

Reversing the Onus and Raising the Bar

Being alert and alarmed when acting for those accused of terrorism offences.

A paper delivered to the *National Access to Justice and Pro Bono Conference*, held at the Sydney Masonic Centre, 66 Goulburn Street, Sydney on 14-15 November 2008

Introduction

Though this paper is being delivered to the criminal law stream of the Conference, and I will be speaking about Dr. Haneef's case, my paper will not be concerned with technical criminal law questions. Indeed, though it may not appear so from the outside, Dr. Haneef's case, only briefly, crossed the threshold of being a criminal law case.

In my opinion, Dr. Haneef was arrested, unlawfully, because the information available to the arresting officers did not satisfy the statutory test¹ that they believed, on reasonable grounds, that Dr. Haneef had committed the offence for which he was arrested.

None of the five detention hearings conducted from 3 July to 13 July 2007 constituted a hearing on the merits in circumstances where the detainee and his lawyers had access to the information given to the magistrate. The necessary battle to obtain a fair hearing meant that the hearings were as much about administrative law as criminal law.

The bail hearing before Magistrate Jacqui Payne had the flavour of criminal law. However, less than three hours after Dr Haneef was granted bail, Mr. Andrews, the Minister for Immigration and Citizenship, cancelled Dr Haneef's visa and made the gaining of bail irrelevant.

And, although an argument over the correctness of the charge and the need for particulars was set down for argument, the Commonwealth Director of Public Prosecutions decided that, at that point, discretion was the better part of a Director's duties and the criminal proceedings were struck out. From that point on, our focus, as far as the legal aspects of the case were concerned, was upon the task of convincing the Federal Court that the Minister had construed the law wrongly in applying the "character" provisions of the *Migration Act 1958* (Commonwealth).

I have previously documented aspects of the disturbing nature of AFP conduct in respect of Dr. Haneef.² However, the governmental context in which the AFP conduct occurred also gives cause for real concern.

¹ Section 3W *Crimes Act 1914*.

² See Notes for a Talk by Stephen Keim in association with Peter Russo to the New South Wales Council of Civil Liberties at the Marigold Restaurant, Sydney on Friday, 31 October 2008.

This paper is directed to matters which were, at the time they were occurring, invisible to the general public; to those of us acting for Dr Haneef; and to the magistrate who was being asked to order that Dr Haneef's time in detention continue to be extended.

Though, at the time, we had to make an educated guess about what might be happening at Ministerial, departmental and in the higher echelons of the AFP, documents that have been obtained under FOI, even though they remain heavily redacted, now allow us to have a better understanding of how all the pieces fit together. I will be discussing information that we have received under FOI from different sources. These sources include the Queensland Police Service (QPS), the Australian Federal Police (AFP), the Department of Immigration and Citizenship (DIAC), and the Department of Prime Minister and Cabinet (PMC).

Though this is far from the criminal law, it remains important for criminal lawyers. Criminal lawyers have to be aware of the new ethos of government ushered in by the so-called war on terrorism. The presumption of innocent until proven guilty has been replaced by a new mantra: guilt or innocence is no longer relevant.

The National Counter Terrorism Committee

Many of the documents obtained through FOI processes refer to a body called the National Counter Terrorism Committee. This Committee was a body in which the actions against Dr Haneef were discussed and coordinated.

Some government documents refer to the National Counter Terrorism Committee as a coordinating committee of Commonwealth, State and Territory governments which meets twice a year.³ It was established by an intergovernmental agreement dated 24 October 2002.⁴

However, the FOI documents also reveal that a Committee bearing the same name met on almost a daily basis during July 2007. Sometimes, it included State and Territory representatives. Sometimes, it was wholly constituted by Commonwealth representatives. The attendees at the meeting that took place on 3 July 2007 included Hugh Borrowman, the acting deputy-secretary of the Department of Prime Minister and Cabinet ("PMC"), who chaired the meeting.⁵

Of the at least thirty-six people in attendance,⁶ two were from the Department of Immigration and Citizenship ("DIAC").⁷ A number of other Commonwealth departments

³ AFP submission to the Clarke Inquiry, page 9. See also <http://www.ag.gov.au/aqd/www/nationalsecurity.nsf/AllDocs/0C453B7326BEB74ACA256FAB0015F3BE?OpenDocument>.

⁴ Ibid.

⁵ Attendance sheet of National Counter Terrorism Committee, dated 3 July 2007, received on FOI from PMC, appendix 1 to these notes.

