

*Crimes Act 1914*

*Section 23CB*

**In Re Mohamed Haneef**

Application to Specify Reasonable Time during which Suspension or Delay of  
Questioning may be Disregarded

**Further Outline of Submissions of the Respondent, Mohamed Haneef Addressing  
Issues of Natural Justice, Particularly, Issues of Apprehended Bias**

**Natural Justice Questions**  
**Apprehended Bias**

1. The detained person has attempted to record, in the affidavits of Ms. Cappellano and Mr. Russo, the matters of which his legal representatives are aware in which the judicial officer has had previous involvement in this matter. However, since very little documentation has been provided to those legal representatives, the judicial officer may well be more aware of greater dimensions of his involvement than the affidavits are able to document. Reliance is placed on the whole of the judicial officer's involvement in the matter including any matters of which the detained person and his legal representatives remain unaware. The judicial officer is requested to place on record, either in recorded or written form the whole of that involvement.
2. It is submitted that the judicial officer before whom this application is brought is prevented by a reasonable apprehension of bias from dealing with this application. The judicial officer disclosed during the hearing on Monday that he had already been involved in at least two search warrant applications and two previous s.23CB applications.<sup>1</sup> It is understood that both the search warrant applications and the first s.23CB applications were in the absence of any other party. The second s.23CB application was conducted by excluding Mr. Russo, legal representative for Mr. Haneef from the room during the hearing and allowing him to return at the conclusion to hear the announcement of the judicial officer's decision.<sup>2</sup>
3. During the hearing on Monday, 9 July 2007, the judicial officer advised the parties that he had attended at the Nerang police station on an earlier day and had spoken to a police officer working on behalf of the investigating officer and that this police officer's account satisfied the judicial officer that there were no unreasonable delays in this case.<sup>3</sup>
4. In the present hearing (and, it is understood, in previous hearings), the applicant for the order has placed the application and supporting material before the judicial officer without providing copies of any of that material to the legal representatives on behalf

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<sup>1</sup> See affidavit of Ms. Cappellano.

<sup>2</sup> See affidavit of Mr. Russo.

<sup>3</sup> See affidavit of Ms. Cappellano.

of Mr. Haneef. While versions of that information have been provided to Mr. Haneef's lawyers, after submissions on natural justice questions were made on Monday, the receipt by the judicial officer of the classified or secret material, together with the other factors, creates an apprehension of bias that cannot be remedied by the ex post facto action of providing some material to Mr. Haneef's legal representatives.

5. The principles relating to avoiding contact between judicial officers and parties led to a disqualification of a family court judge in *Re JRL; ex parte CIL* (1986) 161 CLR 342. at paragraph 4, the principles are set out as follows:

"4. It is a fundamental principle that a judge must not hear evidence or receive representations from one side behind the back of the other: see *Kanda v. Government of Malaya* (1962) AC 322, at p 337. McInerney J. stated the practice as it is generally understood in the profession in *Reg. v. Magistrates' Court at Lilydale; Ex parte Ciccone* (1973) VR 122, at p 127, as follows:

"The sound instinct of the legal profession - judges and practitioners alike - has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined."

The principle, which forbids a judge to receive representations in private, is not confined to representations made by a party or the legal adviser or witness of a party. It is equally true that a judge should not, in the absence of the parties or their legal representatives, allow any person to communicate to him or her any views or opinions concerning a case which he or she is hearing, with a view to influencing the conduct of the case. Indeed, any interference with a judge, by private communication or otherwise, for the purpose of influencing his or her decision in a case is a serious contempt of court: see Halsbury's *Laws of England*, 4th ed., vol.9, par.28 and cases there cited."

6. The specific propositions are part of the broader principles on which the rule against apprehended bias is based. This was also discussed by the Court in *JRL*. At paragraph 11, it was said:

"Counsel for the prosecutor referred us to authorities which establish that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the question involved in it: see *Livesey v. New South Wales Bar Association* (1983) 151 CLR 288, at pp 293-294. I rather think that the present case is governed by an analogous principle, that justice must not only be done but must manifestly be seen to be done; when a judge has received in private representations concerning a case, the court will not inquire whether the representations in fact worked to the prejudice of the party against whose interest they were made - it is enough that they might do so: see *Kanda v. Government of Malaya*, at pp 337-338. Examples of a strict application of the principle are provided by *R. v. Justices of Bodmin; Ex parte McEwen* (1947) KB 321, at p 325 and *Garrity v. Wyatt* (1975) 10 SASR 476."

