

Crimes Act 1914

Section 23CB

In Re Mohamed Haneef

Application to Specify Reasonable Time During Which Suspension or Delay of
Questioning My Be Disregarded

Outline of Submissions of the Respondent, Mohamed Haneef

1. Pursuant to s.23CA(2) *Crimes Act* 1914 (“the Crimes Act”), there are only two purposes which may justify the detention in this case:
 - (a) Investigating whether Mr. Haneef committed a specifically identified terrorism offence;
 - (b) Investigating whether Mr. Haneef committed another terrorism offence that the investigating officer, reasonably, suspects Mr. Haneef to have committed.¹
2. While the singular may include the plural,² if there is more than one [other] terrorism offence, the investigation officer must hold the reasonable suspicion in respect of each such offence. It is not enough for the investigating officer to hold a belief that Mr. Haneef might have committed some sort of unidentified or unspecified offence.
3. The investigation period has already been extended pursuant to s.23DA Crimes Act. This was done prior to the last specification of suspension time. The investigation period is limited to 4 hours in the first instance.³ The maximum extension is 20 hours.⁴ The maximum extension has been previously obtained.⁵ It follows that, in obtaining that maximum extension, the investigation officer placed evidence before the judicial officer which satisfied the judicial officer that:
 - (a) The maximum extension was necessary to preserve or obtain evidence or to complete the investigation into the (specified) offence or specified other offences.⁶ (It becomes a live issue, now, in the present application⁷ as to what steps have been taken to carry out the evidence preserving; evidence obtaining;

¹ The search warrant which has been provided to the respondent refers only to one offence,
² providing support to a terrorist organisation.
³ Section 23 *Acts Interpretation Act* 1901 (“the AI Act”).
⁴ Section 23CA(4)(b) Crimes Act.
⁵ Section 23DA(7) Crimes Act.
⁶ Mr. Russo, solicitor for Mr. Haneef, was advised on behalf of the investigating officer, that this
extension was obtained prior to Mr. Russo’s involvement. This was before the specified order of
7.05pm on 5 July 2007.
⁷ Section 23DA(4)(b) Crimes Act.
See s.23CB(7)(iii) which provides that the judicial officer must have regard to “any other relevant
matters” when deciding whether he or she is satisfied that it is appropriate to specify a period of
reasonable time pursuant to that section.

or investigation (into a specific offence or offences) despite the passage of another 4 days. Presumably, the steps which were necessary when the extension was granted were known at that point in time. A high onus now falls upon the investigating officer to establish why those steps, which were identifiable as the basis for the extension of the investigation period, were not carried out over the last four days. That is, the investigating officer had sufficient information to know that he wished to interview for 24 hours but now seems indefinitely incapable of asking any of those questions.)

(b) The investigation is being conducted properly and without delay.⁸ (This also becomes a live issue in the present application. Four days without completing the investigation period suggests, strongly, that the investigation is, no longer, being conducted without delay and that the continued detention does not relate to any desire to question Mr. Haneef.)

4. It is submitted that, because the statute provides for a strictly limited investigation period (24 hours), standards of proper conduct and absence of delay are very high. It is not sufficient for delays to occur for personal convenience of investigators or to address matters which do not, directly, involve investigation of the identified offences for which Mr. Haneef is being detained or in respect of which he is being investigated. For example, it would be an improper purpose to delay investigation or suspend investigation for the purpose of drafting a charge or to prepare extradition documents or to facilitate investigation of persons other than Mr. Haneef.

5. The application is a second consecutive application to specify a reasonable time⁹ during which questioning of Mr. Haneef is to be delayed. The application is pursuant to s.23CB Crimes Act.

6. The essential nature of the application is to extend an extraordinary period (that is, this form of detention is not available for normal criminal investigation purposes) during which Mr. Haneef is detained for questioning by allowing no questioning to occur. The substantive provisions must be construed and applied in the light of this purpose.¹⁰ Since the sections abrogate the common law right not to be arrested or detained except to be charged, immediately, for a criminal offence and taken before a Court to be dealt with, then the provisions must, also, be carefully construed not to impinge further upon such common law rights than is required by the express language of the provisions.¹¹

7. In paragraph 23CB(5)(c) Crimes Act, examples are set out as to possible reasons for specifying that time during which Mr. Haneef is detained is deemed to be excluded from the actual investigation period (which may not exceed 24 hours).¹² The

⁸ Section 23DA(4)(c) Crimes Act.

