MEMORANDUM

TO: Fraser Richards, MBIE

COPIES TO: Aaron Martin

FROM: Ian Auld

OUR REF: MBIE001/342

DATE: 7 May 2021

SUBJECT: **Samsudeen – Warrant of Commitment**

---

1. This memo records our advice as to whether, and if so how, Mr S can be detained under Part 9 of the Immigration Act 2009 (**Act**) at the conclusion of his criminal proceedings, until such time as he can be deported. It reflects discussions between Crown Law and MBIE legal.

Summary of advice and recommendation

2. We consider that a constable, on the request of an Immigration Officer, could arrest and detain Mr S at the conclusion of his criminal proceedings on two bases:

   2.1 First, that he is liable for deportation (s 309(b)); and

   2.2 Secondly, that there are reasonable grounds to suspect that he constitutes a threat or risk to security (s 309(1)(d)).

3. His detention would be for the purpose of detaining him pending the making of a deportation order, including during the completion of his appeal (under s 310(b)(i) and (d)(i)).

4. If Mr S is arrested on the basis of a suspicion that he constitutes a threat or risk to security, his case would need to be referred to the Minister of Immigration to determine whether to certify that Mr S constitutes a risk or threat to security, under s 163. There are good grounds for the Ministry to certify that Mr S constitutes a risk to security. However, given that Mr S cannot be deported pending the outcome of his appeal the Minister should not advise the Governor-General to order his deportation.

5. An Immigration Officer could apply for a WOC on the basis that, due to Mr S's pending appeal, he is unable to leave New Zealand prior to the expiry of the 96 hour period of detention (s 316(1)(d)).

6. A District Court judge would have jurisdiction to issue a WOC on the following alternative bases:

6.1 Due to Mr S's pending appeal, he is unable to leave New Zealand, and this reason is likely to remain in existence, but not for an unreasonable period (s 317(2)(c)).

6.2 In any event, it is, in all the circumstances, in the public interest to issue a WOC (s 317(3)); and

6.3 Mr S was arrested and detained on the suspicion that he constitutes a threat or risk to security, and it is contrary to the public interest for him to be released on conditions (s 318(3)).

7. The WOC could be issued for the purpose of detaining Mr S pending the making of a deportation order, including during the completion of his appeal under s 310(b)(i) and (d)(i).

8. Subsequent WOCs can be applied for on the same bases, and the Court would continue to have jurisdiction to issue a WOC until Mr S is either deported, or his appeal is allowed.

Background

9. Mr S is a Sri Lankan national of Tamil ethnicity and Muslim religion.

10. Mr S came to New Zealand from Sri Lanka in July 2011 on a student visa. In November 2011, he made a claim for refugee claim, on the basis of a fear of persecution from a group related to the Tamil Tigers, called the Karuna group, arising due to his father's involvement in politics in Sri Lanka. Mr S's refugee claim included detailed accounts of incidents of persecution by the Karuna group, particularly violence against his family.

11. Mr S's refugee claim was declined by the RPO, as the RPO did not find the accounts of persecution to be credible. However, on appeal, the IPT accepted Mr S's evidence and granted him refugee status in December 2013. In January 2014, he was granted residency under the refugee and protection category.

12. In 2016, Mr S came to the attention of Police due to posting material objectionable material on Facebook, specifically graphic videos showing the persecution of Muslims around the world. He had also posted posts supportive of Islamic extremist violence. He was initially warned by the Police. The Police continued to monitor his Facebook activity, and found that he continued to post similar content using a number of accounts. On 19 May 2017, Mr S was arrested at Auckland Airport as he was about to leave New Zealand. He was subsequently charged with possessing and making / copying objectionable material. Mr S was also investigated and charged with a number of fraud offences. He was remanded in custody, where he remains.

13. In June 2018, Mr S was convicted of: 2 x using a document; 2 x knowingly supplying restricted material; and 1 x failing to assist the Police in a search (relating to failure to provide passwords for electronic devices). He was subsequently sentenced in the High Court to one year supervision.

