INTERNATIONAL HUMAN RIGHTS, DOMESTIC COURTS AND THE 'WAR ON TERROR'

By Philip Lynch

On 18 August 2006, the Victorian Court of Appeal quashed convictions against Jack Thomas for receiving funds from a terrorist organisation and possessing a falsified Australian passport.[1]

Mr Thomas had previously been found guilty of these offences on the basis of self-inculpatory admissions made during an interview conducted by Australian Federal Police in Pakistan on 8 March 2003.[2] The Court of Appeal quashed the convictions because these admissions were the only evidence incriminating Mr Thomas. They ruled that the circumstances in which the interview was conducted were such that the admissions could not be said to have been made voluntarily. They also said that to admit such evidence would be unfair and contrary to public policy.

The decision of the Court of Appeal has been repeatedly and misleadingly criticised by conservative commentators – such as Chris Merritt, Andrew Bolt, Piers Akerman and Janet Albrechsten – who claim that the admissions were excluded on the basis of a 'legal technicality'; namely, that the interview was conducted in the absence of legal representation. The same commentators seem to have conveniently overlooked or ignored the broader circumstances in which the interview was conducted. These circumstances were central to the Court of Appeal's decision. They were circumstances which irreparably damaged the probity, reliability and integrity of the evidence and which, moreover, placed our allies in the so-called 'war on terror' – the US and Pakistan – in flagrant violation of the very human rights they purport to protect. Most disturbingly, the circumstances of Mr Thomas' detention, the conduct of his interview, his prosecution on the basis of that interview and, most recently, the imposition of a 'control order' on Mr Thomas, clearly signal that Australian authorities are also prepared to repudiate fundamental human rights for the same cause.

DETENTION AND INTERROGATION

The following facts were accepted by both the Supreme Court and the Court of Appeal. Many of them were not even contested by the prosecution.

Mr Thomas was apprehended in Pakistan in January 2003 and detained by Pakistani authorities for almost six months. He was not charged with any offence and was not allowed access to a lawyer. Prolonged detention without charge, and without any ability to contest the legality of such detention, is a clear violation of article 9 of the *International Covenant on Civil and Political Rights* (ICCPR), which prohibits arbitrary detention.

The conditions of Mr Thomas' detention also violate fundamental human rights and affront good conscience. During the six months of his detention, Mr Thomas was held for extended periods in solitary confinement, including being detained in 'dog-kennel'-like conditions and deprived of food and water for up to three days. He was hooded, shackled, manacled, and threatened with electrocution and execution. On one occasion, he was strangled with the cord of his hood so that he could not breathe. He was threatened with beatings and, on at least one occasion, was bashed by a US official. He was told that his testicles were going to be crushed. He was urged to co-operate fully with Pakistani and US interrogators who told him, 'We're outside the law. No one will hear you scream.' They threatened to rape his wife. The prohibition on torture and other cruel, inhuman or degrading treatment or punishment is enshrined in the *Convention against Torture* and article 7 of the ICCPR. It is also a non-derogable peremptory norm of international human rights law. The prohibition extends to giving effect to acts of cruel, inhuman or degrading treatment, including by admitting evidence obtained in contravention of the norm.

It was in the context of this incarceration in Pakistan that Mr Thomas was interviewed on at least six occasions by ASIO and AFP officers. Most of these interviews were conducted when Mr Thomas was sleep-deprived between 10pm and 3am. Some of his Pakistani interrogators were also present during these interviews. Mr Thomas was threatened and offered inducements during interviews that the prosecution never sought to tender as evidence, because it knew that to do so would be unfair and contrary to principles of justice.

On 8 March 2003, Mr Thomas was interviewed by AFP officers. Contrary to both Australian law[3] and international human rights law,[4] he was not allowed a lawyer during this interview and it was implied that if he did not co-operate he faced the prospect of indefinite detention in Guantanamo Bay, or worse. Mr Thomas made a number of self-inculpatory statements in the course of the interview. He also told his interrogators that he had 'absolutely no' intent of engaging in any kind of terrorist activity.

Mr Thomas was released from custody in Pakistan, without charge, in June 2003 and returned to Australia. Eighteen months after his return, he was charged with the offences of receiving funds (in the form of a plane ticket) from a terrorist organisation, providing assistance to a terrorist organisation, and falsifying a passport – all on the basis of the interview of 8 March 2003.