⁹ Section 23CA(8)(m) Crimes Act.

¹⁰ See s.15AA of the AI Act.

¹¹ *Coco v the Queen* [1994] HCA 15; (1994) 179 CLR 427, 437.

¹² It appears from Mr. Gordon's existing order of 5 July 2007 that nearly all of the examples were relied on by the applicant for that order.

- examples specified include the need to collate and analyse information relevant to the investigation other than from questioning Mr. Haneef, the need to allow other authorities (in and out of Australia) time to collect information relevant to the investigation on the request of the investigating officer, and the fact that information has been sought to be collected from another time zone.
8. The reasons, specified or unspecified, must be relevant to the desire to question Mr. Haneef, specifically, in respect of the identified offences for which he arrested and which he is suspected of having committed. It is insufficient that the investigating officer might have some suspicion that Mr. Haneef had something to do with events that occurred in London or Glasgow. It is insufficient that the investigating officer might want to question Mr. Haneef in order to build a case against other persons.
9. Second, it is submitted that the reason for specifying the suspension of the period must be for the purpose of questioning Mr. Haneef with regard to the specified offences. As submitted earlier in this outline, it is a misuse of the section to use the application, simply, to hold Mr. Haneef for other reasons, for example, to allow the preparation of an arrest warrant or extradition proceedings. To seek an order with that or a similar intention would constitute bad faith and a misuse of the section.
10. Third, the reasons why the investigating officer believes the time should be specified must be reasons going to the necessity to **detain** Mr. Haneef for questioning. There may well be a desire for further questioning to take place within a further period of days of weeks. It does not follow that Mr. Haneef must be detained to allow that questioning to take place. It is now quite clear that all property of Mr. Haneef in Australia of any relevance to the investigating officer has been seized and analysed. It has been broadcast to the whole world that Mr. Haneef has been detained in connection with certain events which occurred in London and Glasgow. Mr. Haneef is not being detained pursuant to the provisions of the *Criminal Code* (*Commonwealth*) ("the Criminal Code") to prevent the occurrence of a terrorism offence and he is not restricted from communicating with other persons the fact that he is detained. Accordingly, it is a live issue whether, assuming further questioning may be relevant at some time in the future, that fact justifies continued detention for those purposes. Mr. Haneef has deposed to his desire to continue living and working at his existing places of living and working, respectively.
11. The application may only be granted if the judicial officer hearing the application is satisfied that it is appropriate to make any such specification¹³ the effect of which is to allow Mr. Haneef to be further detained without any questioning taking place. It is clear that the onus to establish that the order is appropriate is on the applicant. It is equally clear that that is a heavy onus considering the nature of the powers being exercised.

¹³ Section 23CB(7) Crimes Act.

12. It is submitted that the judicial officer would not be satisfied that detention of Mr. Haneef is necessary to preserve or obtain evidence.¹⁴ It is almost a full week since Mr. Haneef has been detained. His place of residence, his place of work, the fact that a key was found to a locker at work have all been broadcast in the media.¹⁵ It may be inferred that all of Mr. Haneef's property in Australia has been seized and fully secured. If any other property existed, it may be presumed that all reasonable means of locating such property have been well and truly exhausted. Ample opportunity to communicate Mr. Haneef's details to all police authorities anywhere in the world were evidence of other property found has been well and truly had.

13. It is, further, submitted that it is not necessary to detain Mr. Haneef to complete the investigation into the offence (for which he has been detained) or another terrorism offence (which he is reasonably suspected to have committed).¹⁶ Mr. Haneef's passport is in possession of the authorities and no application is made to have it returned. Mr. Haneef's photograph has appeared in every paper in Australia. Mr. Haneef's nationality and ethnic origins have been, equally, well publicized. Mr. Haneef has no ability, even if he sought to do so, to do anything other than remain in a location where he is available to cooperate with any further or continuing investigation.

14. Further, Mr. Haneef has resided at a fixed address since last September.¹⁷ His family's location in India is equally well known. He has been employed in a responsible job since last September. He has provided reasons for his intention to depart the country.¹⁸ His bank accounts are fully known to the authorities.¹⁹ There is absolutely no reason to continue to detain Mr. Haneef for the purposes of this investigation.