⁶ Two names and the entity which they represent appear to be deleted from the document as released on FOI. Query whether they are ASIO representatives. The ASIO submission to the Clarke Inquiry, at page 2, states that ASIO participated in "whole of government meetings in relation to Dr. Haneef."

were represented. There were representatives from the Premiers' Departments of New South Wales, Victoria, Queensland and Western Australia. There were representatives from the AFP and a number of State police forces.

As stated above, many of the discussions about Dr. Haneef, at a government level, occurred within this Committee. It is often referred to as a "whole of government" Committee.

From the Beginning

Dr. Haneef was arrested on Monday, 2 July 2007 at fifty-five minutes to midnight.

The AFP prepared a detailed briefing paper for the meeting of the National Counter Terrorism Committee on the following day.⁸ The paper set out the legal bases of detention orders then being obtained pursuant to part 1C Crimes Act. It also set out the legal bases of preventive detention orders ("PDOs") pursuant to the Criminal Code.

The minutes of the first meeting held on 3 July 2007 (the time is not disclosed in the FOI release) disclose something that is not stated expressly in the AFP briefing note. It characterises the information received from the UK Metropolitan Police ("MPS") as "non-threat" information.⁹ That was not quite the atmospheric being radiated from ministerial press conferences of the time.

A second meeting of the National Counter Terrorism Committee for 3 July was held at 5.00pm. This time, the attendees appear to have all been Commonwealth government representatives.¹⁰

The AFP briefed the meeting with further important information. There was no information linking Dr. Haneef with the UK incidents. And there was no basis for "charging Dr. Haneef".¹¹

ASIO told the meeting that there was no basis for changing the then current National Alert level which was at medium.¹²

DIAC told the meeting that a representative of the hospital [where Dr. Haneef worked] stated that his personal file appeared, "even in retrospect [to be] fine" with character checks and medical qualifications and curriculum vitae in order.¹³

⁷ The DIAC submission to the Clarke Inquiry, paragraphs 92 and following, states that DIAC was co-opted to attend meetings of the National Counter Terrorism Committee during July 2007.

⁸ AFP FOI Release, folios 37-41: appendix 2.

⁹ Minutes of meeting of National Counter Terrorism Committee, dated 3 July 2007: appendix 3.

¹⁰ Attendance sheet of National Counter Terrorism Committee, dated 3 July 2007 (5.00pm), received on FOI from PMC: appendix 4.

¹¹ Minutes of meeting of National Counter Terrorism Committee, dated 3 July 2007: appendix 5.

¹² Ibid.

¹³ Ibid.

Developing an Extra Option

At 2.30pm on Wednesday, 4 July 2007, Detective Superintendent Hogan of the Queensland Police Service (“QPS”); David Craig and Ramzi Jabbour, both of the AFP; and legal officers from both police forces met to discuss options for further detention of Dr. Haneef. They prepared a briefing paper which was “submitted”.¹⁴

The types of options being considered to detain Dr. Haneef are revealed by a document released on FOI by the QPS. The document appears to be dated prior to 11.20pm on 5 July 2007. However, from its context, the document seems to be an AFP file note. It states: “The AFP is preparing a submission to the Minister for Immigration for the possible cancellation of the visas for [Drs. Ali and Haneef]”.¹⁵

From material released under FOI, we also know that, as you would expect, the Prime Minister of that time, John Howard, received daily briefings on the situation concerning Dr. Haneef. (Mr. Borrowman, the Acting deputy Secretary of his department, was chairing the meetings of the National Counter Terrorism Committee). The copies of the briefings released on FOI have been heavily redacted. Mr. Howard and his First Assistant Secretary, National Security Division, co-signed the briefings acknowledging that they had noted the information contained therein. In a briefing note signed by Mr. Howard on 4 July, he is advised: “There remains the real possibility that Dr. Haneef will be released without charge. Relevant departments and agencies are continuing to analyse the possible options identified in the 3 July brief”.¹⁶ The options in the 3 July brief are not available on FOI but one might, reasonably, infer that visa cancellation was among those options.

The agenda for the meeting of the National Counter Terrorism Committee held at 9.00am on 5 July contained an entry: “Options for further action: AFP, ASIO and DIAC”.¹⁷ The relevant page of the minutes is not, however, available and so the detail of the options, as discussed that day, is also not available.

The meeting of the National Counter Terrorism Committee at 9.00am on Friday, 6 July 2007, was attended by State and Commonwealth representatives.¹⁸ DIAC was represented by Peter White. Mr. White’s presence is significant because, he was the officer who, 10 days later at midday, decided that it was time for the brief to cancel Dr. Haneef’s visa to go to his minister.¹⁹ Mr. White’s briefing papers to his Minister make no reference to ASIO’s conclusion that Dr. Haneef was not a security threat to Australia.²⁰ Mr. White must have been aware of, at least, ASIO’s interim assessment. ASIO told the

¹⁴ AFP FOI release, folio 45: appendix 6.