7. The High Court, per Mason, Murphy, Brennan, Deane and Dawson JJ set out the principles at pages 293-4 in *Livesey* in the following terms:

“The principle to be applied in a case such as the present is ... that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. ... If a judge at first instance considers that there is any real possibility that his participation in a case might lead to reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting.”

8. The approach of the reasonable observer is discussed by their honours at pages 298-9 as follows:

“As we have already indicated however, we do not consider that a case such as the present is to be resolved by reference to the ability of the members of the particular court or the public confidence in the integrity of the judiciary. What is in issue is the appearance and not the actuality of bias by reason of pre-judgment. The reasonable observer is to be presumed to approach the matter on the basis that ordinarily a judge will so act as to ensure both the appearance and the substance of of fairness and impartiality. But the reasonable observer is not presumed to reject the possibility of pre-judgment or bias; nor is the reasonable observer presumed to have any personal knowledge of the character or ability of the members of the relevant court.”

9. As in the case of *Livesey* (see top of page 300), this is a case where no questions of necessity, special circumstances or consent of the parties intrudes.

10. The problem is accentuated in the present case by the detained person not having knowledge of what transpired between the applicant or his representatives in the previous closed hearing where no representative of Mr. Haneef was present. The appearance of bias is much stronger than in *Livesey*, itself, because, although it is not that decisions on search warrants; extension of the investigation period; and extension of the dead time have all been made adversely to detained person, there is no knowledge available to the reasonable observer of what transpired in those hearings; what evidence was placed before the judicial officer or what informal conversations took place during, before or after those hearings.

11. For these reasons, the judicial officer is urged to disqualify yourself on the grounds of apprehended bias.

#### Natural Justice in the Applicant's Conduct of this Case

12. There are reasons why, in the present application, quite apart from the previous contact between prosecution and the applicant and his officers, that the rule against bias and the right to a hearing have been irremediably breached. The applicant has proceeded in this case on the assumption that he may provide no material, not even a copy of the application, to Mr. Haneef. The purported justification is that the applicant wished to base the whole application on material that was so sensitive that it could not be provided to Mr. Haneef. An attempt has been made to remedy this but the fact remains that there is material placed before the judicial officer that has not been provided to Mr. Haneef.

13. The course of conduct embarked upon by the applicant is based is inappropriate in the context of the requirements of s.23CB. The matters relevant to the application are the reasonableness of the time sought as down time; the reasonableness of the suspension or delay of questioning proposed;<sup>4</sup> the reasons why such time and delay are reasonable (having regard to the types of things specified in s.23CB(5)(c) Crimes Act; and matters relevant to the criteria in s.23CB(7). In most circumstances, the relevant matters are capable of being addressed without disclosing any material that would justify a public interest immunity exemption. In rare circumstances, reference may have to be made to an operational matter covered by the exemption.

14. As submitted on Monday, 9 July 2007, the right of the detained person to be given an opportunity to make representations about the application signifies that that right must be rendered meaningful by the detained person being provided with the application and the material in support. If some of the evidence intended to be placed before the judicial officer is subject to a public interest immunity claim, that should only be placed before the judicial officer by establishing its relevance and by establishing the claim to the immunity. While these elements may be carried out without full disclosure to the detained person and the immunity claim will involve, in most cases, perusal of the disputed material by the judicial officer, none of the material constitutes evidence before the judicial officer unless both relevance and immunity have been established.

15. The applicant has, in these proceedings, placed all of the material before the judicial officer on Monday before making any material available to the detained person. No opportunity to make objections on the ground of relevance has been able to be made. All of the material has been received by the judicial officer as if it were both relevant and subject of the immunity. The judicial officer has been of that frame of mind for 48 hours. Now that, ex post facto, some attempt is made to provide some of the material to the detained person, it will be too late to dislodge views formed with regard to relevance weight to be given to the material. (In fact, at the request of the applicant, on the basis of the material, the judicial officer expressed satisfaction that the requirements of the sections were met without the applicant being able to make meaningful submissions in response.)

