HUMAN RIGHTS

Dr Haneef and me

STEPHEN KEIM recounts his experience as part of Dr Mohamed Haneef's legal team

Getting started

Dr Haneef was arrested on Monday 2 July 2007. He was taken to Australian Federal Police headquarters at Wharf Street. He was allowed to sleep and questioned the next day. He did not want a lawyer present. He freely answered the nearly 12 hours of questions that the two police officers wanted to ask him.[1]

An order to hold without questioning (referred to by almost everyone as 'downtime') for 48 hours was made at 11:05 pm on the day of the interview, 3 July 2007. The law required that Dr Haneef be given an opportunity to make representations about these orders extending the time during which he could be detained and the time during which he could be questioned. My understanding from talking to Peter Russo, my excellent and iconic instructing solicitor throughout Dr Haneef's case, is that Dr Haneef did not receive that opportunity until Thursday 5 July, the day he finally asked to see a lawyer.[2] That lawyer turned out to be the same Peter Russo, of the firm Ryan & Bosscher, who was asked by an old copper mate to come down and see someone at the watchhouse.

That evening, the police made another application for an extension of the downtime, the period during which Dr Haneef could be held without being questioned. The application sought another four days. Peter had had a chance to talk to Dr Haneef for only a short time. One could hardly say he had had a chance to get geared up for the forensic battles ahead. Peter knew little about the process in which he suddenly found himself. Nonetheless, he was astonished when he was asked to go outside while the magistrate read a bundle of secret material which the police had provided to the magistrate. Peter was not given access to the material. The police officers remained with the magistrate. And, when Peter was called back in, he was told the order would be made. The only vain submission he got to make was that Dr Haneef would like to go home and, if allowed to do so, would continue to cooperate and answer questions if and when so required.

Peter rang me the following morning, and asked to have a chat. I was in the Industrial Court, that day, and did not get to see Peter until about 5pm. Initially, Peter believed that I might be able to help him interpret part 1C of the Crimes Act.

He was wrong. I couldn't make sense of it at all, despite the fact that part 1C is clearly drafted and uses plain language. You see, no one seemed to have been able to read part 1C, which was amended in 2004 to apply to terrorism offences. And since Dr Haneef was the first person to actually experience the impact of the legislation, we were all facing part 1C as a practical issue for the first time.

The problem is that everyone starts, in the back of their mind, with an idea of the even more draconian 2005 amendments (to the Criminal Code).[3] The 2005 legislation creates the right to hold people incommunicado. It also imposes penalties of five years for any failure to answer a question. Even more extraordinary is the prohibition, also with penalties of five years imprisonment, of breathing a word to anyone else about the fact that someone is being held under that legislation. I was looking for the bit that said I would go to jail for five years if I told my wife about my new brief.[4] And so, I couldn't see what **was there** in part 1C because I was looking for the things that **weren't there**. Later on, even that great national newspaper, *The Australian*, and all of its fabulous legal minds, had to be forcibly persuaded that they wouldn't go to jail either. They also had the 2005 amendments and division 105 of the Criminal Code in the back of their minds.

By Sunday evening, I had, eventually, come to terms with what was in part 1C. And so I could, at last, bring something to the task of dealing with Dr Haneef's situation.

By this time, also, Peter was already getting almost no sleep, receiving wall-to-wall phone calls from media organisations, within Australia and around the world, and never refusing a request for an interview. In this way, he achieved the most amazing piece of advocacy. He turned an unknown and fearsome 'terrorist suspect' into a real person undergoing a very difficult ordeal — a person with whom people could identify and empathise.

This part of Peter's role maintained its intensity for six weeks, at least. This was on top of his enormous job as a solicitor in what became a series of difficult pieces of litigation.

Downtime and natural justice

On Monday 9 July, another downtime application was made, this time for five days — five further days — during which Dr Haneef could be held without charge, without interrogation. This time, at least, we had some idea of what to expect.