¹⁵ QPS, review FOI release, page 65: appendix 7.

¹⁶ Secret briefing for Prime Minister dated 4 July 2007, appendix 8.

¹⁷ Agenda for meeting of the National Counter Terrorism Committee, 5 July 2007, 9.00am: appendix 9.

¹⁸ Attendance sheet of National Counter Terrorism Committee, 6 July 2007, 9.00am: appendix 10.

¹⁹ Notes of briefing of Australian Labor Party representatives concerning cancellation of Dr. Haneef’s visa: appendix 11.

²⁰ ASIO’s view is expressed in the ASIO submission to the Clarke Inquiry, page 2.

meeting, on 6 July 2007, that “no threat information has been revealed by ASIO’s investigations”.²¹ (Emphasis added.)

The minutes of the National Counter Terrorism Committee meeting of 9 July 2007 at 10.00am display a degree of coyness. The report of the AFP contribution notes that “options for continued detention continuing”. Under “future options”, the minutes note: “If the extension [of detention time] is rejected, there are a number of steps which will be discussed in a separate forum with the relevant agencies”.²² (Emphasis added.)

The details of those options are, however, available because they are spelt out in a briefing paper prepared for the secretary and deputy secretary of the PMC prepared on the morning of 9 July 2007.²³ The briefing paper was written after the 10.00am meeting of the National Counter Terrorism Committee had finished. The purpose of the paper was to update its recipients on the status of the “UK Incident and Australian Terrorism Investigations”. The paper states that there was a possibility that the issue might be discussed, the following day, in Cabinet. It states that two written briefs have previously been provided to the Prime Minister. The author of the paper states that oral updates had been given to the Prime Minister, that morning.

The paper states that the matter remained an operational investigation. It goes on to state that the authors were also starting to identify broader policy implications, particularly, in light of an announcement of the Prime Minister called “Stronger Border Control” of the previous day.

After discussing the applications for detention time under part 1C Crimes Act, the paper states that, if the application being made, that day, was unsuccessful, the AFP would apply for a PDO. This was thought to yield up to 48 hours of detention. Upon that expiring, the AFP or Queensland Police were said to be able to seek a PDO under Queensland legislation for “up to 12 days”. These statements, made in a briefing paper to two very senior PMC officers, are very surprising. This is because there is independent evidence that the AFP did not believe, at least as late as the preceding Thursday, that there was sufficient evidence available to support a PDO under any legislation.²⁴

Then, the last of the options is discussed. The paper states: “As noted in the PM brief of 6 July, if Dr. Haneef no longer meets the requirements for 457 visa status (eg visa cancellation as a result of an adverse security assessment, or on foreign policy grounds, or as a result of no longer meeting other character requirements), his visa would be cancelled and he would be taken into immigration detention, pending removal. DIAC are actively considering these issues and closely engaged with the AFP”.

The next section of the briefing paper is redacted. It is headed “Broader policy implications”. However, the paper then notes that it may be appropriate for the NSC

²¹ Minutes of National Counter Terrorism Committee, 6 July 2007, 9.00am: appendix 12. Note also that “ASIO information is being compared with AFP information”. This puts to rest any suggestion that ASIO assessments were not made with the full benefit of information in the possession of the AFP.

²² Minutes of National Counter Terrorism Committee, 9 July 2007, 10.00am: appendix 13.

²³ Briefing Paper, Department of Prime Minister and Cabinet, 9 July 2007: appendix 14.

²⁴ See AFP FOI Release, folios 49-51, dated 5 July 2007: appendix 15.

(National Security Committee of Cabinet) to consider the broader policy issues on Monday 16 July 2007. The authors of the briefing paper were considering possible issues for ministers to consider.²⁵

The briefing paper was signed as “noted” by both Dr. Peter Shergold (secretary) and Duncan Lewis (deputy secretary) of the PMC.

So, it is clear that, at least as early as 5 July 2007, less than three days after Dr. Haneef's arrest, the AFP and QPS were working on the option to cancel Dr. Haneef's visa.

It is also clear that the Prime Minister, Mr. Howard, was aware by Friday, 6 July, that the visa cancellation was being contemplated, including visa cancellation by use of the character provisions in s.501 *Migration Act 1958*. It is also likely that the subject of visa cancellation was discussed, at least by the National Security Committee of Cabinet, and, possibly, by Cabinet, itself.

It's the No Evidence Option

However, as it turns out, the option actually being considered displayed a complete lack of consideration for the rights of the individual. The specific details of the option are made clear by an undated document released on FOI by DIAC.²⁶ The document is headed “DIAC DFAT Options”. However, the handwriting on the document identifies it as “Security In Confidence: NCTC²⁷ AG Working Paper”.