16. The procedure that has taken place has given rise to an irremediable and reasonable apprehension that the judicial officer has already absorbed and given weight to the material; has concluded that all of it is relevant; has concluded that it was proper that it not be provided to the detained person; and concluded that the requirements of the sections had been met. A reasonable apprehension of bias has been created by this process which can be removed by subsequent action.

17. The apprehension of bias that has arisen because of this process is different to the quite proper circumstances which arise where parties are fully served with another's material except for material intended to be subject to a public interest immunity claim and where that claim is determined after specific justification of the relevance of the

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<sup>4</sup> Section 23CA(8)(m)(i) Crimes Act.

material and the validity of the claim even if the other party does not receive access to that specific document.

18. For these further reasons, the judicial officer is urged to disqualify yourself on the grounds of apprehended bias.

### Construction of the Section The Purpose of s.23CB

19. The applicant submitted on Wednesday morning, through his counsel, that an application to specify time was analogous to the issue of a search warrant. It is submitted that characterization is inappropriate for a number of reasons. A search warrant application will, almost always, be ex parte the person whose property is the subject of the search warrant. No right to be heard exists in such an application. Although both hearings constitute safeguards against uncontrolled action by the police against common law rights, the s.23CB hearing is marked by the right of the detained person to be heard and by the importance of the safeguard element involved in that right to be heard. It is important, in assessing the natural justice issues, to keep that distinction in mind.

20. On Monday, it was submitted, on behalf of Mr. Haneef, that, in the light of the fact that s.23CB provides for an extended period during which an exception is made to an arrested person's normal rights to be taken, immediately, before a Court, the provisions should be construed and applied, very carefully, with a protective eye to those rights. *Williams v the Queen* [1987] HCA 36; (1986) 161 CLR 278 confirms the rights which s.23CB purports to abrogate. Mr. Haneef has been arrested for an offence on the basis that a reasonable belief was held that he had committed that offence. His rights to be taken before a Court and dealt (including a right to apply to a court for bail) have been removed by Part 1C subject to very strict limits and restrictions including the obligation to bring him before a court or release him, unconditionally or on bail, prior to the end of the investigation period. See s.23CA(3).

21. However, recourse to extrinsic material<sup>5</sup> indicates that the purpose of the s.23CB is, actually, to prevent lengthy or unjustified amounts of downtime which might, otherwise, cause the detention authorized by s.23CA Crimes Act to be otherwise than the minimal delay (before going before a Court) intended by the legislature. In the light of the extrinsic material, the detention and delays which have already occurred may be seen to be completely contrary to the objectives sought by part 1C as a whole and ss.23CA and 23CB, in particular.

22. The amendments to part 1C Crimes Act were effected by the passage of the *Anti-Terrorism Bill 2004*. See notes to Crimes Act.

23. Recourse to the Bill shows that no s.23CB existed in the Bill. Section 23CA provided for downtime similar to that which had existed for Commonwealth offences,

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<sup>5</sup> See s.15AB *Acts Interpretation Act 1901* ("the AI Act").

generally, in s.23C since part 1C was inserted in 1991 in the wake of the decision of the High Court in *Williams*, four years earlier. Subsection 23CA(8)(m) provided in the Bill for the innovation of downtime limited, by reasonableness, for the obtaining of information from a place outside Australia in a different time zone but limited, in total, to the amount of the time zone difference.

24. Recourse to the explanatory memorandum (page 4 of the document) and to the second reading speech of the Attorney-General (page 27659 of Hansard for 31 March 2004) shows that the limitations of reasonableness and the time zone limit were regarded as a safeguard of fundamental importance. Both documents indicate the absence of any s.23CB from the Bill as presented to the House.

25. Reference to the Legal and Constitutional Legislation Committee's report to the Senate on "*Provisions of the Anti-terrorism Bill 2004*" shows another importance fact about the genesis of s.23CB.