I appeared on the application and argued that the law provided for Dr Haneef to be able to make submissions. I argued that, therefore, the rules of natural justice meant that Dr Haneef had a right to know at least enough about the grounds of the application to allow those submissions to be meaningful. This time the magistrate, Mr Gordon, did not ask Peter and me to go outside. He suggested to Mr Simms, the applicant police officer, and Mr Rendina, his legal adviser, that they might like to take some advice and instructions about the submissions I had made. He extended the downtime (on an interim basis)[5] and adjourned the application for two days so that such advice could be obtained.

On Wednesday 11 July 2007, the police arrived with two barristers. The police, on advice from their

REFERENCES

1. In fact, he declined to answer one question which sought his attitudes to the Iraq and Afghanistan conflicts.

2. See, for example, ss 23CB(6) and (7)(e) *Crimes Act 1914* ('the Crimes Act').

3. See divisions 104 and 105 *Criminal Code 1995* (Commonwealth) ('the Criminal Code').

4. See s 105.41(2) Criminal Code.

5. In fact, this order was not necessary. The time taken to decide an application constitutes automatic down time. See s 23CA(8)(h). I hadn't quite fully mastered the legislation by the time of this first application.

counsel, agreed to provide 10 pages of information which, two days earlier, had been so secret I could not see one letter of it. But, by now, I had moved on. I wanted to argue the other half of natural justice, a 'reasonable apprehension of bias'. It seemed to me that Mr Gordon had spent so much time in private with the police officers, making orders for search warrants; for investigation time; and for downtime, including the time he asked Peter to leave the room, that there was a strong argument that he should disqualify himself from further involvement in the matter.

So, on Wednesday afternoon, I argued reasonable apprehension of bias. When we finished, the magistrate adjourned the hearing until Friday.[6] I was doing pretty well at getting the police the downtime without Mr Gordon having to make a decision.[7]

On Friday 13 July 2007, shortly before Mr Gordon decided whether to disqualify himself, the police withdrew their application. We did not get to argue the downtime application on the merits. It is a matter of history, then, that there has never been a properly contested application for downtime where natural justice applied and the detainee had, available, the information on which the application was based.

Who's bailing who?

Friday night, 13 July, going to 4:42 am on Saturday 14 July, Dr Haneef was questioned for another 12 hours. This time, unlike Dr Haneef's first interview, Peter was present. Despite whatever advice Peter gave him, Dr Haneef, again, chose to answer every question put to him. The official police transcription is 378 pages long.

I had gone home on Friday evening and tried to get a good night's sleep. By about 7am on Saturday, when Peter hadn't called, I called him. He told me that 'they're going to charge Mohamed'. We had achieved some sort of weird victory. Dr Haneef's indefinite period of being held without charge had come to an end. We had secured our client's right to be charged with a terrorist offence.

Apart from the disappointment of knowing that Dr Haneef's ordeal was not over, that call had a strange feel. Peter and Dr Haneef had been through a night of being questioned and wondering, topped off by the disappointing news that the ordeal wasn't ending, it was just charging into a new phase. I had gone home to comfort and safety. Despite the logic of someone on the team having had some sleep, it felt as though I had abandoned them. I also felt as if I was suddenly out of the loop. During the call, Peter also told me that there would be an opportunity to make a bail application that morning.

So, I got dressed and headed into town, knowing that I would be making a bail application some time later that day. At that time, I did not know the charge against my client; the particular provisions of the law that applied to bail in cases of that kind; what evidence the Crown would throw up; or what pieces of paper we would be able to gather from the downtime hearings to support the application for bail. But, somehow, that day, we managed.

It was during that bail application that I knew, for the first time, that the Commonwealth's case against Dr Haneef was completely untenable. (Mr Bugg would confirm this for everyone, two weeks later. Since 24 October, of course, we have known that Commissioner Keelty's views, at the time, were very similar to mine.[8]) I knew this when the prosecutor, Clive Porritt, spelled out the Crown's case. The Crown sought to prove that, when Dr Haneef gave his SIM card to his second cousin 11 months earlier, it was anything other than an innocent act.

Mr Porritt said: 'He lived with these people [since acknowledged to be wrong]; he may have worked with these people; he associated with them.'[9] I knew, at that moment, that Dr Haneef had already suffered a great injustice.