At trial, before the Supreme Court of Victoria, Mr Thomas was convicted of the offences of receiving funds and falsifying a passport. He was acquitted of the charges of assisting or providing support or resources to a terrorist organisation. The jury found that he had no intent of engaging in any terrorist activity. This fact is conveniently overlooked by

conservative commentators, who persist in misleadingly labelling Mr Thomas a 'terrorist' or 'alleged terrorist'.

In allowing the appeal and quashing the convictions, the Court of Appeal held that the conditions and impact of detention – conditions that were so torturous as to cause Mr Thomas profound psychiatric harm – combined to mean that he did not make the statements voluntarily and that it would be unfair and against public policy to admit them. This decision is both courageous and compellingly correct.

THE RELEVANCE OF INTERNATIONAL HUMAN RIGHTS

Before the appeal, the Human Rights Law Resource Centre (the Centre), which aims to promote the harmonisation of domestic law and practice with international human rights standards and norms, made written submissions to be heard as *amicus curiae*. In the words of the Court of Appeal:

> 'the Centre sought to make submissions in respect of international law and its influence upon the common law and the exercise of judicial discretion in the areas of:
> - torture and other cruel, inhuman or degrading treatment or punishment;
> - arbitrary detention;
> - the right to legal representation;
> - the right to be treated with humanity and with respect to the inherent dignity of the human person; and
> - the right to health (including mental health) and the provision of adequate medical care (including mental health care).'[5]

The Centre sought leave to intervene because, in the words of Brian Walters SC, counsel for the Centre:

> 'The case raises fundamental issues of human rights. Those issues include questions relating to arbitrary detention, mistreatment in detention and the entitlement of suspected persons to legal assistance. The resolution of those issues is likely to affect the community generally, because they go to the heart of what is meant by the rule of law in Australia.'[6]

The application for leave to intervene as *amicus* was also informed by recent judicial comments regarding the relationship between domestic law and international human rights law, including the use and relevance of international human rights in domestic proceedings. The case of *Royal Women's Hospital v Medical Practitioners Board of Victoria*[7] concerned the issue of 'public interest immunity' and, in particular, whether it attached to a patient's medical records. In the course of proceedings, the court requested that parties make submissions on the relevance, if any, of international human rights law to the questions before the court.

Commenting on the submissions subsequently made to the court on this matter, the judgment of the president of the court, Justice Maxwell, makes the following critical points.

First, that the Court places significant value on international human rights law. Having regard to this:

1. 'The Court will encourage practitioners to develop human rights-based arguments where relevant to a question in the proceeding.
2. Practitioners should be alert to the availability of such arguments and should advance them where relevant.
3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will involve judges and practitioners working together to develop a common expertise.'[8]

Second, that there are at least three important ways in which international human rights law and jurisprudence may be relevant to the resolution of disputes under domestic law:

1. Statutes should be interpreted and applied, as far as language permits, in conformity with international human rights treaties.[9]
2. International human rights law may be used as a legitimate guide to the development of the common law.[10]
3. The provisions of an international human rights treaty to which Australia is a party may serve as an indicator of contemporary values and the public interest.[11]

Third, having regard to the above, that Australian courts have appropriately considered the use of international human rights in:

1. exercising a sentencing discretion;
2. considering whether special circumstances exist to justify the granting of bail;
3. considering whether a restraint of trade is reasonable; and
4. exercising a discretion to exclude confessional evidence.[12]

In the *Thomas* appeal, notwithstanding the judicial 'invitation' in *Royal Women's Hospital*, the court declined the *amicus* application on the basis that counsel for Mr Thomas, Lex Lasry QC, could make the submissions directly on his client's behalf. Following the refusal of the *amicus* application, Mr Lasry QC subsequently filed a supplementary written submission embodying much of the Centre's *amicus* submission. Ultimately, however, the court did not find it necessary to refer to this submission in the disposition of the appeal because it could be dealt with under established principles of domestic law.