26. The Recommendation for the inclusion of the extra section can be seen at paragraph 3.47. A perusal of the sections of the report immediately preceding the recommendation show that s.23CB was meant to be an additional safeguard to prevent lengthy use of downtime. The concern expressed related, specifically, to periods in excess of 20 hours. The Committee made, inter alia, the following comments:

“3.43 The Committee is concerned, however, that the ‘dead time’ provisions contained in proposed paragraph 23CA(8)(m) may result in suspects being held for periods of over 20 hours before the investigating officers are required to apply for an extension to the investigation period. ... The Committee appreciates that there are provisions for down time in s.23C of the Crimes Act, although these are generally for events that are of limited time. However allowing for large time differences could lead to the reasonable use of dead time well in excess of 20 hours.

3.44 The Committee believes that to balance the extended investigation period available in the Bill, the use of the ‘dead time’ provisions of proposed paragraph 23CA(8)(m), should require application to a judicial officer as defined under the Crimes Act.

3.45 The Committee notes that the Attorney-General's Department considered that such a requirement would not be unworkable. The Committee believes that if such a condition was added to the Bill, then the need for an absolute limit on the period of questioning as proposed by some submitters would not be necessary, as each extension and use of ‘dead time’ would have been deemed reasonable by a judicial officer.”

27. Lest it be thought either that the Committee or the Attorney-General's Department was considering judicially authorized extensions of the kind being sought in this application, it is well to look at the Committee's extract from the submission of the Department as to what was considered a reasonable period even by way of judicial authorization. At paragraph 3.25, the Committee quoted from the evidence before it of a representative of the Attorney-General's Department. The paragraph reads:

“3.25

A representative of the Attorney-General's Department argued that it did not agree with the concerns expressed by Professor Williams<sup>6</sup> in regards to the 'dead time' provisions, and argued it was unlikely that these provisions would result in suspects being held for extended periods of time:

I would be extraordinarily surprised if the dead time, for example, in relation to the time zones would get anything like the sorts of time periods that were being suggested by Professor Williams. I have spoken to the Victorians concerning reasonable time and what the court has considered to be reasonable time in Victoria concerning reasonable time and the Court has considered periods like 16 hours to be reasonable. So in terms of the time zone issue, if a country was many hours different in time but it was during business hours, then the argument for saying that the time difference was a reasonable consideration would be diminished enormously.” (Footnote added.)

28. It is presumed that the investigating officer has brought these aspects of the extrinsic material to the attention of the judicial officer on previous applications when assisting the judicial officer as to the meaning of:

- (a) “reasonable” (used twice) in s.23CA(8)(m) Crimes Act;
- (b) “appropriate” in s.23CB(7)(a) Crimes Act; and
- (c) The application of the concept of “reasonableness” to the “reasons why the investigating official believes the period should be specified” in s.23CB(5)(c).

29. If these aspects of the extrinsic material have not previously been brought to the attention of the judicial officer, the judicial officer may be justified in concluding that the high level of frankness which your honour indicated (during the hearing on Monday) was appropriate to applications of this kind has not been adhered to in all respects.

30. It is submitted that the extrinsic material is of great assistance in indicating the purpose of s.23CB which, in turn, is of assistance in construing and applying its provisions. In particular, the requirements that the specified time must be reasonable time and that any suspension or delay in the questioning must also be reasonable constitute standards that are unlikely to be able to be met in this case where a delay in further (judicially approved) questioning already exceeds a week.

31. In terms of the natural justice issues raised, the status of s.23CB as an additional safeguard added to the legislation (after a report of the Senate Committee) to ensure that the concept of down time was not misused makes the role of the judicial officer in administering that safeguard of huge importance. In that context, the importance of avoiding any reasonable apprehension of bias is also of great importance. It is hugely important to avoid any apprehension that the safeguard installed by the Parliament is

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<sup>6</sup> See paragraph 3.21 and 3.22 of the report. Professor Williams referred to multiple applications of the provision leading to a detention extending over “a number of days”.

not functioning as intended by the Parliament because of a reasonable apprehension that the judicial officer involved in the safeguard process does not bring an impartial mind to his or her role.

Stephen Keim SC  
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11 July 2007