at Guantanamo.

information and that is properly done outside what would be the procedures of a court."[54]

34. Others, however, have condemned the process. Green Party MP Keith Locke, for example, has been consistently critical, noting that the special advocates were appointed by the Inspector General rather than Zaoui, and were restricted from informing either Zaoui or his counsel about the classified contents of the security risk certificate.[55]

Conclusions

35. What are we to make of all this? It is clear that since 9/11, the New Zealand Government, like governments elsewhere around the world, has used the actual or perceived threat of terrorism as justification for a massive increase in the power of the coercive state apparatuses such as the SIS. These have extended beyond the criminal procedural sphere to the use of classified information in immigration processes.

36. Just as the state's responses to terrorism haven't changed, the concerns for defence lawyers are the same: has the Inspector General any assurance of the credibility of secret witnesses? Has it come from the secret service of Algeria's dictatorial regime? Has it been acquired by torture or by paid informants? The answers to these questions remain unknown. Furthermore, the processes for the overview of the actions of the SIS are impoverished. The SIS budget has recently been increased from NZ$23.28 million to NZ$43.5 million. Meanwhile, the Inspector General has an annual budget of NZ$112,000, a part-time secretary and an office carved out of space in another government department.

37. It is clear from the Zaoui litigation that the New Zealand courts have gone some way in assuring that basic human rights are protected in this sphere. However, in a Dicean constitutional framework with total and unquestioned parliamentary supremacy and an un-entrenched bill of rights, New Zealand's defence lawyers can probably expect an uphill battle in securing access to prosecution witnesses in the future, at least where "national security" or "the life of the nation" is allegedly at stake. As for the threat of terrorism as a justification for in camera hearings and secret witnesses, the words of Lord Hoffman in a recent case spring readily to mind:[56]

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

38. The Prime Minister has suggested that, once Zaoui's case has been concluded, the risk certificate regime will need to be revisited.[57]

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54 "PM defends Zaoui closed door hearing", NZPA, *The New Zealand Herald*, June 9, 2007.

55 Ibid. See also Keith Locke's comments in the House: (2007) NZPD 639, 9889.

56 *A v. Secretary of State for the Home Department* [2005] 2 AC 68, at para [97].

57 (2004) NZPD 615, 10945.