Reflections upon the trial of Dr Haneef

By Stephen Keim SC

In a personal account of his involvement as counsel for Dr Haneef, Stephen Keim describes how a case with unlikely beginnings ultimately proved to have significant social implications for us all, as well as specific lessons for lawyers in defending their clients' interests in today's political climate.

On Monday 2 July, Dr Mohamed Haneef was arrested by the Australian Federal Police (AFP). He was about to fly home to the city of Bangalore in India. He was flying in his own name and was carrying a plethora of identifying material.

Dr Haneef was taken to the AFP headquarters in Wharf Street. He was allowed to sleep and questioned the next day. He did not want a lawyer present. He freely answered over nearly 12 hours of questioning, interspersed with breaks.

The police officers had already obtained an order at 10.15am, that morning, 3 July 2007, to extend the period of questioning allowed from 4 to 12 hours. Over 11 hours and 43 minutes that day, 1,615 questions were asked.

And then nothing happened. An order to hold without questioning for 48 hours was made at 11.05pm on the day of the interview. My instructing solicitor, Peter Russo, understands that our client was not given any opportunity to attend and make submissions, despite legal requirements to that effect, which apply to any order made under part 1C of the *Crimes Act*, at any hearing before Thursday 5 July.[1]

On the evening of Thursday 5 July, another order was made to hold Dr Haneef without questioning – this time, for another four days. Mr Russo was present for part of this application, his first exposure to the forensic battles ahead. Having had only a brief opportunity to talk to his client, Mr Russo went into the application knowing little about the process. The application was made on the basis of information that he, as Dr Haneef's lawyer, was not allowed to see. Mr Russo was asked to go outside while the magistrate read the material. The police officers remained with the magistrate. When Mr Russo was allowed back, he was told that the order would be made. He was able to say only that Dr Haneef would like to go home, and would continue to co-operate and answer questions if required to.

On Monday 9 July, another down-time application was made, this time for five more days. This time, at least, Mr Russo and I knew a little of what to expect. I appeared on the application. Again, the police handed up their secret material. I argued that the law provided for Dr Haneef to be able to make submissions, and that the rules of natural justice meant that he had a right to sufficient information to allow those submissions to be meaningful. After I finished my submissions, the magistrate, Mr Gordon, suggested to Mr Simms, the applicant police officer, and Mr Rendina, the legal adviser, that they might like to take some advice and instructions about the submissions I had made. He extended the down-time (on an interim basis) and adjourned the application for two days so that such advice could be obtained.

On Wednesday 11 July 2007, the police officers appeared with two barristers, including Tom Howe QC from Canberra. The police did not concede the natural justice arguments, but sought to avoid them by providing some of the information on which the application was based. By the end of the day, 10 pages of such information were made available. By now, I had moved on and wanted to argue reasonable apprehension of bias, based on the magistrate's involvement in making orders in private with the police officers, including the current applicant for the further down-time order.

The 10 pages of previously secret information received on Wednesday 11 July set out the AFP's reasons for detaining Dr Haneef without questioning for another three days. It did not make any reference to relying on further information that might still be protected or secret. On the same afternoon, Mr Howe and I argued the question as to whether the magistrate should disqualify himself. The magistrate adjourned the hearing until Friday and two more days of down-time ensued automatically.[2] The police officers had effectively got most of their five days while the applications were being decided.

On Friday 13 July 2007, shortly before the magistrate decided whether he should disqualify himself and shortly before the argument as to the merits of the down-time

application took place, the applicant withdrew his application. No judicial officer has ever decided, in a properly contested application conducted in circumstances of natural justice, whether down-time should be granted under part 1C of the *Crimes Act*.

From the evening of Friday 13 July, until 4.42am on Saturday 14 July, Dr Haneef was questioned for another 12 hours. This time, Mr Russo was present. Dr Haneef again chose to answer every question put to him. The official police transcription is 378 pages long. It is in this interview that the famous chat room discussion, as translated from Urdu, was discussed. In the morning, Dr Haneef was charged with an offence of giving a SIM card to a terrorist organisation, being reckless as to whether the organisation was a terrorist organisation.