15. It is submitted that, so far as it is relevant to s.23CB, that the investigation is not being conducted properly and without delay. That is, the judicial officer would not be satisfied that the application is in good faith. As has been pointed out earlier in this outline, the investigating officer obtained an order to extend the questioning period to the maximum of 24 hours but now seems, indefinitely, incapable of asking any questions. There can be no requirement to obtain further property of Mr. Haneef. Any officers from overseas have had ample time to get here and/or to transmit any relevant data. No thought seems to have been given to whether continued use of detention powers is necessary (as opposed to the investigating officer simply assuming that the status quo must remain). It appears from the events as they have transpired, and the judicial officer, it is submitted, would infer, that the powers are being used to hold Mr. Haneef, unnecessarily and indefinitely, and not as part of a

¹⁴ Section 23CB(7)(c) Crimes Act.

¹⁵ The search warrant for his residential premises (exhaustive and thoroughgoing as it is) is dated 3 July 2007, Tuesday of last week.

¹⁶ *Ibid.*

¹⁷ See Haneef affidavit, paragraph 12.

¹⁸ See Haneef affidavit, paragraphs 14 – 16.

¹⁹ See search warrant.

proper investigation (as that term is envisaged by the relevant sections) and, certainly, not without delay.

Access to Materials

16. Section 23CB places great emphasis on the importance of Mr. Haneef's being able to make representations about this application. This indicates that the legislation intends to preserve the rights of natural justice (procedural fairness) in respect of the statutory power which has been created.²⁰

17. It is trite that, for a right to make submissions to be meaningful, the person affected by a decision must be given knowledge of the material on which the Tribunal is to make its decision. This is particularly so in respect of material that is adverse to an applicant or his prospects in the proceedings. It follows that Mr. Haneef, through his legal representatives, has an entitlement to be aware of the material being placed before the judicial officer directed to obtaining the "specified period" order.

18. In *Kioa v West* (1985) 159 CLR 550, Mason J. said at 587:

"In the ordinary course of granting or refusing permits there is no occasion for the principles of natural justice to be called into play. ... But if in fact the decision maker intends to reject the application by some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter." (Emphasis added.)

19. In *Minister for Immigration v Kurtovic* (1990) 21 FCR 193, the Full Federal Court insisted on information being available to a person the subject of a possible deportation order notwithstanding strong public policy grounds. Each of the members of the Full Court of the Federal Court agreed with the proposition.²¹ Neaves J. said at page 197:

"Whatever may have been the justification for the prison or parole authorities withholding those reports from the respondent, the Minister, consistently with what was said by the High court in *Kioa v West* ... was bound, if he proposed to take those matters into account, to afford the respondent an opportunity to make submissions in relation to them. This could have been done without necessarily giving the respondent copies of the reports if the Minister had adequate grounds for declining to do so. For example, the reports could have been available to the respondent's legal advisers. But, by whatever means it could be achieved, it was incumbent on the Minister to give notice of the matters derived from those reports on which he intended to rely so that submissions could be made in relation to those matters if the respondent chose to do so." (Emphasis added.)

20. Further assistance as to the obligation of the judicial officer in the present matter comes from the reasons of Mason CJ, Deane and McHugh JJ. in *Annetts v McCann* at page 601. Their honours said (in the context of a coronial inquiry):

²⁰ Very clear language is required to exclude natural justice or procedural fairness. See *Annetts v McCann* (1990) 170 CLR 596, 598.

²¹ See Neaves J., at page 197; Ryan J., at page 205 and Gummow J., at page 223.

“Counsel for the appellants argued that, as he could not know what findings the Coroner would make until the case was over, he was entitled to address on the whole of the evidence. The conclusion does not follow from the argument. The issues in respect of which findings adverse to the appellants may be possibly made can be isolated and, once isolated, counsel for the appellants is not entitled to the Coroner on matters which are not relevant to those issues. At the same time, the Coroner has a responsibility to define the issues in respect of which there exists a possibility that he may make findings adverse to the appellants. By defining those issues he can effectively assist the identification of the topics on which counsel can relevantly and usefully address and limit the scope of that address.” (Emphasis added.)

21. In the present matter, the statutory provisions do not purport to exclude the principles of procedural fairness. They highlight the applicability of those provisions notwithstanding the sensitive nature of any investigation being carried out. It is submitted that it is a minimum obligation that the applicant for the order and the judicial officer provide whatever information is necessary to Mr. Haneef’s legal representatives to allow properly focused and meaningful submissions to be directed to the judicial officer concerning the order being sought.

Stephen Keim SC
Counsel for Mohamed Haneef
9 July 2007