14. In August 2018, he was arrested and charged with further offences: possession of an offensive weapon (relating to a hunting knife found in his home); knowingly supplying restricted material; and 5 x failing to assist a search.

15. As part of their investigations, Police forensically analysed Mr S's computer, and found a number of documents that indicated that he had forged some of the documentation used in his initial refugee claim, including medical reports and statements from his family members. This information was shared with the RPO.

16. Other members of Mr S's family now reside s9(2)(a) . As part of the investigation into Mr S, Police shared information with the s9(2)(a) Police, who interviewed Mr S's family living in s9(2)(a) , including about the incidents of persecution that formed the basis of Mr S's initial refugee claim. The information they provided was inconsistent with Mr S's accounts. This interview cast further doubt about the credibility of Mr S's refugee claim.

Decision and appeal

17. Based on this information, on 1 February 2019, the RPO found that Mr S's refugee status may have been obtained by fraud, forgery and misleading representations. Further, given that the underlying basis of Mr S's refugee status was undermined, the RPO also considered that Mr S was not a refugee or protected person. Accordingly, the RPO decided to cancel Mr S's refugee status under s 146(1)(a) of the Act.

18. Based on the cancellation of his refugee status, Mr S became liable for deportation under s 162 of the Act. He was also liable for deportation under s 161 on the basis of the fact that he had committed an offence for which the court has the power to impose imprisonment for a term of 2 years or more within 5 years of becoming a resident.

19. Mr S has appealed his liability for deportation under s 162 of the Act to the IPT, on both the facts and on humanitarian grounds, pursuant to s 162(2) of the Act.

Criminal proceedings

20. The trial for the charges referred to above is set to commence on 17 May 2021. It is likely to take approximately 7 days.

21. Mr S has been in custody since his arrest on these charges in August 2018. It is very likely that he will be "time served" for any sentence in the event he is convicted. It is also possible that he will be granted bail pending sentence on this basis.

Detention under the Immigration Act

22. The Police consider that Mr S poses a significant security risk. Accordingly there is a desire that he remain in custody if possible following the conclusion of the criminal proceedings and until he is able to be deported. The question, then, is whether there is a basis for him to be detained under Part 9 of the Act.

Initial arrest and detention

23. Mr Samsudeen will be liable for arrest and detention, under s 309(1)(b) of the Act, on the basis that he is a person who is liable for deportation. He is also liable for arrest and detention under s 309(1)(d), on the basis that he is a person whom there are reasonable grounds to suspect constitutes a risk to security. As his refugee status has been cancelled, he is not currently recognised as a refugee, and thus his detention is not prohibited by s 309(2).

24. Under s 310(b)(i) of the Act, a person may be arrested and detained for the purpose of detaining them pending the making of a deportation order, including during the

completion of any appeal brough by the person against his or her liability for deportation.

25. Further, under s 310(d)(i) of the Act, a person who is suspected of constituting a threat or risk to security may be detained pending the making of a deportation order. We consider that a person may be arrested and detained for more than one of the purposes under s 310 the Act.

26. Under s 313 of the Act, a constable may, or if requested by an immigration officer must, arrest a person liable for arrest and detention for the purposes set out in s 310, without warrant. A person may only be detained as long as is necessary to achieve the relevant purpose, and must not be detained for longer than 96 hours.

27. If a person is arrested and detained on the suspicion that they constitute a threat or risk to security, a constable must as soon as is practicable refer the case to the Minister of Immigration to determine whether to certify that the person constitutes a threat or risk to security, under s 163 of the Act.

Warrant of commitment under s 317

28. Under s 316 of the Act, before the expiry of the 96 hour period of initial detention, an Immigration Officer may apply to a District Court Judge for a warrant of commitment (**WOC**) authorising the person's detention for up to 28 days where, it has become apparent that, for any reason, the person is unable to leave New Zealand.

29. A Judge may issue a WOC if the reason the person is not able to leave New Zealand is still in existence and are likely to remain in existence, but not for an unreasonable period, under s 317(3)(c) of the Act.