That same Saturday morning, 14 July 2007, I applied for bail before magistrate Jacquie Payne. By now, the police officers had detained Dr Haneef for nearly two weeks; they had questioned Dr Haneef for two lots of 12 hours; they had executed search warrants investigating every aspect of his life; and they had had more than two weeks to scour the world for evidence against him. The magistrate heard the application for over an hour. That was when the DPP prosecutor, Mr Clive Porritt, told the court that the SIM card was found in the car that caught fire in Glasgow in the failed terrorist attack on Glasgow airport on Saturday 30 June 2007. The magistrate reserved her decision for two days until Monday. Dr Haneef remained in the watchhouse, now as a man charged with an offence. At least his period in limbo was over.

On Monday morning, 16 July, the magistrate, Jacquie Payne, handed down her decision. She granted bail, subject to a surety of $10,000 or two sureties of $10,000 each. In her decision, Ms Payne said:

> 'The case against [Dr Haneef] as told to me on Saturday, was a SIM card which belonged to [Dr Haneef] was left in the United Kingdom with his second cousin with whom he was residing. There was no evidence before me the SIM card was used in any terrorist activity.
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> Further, the SIM card was given to the UK suspect 2, more than 12 months ago and, in relation to the element of the offence there have been no submissions to support the element of the offence that the defendant was reckless, other than that he was living with UK suspects 1 and 2 and he gave the SIM card to UK suspect 2.'

Later, Ms Payne said, in setting out her reasons for granting bail:

'1. The Crown does not allege that the defendant has any direct association with any terrorist organisation and further [concerning] the provision of the resource, the SIM card, the defendant … was reckless as to whether the organisation was a terrorist organisation.
2. There is no evidence or submission that the SIM card was used or associated with any terrorist attack or activity other than being in a vehicle that was used in a terrorist attack.'

Only hours later, Kevin Andrews, Minister for Immigration, made an announcement: Dr Haneef's visa had been cancelled on the grounds that he was of bad character, and that it was in the national interest that he be deported. Dr Haneef remained at Arthur Gorrie Correctional Institution until Friday 27 July 2007. On that day, the Director of Public Prosecutions, Damien Bugg, announced that, having reviewed all the evidence, including potential evidence from ongoing and future investigations, the charge against Dr Haneef could not be made out, and it had been discontinued.

On Wednesday 18 July, an application for judicial review of Mr Andrews' decision to cancel Dr Haneef's visa was filed in the Federal Court in Brisbane.

The application in the Federal Court was tried and argued on 8 and 9 August 2007. I was assisted greatly by my juniors, Darryl Rangiah and Nitra Kidson, and many experienced immigration lawyers in Brisbane and around Australia.

The decision setting aside the decision of the Minister was handed down on Tuesday 21 August 2007. The Court's decision was stayed on the same day. An appeal was lodged and served on Wednesday 5 September 2007. On Monday 10 September 2007, the stay was extended until determination of the appeal.

The point of this long chronology is to show how this case began with a hurly burly of appearances before magistrates, but evolved into a complex administrative law matter in the Federal Court (and continues to wend its way upwards through the court system). There has been barely any time >>

as yet to consider the broader social implications of the predicament Dr Haneef found himself in, or the challenges facing the lawyers whose task it was to defend him.

THE BLURRED ROLE OF THE LAWYER

The role of a criminal lawyer usually begins at a police station when a client is being questioned by police. The lawyer's main function is to advise whether questions should or should not be answered.

Once a client is charged, the most immediate tasks are applying for bail and then preparing for committal and trial. Advice on whether to go to trial (involving an assessment of the evidence) is another important task.

The circumstances faced by Dr Haneef altered these principal roles. First, the mere mention of a terrorism offence raises a level of hysteria and prejudice that is absent from many criminal allegations. Mr Russo, perhaps without thinking too much about it, dealt with this prejudice in a very effective way. Assisted by working journalists who were already beginning to become sceptical about a system that arrested but refused to charge with an offence, Mr Russo, in a very calm and honest way, turned an anonymous terrorism suspect into a detainee with an identity; a family; with feelings; with ongoing day-to-day experiences; a personality and, eventually, a human face. Mr Russo did this by spending time with his client and by answering questions in a straightforward manner, without a hint of spin.