In the Centre's view, although the international human rights submissions may not have been determinative, they do reinforce the court's ultimate conclusion and also form part of an important dialogue between the court and practitioners regarding international human rights in domestic law. This dialogue will become increasingly important as the court is required to deal with comparative and international human rights jurisprudence in the elucidation and development of the content of human rights under the Victorian *Charter of Human Rights and Responsibilities*.

CONCLUSION

We are told that the so-called 'war on terror' is a war against fundamentalists and extremists who seek to deny us the rights to liberty and security of person. They do not recognise or respect our common humanity and inherent dignity. They seek to torture and subject to cruel treatment those who resist them. They certainly do not respect rights to freedom from arbitrary detention, to access to legal representation and to a fair trial. As signalled by Australia's >>

ratification of the ICCPR and the *Convention against Torture*, from which these rights are derived, human rights matter deeply and are worth fighting for. In the aftermath of the last truly global war, World War II, respect for human rights was recognised as the foundation of peace and justice.

Yet these are the very rights that Mr Thomas' captors and interrogators themselves abused and denied. If it had admitted evidence obtained in breach of these fundamental rights and freedoms, the Victorian Court of Appeal would have sanctioned those violations. This would have been repugnant to justice and humanity and a contravention of Australia's human rights obligations. It would have handed victory to the terrorists.

By allowing the appeal and quashing the convictions, the Court of Appeal has signalled that the 'war on terror' does not permit a 'war on human rights'. We must not succumb to the invidious temptation and hypocrisy of demanding compliance with human rights by others, while not respecting human rights at home. ■

Notes: **1** *The Queen v Joseph Terrence Thomas* [2006] VSCA 165 (18 August 2006). **2** *DPP v Thomas* [2006] VSC 120 (31 March 2006). **3** *Crimes Act* 1914 (Cth) s23G. **4** See, eg, ICCPR articles 9(4) and 14(3); *Berry v Jamaica*, UN Human Rights Committee, Communication No 330/1998, UN Doc CCPR/C/50/D/330/1988 (1994) at [11.1]; *Kurbanov v Tajikstan*, UN Human Rights Committee, Communication No 1096/2002, UN Doc CCPR/C/79/D/1096/2002 (2003). **5** *The Queen v Joseph Terrence Thomas* at [121]–[122]. **6** 'Outline of Submissions of the Human Rights Law Resource Centre Ltd in Support of Application for Leave to Appear as Amicus Curiae', *Joseph Thomas v R*, Brian Walters SC and Michael Kingston, 3 July 2006. **7** [2006] VSCA 85 (20 April 2006). **8** *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 (20 April 2006) at [69]. **9** *Ibid* [73]. **10** *Ibid* [74]. **11** *Ibid* [75]. **12** *Ibid* [70].

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EVENTS

2006 Australian Lawyers Alliance Civil Justice Award presentation

By Andrew Freer

Jon Stanhope, Chief Minister, ACT

On Monday 13 November 2006, more than 50 Lawyers Alliance members and others with an interest in civil justice issues attended a cocktail reception at the ACT Legislative Assembly. The purpose of the reception was to present the Civil Justice Award in person to ACT Chief Minister, Jon Stanhope.

A brief overview of Jon Stanhope's career and a list of relevant civil justice-orientated achievements formed the basis of the presentation. As an aside, it was noted that in January 2003 Jon Stanhope demonstrated considerable foresight by having chosen to wear fashionable underwear before he stripped off to help rescue a helicopter pilot who had crashed into a dam during the Canberra bushfires.

The Civil Justice Award is not politically motivated, but is judged on the basis of the protection and promotion of justice, freedom and the rights of individuals. Specific mention was made of Jon Stanhope's involvement in the introduction of the ACT *Human Rights Act*, his championing of a model prison, advocating the Civil Union Bill, encouraging an informed debate on anti-terrorism legislation, making public statements rejecting the death penalty, giving support for the release/repatriation of David Hicks, and taking a measured approach in relation to tort reform.

In accepting the award, Jon Stanhope reiterated his determination to maintain a principled stance on issues affecting the rights of the individual. In doing so, he noted that it was not necessarily a populist position to take. Indeed, on some issues, he described occupying what felt like a somewhat lonely position. He made particular reference to the apparently systemic political chipping away of fundamental rights that have evolved in our legal system over many years. We allow this process to continue unabated and without protest at the peril of us all. ■

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