30. The purpose for which a Judge may exercise the power to issue a WOC are those contained in s 310 of the Act. This includes, for the purpose of detaining someone pending the making of a deportation order, including during the completion of any appeal brought by the person against his or her liability for deportation. It follows, then, that the fact a person cannot be deported due to an ongoing appeal must be a valid reason for them not being able to leave New Zealand for the purposes of s 317(2).

31. As to the period of detention, the period during which Mr S will be able to leave New Zealand will depend on the time taken to hear and determine his appeal. It is likely to be in the order of some months. In the circumstances, a good argument can be made that this is not an "unreasonable" period – again, particularly given that s 310 specifically foresees that a person may be detained pending the resolution of an appeal.

32. Based on the above, we consider there will be good grounds for a Judge to issue a warrant of commitment in respect of Mr S under s 317(2) of the Act.

33. Further, even if the Judge does not consider that s 317(2)(c) applies, they may nevertheless make a WOC if it is, in all the circumstances, in the public interest to do so (under s 317(3)). There is a very strong argument that there is a public interest in Mr S being detained pending his deportation because:

33.1 He is prima facie liable for deportation under both ss 161 and 162; and

33.2 There is strong evidence that he poses a significant risk to security. This evidence will be strengthened if he is convicted of his current charges. It will

also be strengthened if the Minister certifies he is a risk to security under s 163 of the Act (discussed further below).

Warrant of commitment under s 318?

34. There is strong evidence that Mr S poses a risk to security. Accordingly, there are good grounds for his arrest pending the making of a deportation order, under ss 309(d), 310(d)(i) and 313.

35. However, due to Mr S's current appeal, under s 164(1) of the Act, he may not currently be deported. Accordingly, a deportation order cannot be made under s 163 until his appeal is resolved.

36. As above, an Immigration Officer may make an application for a WOC in respect of a person who is detained under s 313 on the basis that, for any reason, the person is unable to leave New Zealand. Again, here the reason Mr S will not be able to leave New Zealand will be because of his unresolved appeal.

37. Where a person has been arrested and detained on the suspicion that they constitute a risk to security, or where a person is subject to a deportation order under s 163, a District Court must issue a WOC, unless the release of the person would not be contrary to the public interest.[1]

38. The purpose for which a WOC may be issued in case of a person who is suspected of constituting a risk to security is to detain that person pending the making of a deportation order (s 310(d)(i)). However, once a deportation order has been made the only purpose for which a person may be detained is to deport the person by placing them on the first available craft leaving New Zealand.

39. As noted above, where a person is arrested under s 313 on the suspicion that they constitute a risk to security, a constable must as soon as practicable refer the case to the Minister to determine whether to certify, under s 163, that the person constitutes a risk to security. However, notably, under s 163, once the Minister has certified that a person constitutes a risk to security, there is a further discretion for the Governor-General (acting on the advice of the Minister) whether to order their deportation.

40. Part 9 of the Act appears to conflate these two steps – for example both ss 314 and 316(c) appear to envisage that certification will occur contemporaneously with making a deportation order. However in the current situation, where it is not possible to make a deportation order, we consider the Minister could certify that Mr S poses a risk to security, but not advise the Governor-General to order his deportation. In that case, we consider that s 310(d)(i) would continue to apply, and Mr S could continue to be detained pending the making of a deportation order.

41. Although s 310(d)(i), unlike s 310(b)(i), does not specify that a person who is suspected of constituting a threat or risk to security can be detained pending the completion of any appeal, we do not consider this prohibits detention under s 310(d)(i) for a period where a deportation order cannot be made due to an ongoing appeal of other deportation liability.

---

[1] Immigration Act, s 318.

42. We consider that a Court can issue a warrant of commitment on more than one basis under ss 317 and 318.

43. Accordingly, we consider Mr S could also be initially detained on the basis of a suspicion that he poses a risk to security, and a Judge could issue a warrant of commitment under s 318, for the purpose set out in s 310(d)(i).

s(9)(2)(h)