I faced a different conundrum. The advocacy before Mr Gordon was straightforward, albeit challenging. However, arrayed against my client was a new set of powers that had not been used before. My client's fate was being decided neither in open court nor in a forum to which any rules of non-publication, apparently, applied. Enormous public interest surrounded the matter. In the view of both Mr Simms and Mr Rendina, the amount of detention that was appropriate and likely to be authorised by the legislation extended to multiples of weeks, perhaps months. Dr Haneef's reputation was also being continually attacked by unsourced stories, apparently from law-enforcement agencies.

In retrospect, the decision to continue to detain Dr Haneef for more than a few hours after his first interview is neither explicable nor justifiable by law-enforcement reasoning. The decision to charge after the second interview was even less justifiable, since two weeks of investigation had failed, even more obviously, to yield a scintilla of a case against Dr Haneef that was capable of going before a jury. One does not have to take my word for these conclusions: the decision of the DPP, two weeks later, confirms them.

The question that that must be asked – and answered by future inquiries – is how those decisions came to be so wrongly made. If the answer is that politics intruded into the law-enforcement process, the future challenge for lawyers is that their client's freedom may rest not on decisions in the law-enforcement process made on law-enforcement criteria, but by decisions made outside it, based on political criteria. No longer can lawyers restrict their thinking to what to say to magistrates on bail applications or in submissions to prosecutors. It may now be necessary to decide what to say in order to influence those political forces that affect the law-enforcement decision-making process.

That Dr Haneef's freedom was being determined by powerful forces outside the law-enforcement system became clear on Monday 16 July 2007, when the bail magistrate's decision was trumped by that of the Minister for Immigration to cancel Dr Haneef's visa. My client's freedom and well-being were now being decided by political decisions made by the Executive.

When Mr Andrews made his decision (which took away Dr Haneef's right to be free in the community on bail), he defended it in political terms. Much of that defence was, at least, arguable. As the lawyer who had attended all of the contested hearings over the preceding week, I was in a good position to throw a factual light upon the Minister's political claims. As a result, for 24 hours, I engaged in a public discussion, setting out my knowledge of what had happened, including the case put by the prosecution to the bail hearing (both in terms of the weakness of the evidence and the absence of any suggestion that Dr Haneef would be a danger to the community, if released on bail). This was a role alien to me as an advocate but unavoidable, in my view, because of my duty to my client and the pivotal position which, in terms of knowledge, I occupied.

I was also aware of documents that showed, in much greater detail than I could provide by anything I said in an interview, the true factual situation concerning the allegations against Dr Haneef, and his responses to those allegations. A particularly good example of this is the record of Dr Haneef's first interview with the AFP. As it turned out, extracts from that document were published in *The Australian* of 17 July 2007, and something of a furore followed.

The political decision to cancel Dr Haneef's visa has never been subject to any review on the merits in any independent court and tribunal. It is trite law that the limited judicial review available in respect of decisions of the Minister under s501 of the *Migration Act* 1958 does not involve any consideration of the factual merits. In fact, the Federal Court proceedings have, necessarily, been conducted in reliance on facts that everyone now knows are completely wrong, demonstrated by a number of anecdotes from these proceedings. During the hearing before Justice Spender, the Federal Solicitor-General, Dr David Bennett, tried to convince the Court from two statements in annex 2 of the immigration documents that there was a misprint, and that the reference to the SIM card expiring in August 2006 must have been a reference to its expiring in August 2007. This is because the same document referred to the SIM card being still connected and, wrongly, to Dr Haneef departing the UK in September 2006. Dr Bennett had already published an opinion on changes in known facts between what was briefed to Mr Andrews when he made his decision and, later, after the charges were discontinued. Presumably, he had been told that Dr Haneef had left the UK in July and that the SIM card did, in fact, expire in August, 2006. Yet, he was able to make submissions that a fact, correctly stated in the document, could be construed as a typo and given effect as a

date 12 months later than stated (and than was true).