Ms Payne adjourned to Monday morning.

Our flurry of activity seemed to be drawing to some kind of conclusion. We had gone from a situation of being excluded from the room to having some say as to what happened in the room. The AFP had gone from a view that they would hold Dr Haneef without charge, indefinitely, to one where they were happy to allow Dr Haneef's future be decided by the courts.

Or that was what we thought. Unbeknownst to us, shortly after the bail application finished, four senior AFP officers, David Craig, Frank Prendergast, Ramzi Jabbour and Luke Morrish, discussed the possibility that the bail application might be successful.[10] They came up with a plan. They would get the Minister for Immigration to cancel Dr Haneef's visa. This would allow them to keep Dr Haneef in detention. At 5:22 pm on Saturday, Mr Craig was able to report that these 'contingencies' were 'in place'. Mr Craig does not tell us to whom in the Minister's office or to whom in the Department of Immigration he spoke, to put the plan in place.

On Monday morning, at 8:10 am, Mr Morrish, one of the AFP officers, forwarded Mr Craig's affidavit to Peter White, a high ranking officer in the Department of Immigration and Citizenship. Mr White would, shortly thereafter, prepare all the documentation which would allow Mr Andrews to cancel Dr Haneef's visa.

We, of course, were blithely unaware of these dealings. So, when bail was granted by Ms Payne, subject to sureties amounting to $10 000, we allowed ourselves a moment of pleasure and self-congratulation. We felt, indeed, that we had achieved a great thing for our client and the rule of law in this country.

Buddhism is right about excessive celebration

Shortly after 1:00 pm on that same Monday, Mr Andrews, the Minister for Immigration, entered the fray.

He cancelled Dr Haneef's work visa. He ensured that the grant of bail by the Court could not be effective. Dr Haneef faced, perhaps, years in custody while he waited for the Crown to get ready for his trial.

Mr Andrews' decision made fair treatment in the criminal sphere much more difficult to obtain. Dr Haneef had already been subjected to an unrelenting campaign to damage his prospects before any future jury. From the moment of his arrest, law enforcement sources campaigned, albeit anonymously, to destroy his reputation in the community even though they must have been aware that their leaks were, variously, either misleading or simply untrue.[11]

6. See s 23CA(8)(h) Crimes Act.

7. I wasn't too displeased. From my discussions with Mr Simms and his adviser, Mr Rendina, I gained the strong impression that although downtime was being applied for in five day intervals, the intention of the Australian Federal Police was that Dr Haneef was to be held for many weeks. Progress was progress, even when it was slow.

8. See news report at <www.news.com.au/story/0,23599,22639167-421,00.html> at 12 June 2008.

9. I have seen nothing to suggest that Clive Porritt acted other than on instructions from police officers that day. I am mystified as to why Mr Porritt has been disciplined for his role in Dr Haneef's case. As with others who have spoken publicly, I have known Mr Porritt to always display a high level of integrity in my dealings with him.

10. See <www.theaustralian.news.com.au/story/0,25197,22688973-601,00.html> at 12 June 2008. This page includes the link to the emails discussed.

11. By way of example, see *Daily Telegraph*, 4 July 2007, 'Enemy Within: Foreign Doctor Visa Review'; *Courier-Mail*, 4 July 2007, 'Terror Link on our Doorstops'; *The Australian*, 5 July 2007; *Sunday Mail*, 8 July; and *The Australian*, 17 July 2007, per Cameron Stewart.

Mr Andrews added to this the use of the solemn power of the Executive and the *Migration Act 1958* to declare Dr Haneef a man of bad character. He also declared Dr Haneef a danger to national security. These were slurs now being made in the public arena by the Minister for Immigration with all the backing of the federal government and, at the time, supported by its loyal opposition.

The Migration Act allowed the Minister to claim that he had secret evidence which justified his actions. The secret that Mr Andrews could have shared with the Australian people was that Mr Prendergast, the contingency planner, was prepared to certify to the Attorney-General that there was not a jot of information to suggest that Dr Haneef was a danger to the Australian community.[12] Instead, Mr Andrews' secret evidence hinted at dark secrets about my client that could not be combated for the very reason that no one knew what they were.