This would suggest that the document was prepared by the Attorney-General's Department (“AGD”). It would suggest that it was available to each of the departments whose representatives attended meetings of the National Counter Terrorism Committee and to their respective ministers.

The working paper made it clear that cancellation of the visa was the option to be used where there was no evidence against Dr. Haneef. It says:

“Should the AFP decide that they do not have enough to criminally charge [Dr. Haneef] and ASIO decides that it does not have enough evidence to issue an adverse security assessment the government may seek options from DIAC regarding possible visa cancellation”.²⁸

It went on to state that, if a quick cancellation option was sought, “the Minister could consider [Dr. Haneef] under s.501(6)(b) - Association”. All that was needed according to

²⁵ As Mr. Vaile appeared to confirm at the time, the NSC did, indeed, get to discuss the matter. See <http://www.theaustralian.news.com.au/story/0,25197,22125958-5001561,00.html> and <http://www.rediff.com/news/2007/jul/24glasgow3.htm> .

²⁶ DIAC FOI release, documents 10-17: appendix 16.

²⁷ National Counter Terrorism Committee.

²⁸ See also file note of Eliza Bateman dated 13 July 2007 which states: “If the AFP has insufficient evidence to lay criminal charges ... and ASIO does not issue an adverse security assessment, then the following events will occur ...”: appendix 17.

the paper was to show “the association” and “sufficient material to show that the persons in the UK, subject of the association, may have been involved in criminal conduct”.²⁹

The paper was, however, pessimistic on one point. It stated “the minister may be reluctant to use his national interest power where both the AFP and ASIO have indicated there was insufficient information to establish that this person was a national security threat”.

The minister never displayed any such reluctance. The issue may have been skillfully avoided by the public servants who prepared the visa cancellation papers.³⁰ They did not mention the inconvenient fact that there was no evidence at all to suggest that Dr Haneef was a national security threat. Neither Mr. Andrews nor any other Minister seems to have complained about that omission even though the ASIO submission to the Clarke Inquiry makes it almost certain that its assessment was within the knowledge of all relevant ministers. The submission states: “In a written advice issued to the Government and various agencies on 11 July 2007, ASIO reported that, while it continued to progress its inquiries, it did not have information to indicate Dr. Haneef had any involvement in, or foreknowledge of, the UK terror acts.”

The AFP assessment was the same as that of ASIO. The AFP National Manager Counter Terrorism, Frank Prendergast, certified, on 16 July 2007, to the Attorney-General that Dr. Haneef was not a danger to the Australian community.³¹

Conclusion

What are the lessons that criminal lawyers acting in terrorism cases can learn from Dr. Haneef's experience?

The evidence discloses that the more the investigations made it clear that there was no evidence of wrongdoing against Dr. Haneef, the more the authorities planned to take action against him. As it became clear that Dr Haneef was innocent of the allegations against him and that he did not constitute any kind of security threat, the authorities renewed their efforts to lock him up and/or remove him from the country. The option of releasing Dr. Haneef and allowing him to return to his work, his family and his studies was never considered.

This planning was carried on in a Committee containing senior representatives from the Department of Prime Minister and Cabinet; the Attorney-General's Department; the Department of Foreign Affairs and Trade and the Immigration Department. The Prime Minister and other ministers were kept informed. The attitudes that led to the continued persecution of Dr Haneef constituted a “whole of government” enterprise.

²⁹ This was, essentially, the basis on which Mr. Andrews, in due course, acted.

³⁰ They included Mr. Peter White and Ms. Zoe Clark.

³¹ See AFP FOI release, folios 205-208 and folio 202: appendix 18. The certification was contained in an application for a Criminal Justice Stay Certificate. It went, in the first instance, to Mr. Ruddock but was, also, expressly, provided to Mr. Andrews for his consideration whether Dr. Haneef should be given a Criminal Justice Visa, which, if granted, would have allowed Dr. Haneef to be in the community, pending his trial. Mr. Andrews appears to have ignored Mr. Prendergast's certification.

What happened to Dr. Haneef is a warning to any lawyer who acts for a client who is suspected, no matter how incorrectly, of terrorist crimes. What is a salutary lesson for criminal lawyers is a depressing lesson for observers of our political condition. Amongst all of the discussion of Dr. Haneef's case within the halls of government, there appears to be very little evidence that any dissenting voice was raised. No one dared ask whether it could be right to expel from Australia a man against whom there was no evidence of wrongdoing. This collective failure of our government institutions means that we should indeed be alert and alarmed.

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