Furthermore, it is common knowledge that Dr Haneef did not live with Sabeel Ahmed at 13 Bentley Road, Liverpool. However, because judicial review does not involve objective review on the facts, the barrister appearing on behalf of the Minister on a stay application, on 10 September 2007, submitted to Justice Greenwood that 'Haneef had, in fact, resided with Sabeel Ahmed in England…' and cited the famously incorrect paragraph 13 of the Minister's briefing note.

And a political option lies behind the results of any current litigation. Mr Andrews predicts the current litigation is destined for the High Court. At the end of the day, however, the High Court will decide only whether a decision made by Mr Andrews in the past was lawful. The day after the High Court decision – probably even the same day – Mr Andrews will be free to seek another briefing from law-enforcement agencies and to make a fresh political decision to cancel Dr Haneef's visa. Whether or not that happens is in the realm of politics and not in the realm of the courts.

Therein lies the challenge for lawyers. We understand the intricacies of the facts and law going to our client's circumstances as well as anyone. We are trained in the law of persuasion. But we are not comfortable plying our skills away from the quiet atmosphere of a court room and our freedom to do so is not, in any event, unlimited. We do, however, have a duty to argue our clients' cases fiercely and fearlessly. How we deal with these difficult cases is something for us to ponder.[3]

THE SOCIAL ACTIVIST DESPITE HIMSELF

The Dr Haneef case was, like any other, conducted to further the best interests of the client.

Despite this, I suspect that the wider social impact of the case will prove to be significant.

The media have found what it is like to operate with real facts, and not just press releases and spin.

The general public has learned, again, the important lesson that, just because the police accuse someone of an offence, this does not mean that that person is guilty.

The general public has also developed considerable scepticism about the prognostications of security and law-enforcement agencies on terrorism-related issues. There may even be a suggestion that good and sensible policing may be more use to the security of each one of us than a burst of new powers, next time this debate is kicked off. (Of course, Chas, Dom, Craig and Julian and their 'Canadian' entourage contributed to that sense of scepticism as well.)

Without needing to decide the correct interpretation of 'association' in s501(6)(b) of the *Migration Act*, the general public has had a further opportunity to reflect on how much untrammelled discretion, and how much accountability, decision-makers should have under the *Migration Act*. There is a realisation that, as we swing towards unaccountable discretion, we also swing away from the rule of law. And that is an uncomfortable realisation for many. If rights have become privileges in the immigration area, people may become concerned about what other rights will become privileges and may subsequently be lost, forever, in other aspects of our lives.

Finally, in terms of the wider social ramifications of this case, a drop of 80% in the number of much-needed overseas-trained doctors applying to work in Australia has recently been reported, apparently as a direct consequence of the treatment of Dr Haneef.[4]

Certainly an important lesson to be drawn from the Dr Haneef affair is that it is not always the cases that have their origins in a social campaign that are the most influential. Sometimes, fighting for the rights of disadvantaged people produces its own social messages. Dr Haneef's case may just be one of those cases. ■

Notes: **1** See, for example, ss23CB(6), (7)(e) *Crimes Act* 1914. **2** See s23CA(8)(h) *Crimes Act* 1914. **3** In wrestling with these difficulties, I received great assistance from David Wilson, a media consultant retained by the firm of lawyers of which Mr Russo is part, Ryan & Bosscher, solicitors. **4** http://abc.net.au/news/stories/2007/09/21/2039258.htm?section=justin

Stephen Keim SC *is a Brisbane barrister of 22 years' standing, vice-president of the Queensland chapter of the International Commission of Jurists and a member of the Lawyers Alliance. This article, which draws on his experiences in his ongoing role as Dr Haneef's barrister, is an edited version of a paper he delivered to the National Association of Community Legal Centres in Brisbane in September 2007. It represents his personal views and should not be taken as an official position of the ICJ, NACLCs or the Alliance.*