My client's position was looking very bleak and, despite everything we could do, it just kept on getting bleaker. Despite Mr Andrews' claims of secret information, I knew that every piece of information on the record, including the text of the first record of interview; the AFP's own written summary of their case; and Mr Porritt's words to the bail magistrate, indicated that the evidence against Dr Haneef was exceptionally weak at best. But that wasn't what people were being told.

Time to make a call and then another and then ...

It was in this context that I made a decision.

I believed that the public would be well served by facts, as opposed to anonymous leaks, and the Minister's claims based on unpublished and, therefore, untested information.

I decided to release the first record of interview to a journalist who was prepared to report upon the document with honesty. I had no doubts that this was lawful; ethical; in my client's best interests; and the right thing to do.

I knew the action in releasing the transcript would be controversial. I knew criticism might descend on those who were thought to be responsible. I knew that Peter and Dr Haneef were under enough pressure already. So, I made the decision and sent a copy of the transcript by taxi to Hedley Thomas of *The Australian*. I placed the envelope in a taxi late on the afternoon of Tuesday 17 July 2007.

Hedley Thomas did, indeed, report the story with accuracy and enthusiasm. The story had a huge impact and, eventually, was instrumental in Mr Bugg's decision to review the file and drop the charge. But, during Wednesday 18 July 2007, my strategy looked much less brilliant than I had imagined.

At about 9:00 am, the Commissioner of the AFP, Mick Keelty, went on radio and said that he had been assured by the editor of *The Australian*, Chris Mitchell, that the release of the document had nothing to do with the AFP.

As a result, all eyes turned to the defence team. Peter and his firm, Ryan & Bosscher, spent all morning fielding furious press questioning about the origins of the story. (Some journalists seemed more concerned that someone else had got an exclusive than they were with the contents of the record of interview.) Within a few hours, Mr Keelty, the Prime Minister and the Attorney-General all held press conferences condemning the person who had leaked the record of interview. The criticism was ridiculous but the critics didn't care. They knew that everyone would blame Dr Haneef's defence team. But they believed that they could say whatever they liked because whoever **had** released the document would be too scared to defend themselves. It was a perfect situation for politicians and a police chief who were determined to make political capital out of the situation. And, in the meantime, they had succeeded in ensuring that no one was paying attention to the contents of the record of interview and what it revealed about the true nature of the case against Dr Haneef.

And so another decision was called for.

I had been to a meeting on the Gardens Point campus of QUT. I was due to return to the campus for another meeting, later that day.[13] I rang Denise, my wife, as I wandered through the old Botanic Gardens off Alice Street. I told Denise that I was about to acknowledge that I had released the record of interview.

For each of us, the issue was simple. I had made an ethical decision to release the transcript. I would take responsibility for that decision. I would defend my action in a forthright manner.

I went to my office. I rang Ryan & Bosscher's media consultant, David Wilson, and he agreed with my decision and we worked on a media release which David would put out.

My colleagues in chambers were unsure. Some urged me not to do it. I had no doubts.

The release went out. A strange calm descended on the land. Then, all hell broke loose for a second time that day. The phone rang and rang. My chambers filled up with journalists from every kind of media.[14]

The decision to take responsibility and defend my actions turned the tide. The focus did return to the contents of the record of interview and the baselessness of the allegations against Dr Haneef. The criminal charge against Dr Haneef was discontinued nine days later, on 27 July, allowing him to return home.

In the Federal Court

A decision pursuant to s 501(3)(b) of the Migration Act is not subject to any appeal on the merits. Only the limited form of judicial review entrenched in s 75(v) of the Commonwealth *Constitution* is available.[15]

Now, while I have lost more environmental cases due to lack of standing than anyone else in the western world and, therefore, claim to be an administrative lawyer of sorts, the Migration Act (and its plethora of case law) on the one hand and I, on the other, were, to put it bluntly, wholly unacquainted. Enter Nitra Kidson. Nitra is in her second year at the bar. She had spent her first year in the pupil's room in our chambers. As a solicitor, she worked at the South Brisbane Refugee and Immigration Law Service and Queensland Public Interest Clearing House. In contrast to me, she and the Migration Act had had, over the years, a very intimate although not always loving relationship.

12. See <www.theaustralian.news.com.au/stroy/0,25197,22702742-11949,00.html> at 12 June 2008. The statement was made in an application for a Criminal Justice Certificate (under the Migration Act) dated 16 July 2007, the same day that bail was granted and the visa was cancelled.

13. I never made the second meeting.

14. As it turned out, I did not make the second QUT meeting.

15. 'In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth ...'

I asked Nitra to do something, I forget exactly what, but it was something like, 'Can you find me a copy of the Migration Act?' Before we knew it, we had assembled a team, in fact a network of immigration lawyers. Darryl Rangiah, a barrister with a lot of experience in both administrative law, generally, and immigration law, in particular; Nitra and I were the tip of the iceberg. As well as assistance from local lawyers, we had help from barristers from both Sydney and Melbourne and from CLCs around the country.

Each person helped in their own way. We didn't follow every suggestion that we received but every piece of advice deepened our understanding of the case. We chose, ultimately, to run a minimalist case, arguing, principally, the construction of 'association' in s 501(6)(b) Migration Act and a narrow 'improper purpose' point. When the trial came on, on 8 August 2007, Darryl and I split the argument with Darryl arguing the construction point and I, the improper purpose point, in my case, on submissions and speaking notes, largely written by Nitra.

On 21 August, Spender J handed down his decision finding for Dr Haneef on the 'association' point and against us on the improper purpose point. The Minister has appealed. We have put the improper purpose point in contention on the appeal. [*Author's update: The appeal was heard on 15 and 16 November and the Full Federal Court handed down its decision on 21 December 2007. Justice Spender's decision was upheld. The Full Court found it unnecessary to consider the improper purpose point, including our request that they hear fresh evidence, including receiving emails from AFP officers sent on 14 July in which they spoke of having put in place contingencies to keep Dr Haneef detained and contained by having him put into immigration detention.*

That same day, the new Minister Chris Evans considered an updated brief of evidence from the AFP and found no basis to re-cancel Dr Haneef's visa. In January 2008, Mr Evans stated that he would not be seeking leave to appeal the Full Court's decision from the High Court.

The actions taken against Dr Haneef are the subject of an Inquiry being carried out by Mr John Clarke QC, a retired judge of the New South Wales Supreme Court.]

Through all of this we received tremendous support. In the 24 hours after I took responsibility for releasing the record of interview, I received over 300 emails. Many of these were from my legal colleagues both in Brisbane and around Australia. And 'Dr Haneef's legal team', which has become a bit of a cliché, really exists. I have mentioned Peter and Nitra and Darryl. Two young lawyers in Peter's firm, Kris Jahnke and Anna Cappellano, responded cheerfully to the unreasonable demands that only barristers can make by making the impossible actual — on countless occasions. Another barrister, Kerrie Mellifont, did the analysis of the criminal charge which was the trigger for the Director of Public Prosecutions, Damien Bugg, to review the case and drop the charge. As well as the volunteers who provided ideas and guidance on immigration law, we used many other volunteers, lawyers, law students and others, to deal with various logistical emergencies whenever they occurred.

I am fortunate, indeed, to have been part of such a wonderful team.

STEPHEN KEIM

Remembering Tim McCoy

This speech was delivered by Dr Mohamed Haneef's barrister, STEPHEN KEIM, at the Tim McCoy Memorial Dinner in November 2007. Stephen explained that, although he hadn't known Tim McCoy, he felt the Haneef case would have appealed to him. 'It has a touch of David and Goliath to it. It has a political edge which is never far from the surface. It is about bringing into the sanitising light, issues that others would prefer to keep hidden. I think it has all the elements that would make it a Tim-kind-of-case.'

The 2008 Tim McCoy Dinner will be held on 7 November, with guest speaker Julia Gillard.