



Our Ref: HM:ssh:1278946

15 May 2008



FAXED

16/5/08 2.30 pm

The Secretary
Clarke Inquiry
PO Box 5365
KINGSTON ACT 2604

By email: clarkeinquiry@ag.gov.au

Dear Sir,

Re: Clarke Inquiry into the case of Dr Mohamed Haneef

Thank you for the opportunity to provide a submission to the Inquiry into the case of Dr Mohamed Haneef.

The Law Society's Human Rights Committee (Committee) has closely monitored the case of Dr Haneef and makes the following submission in the interests of equality before the law and basic human rights.

Having considered the terms of reference the Committee has significant concerns with the cancellation of Dr Haneef's Australian visa as well as the operation of sections 23CA and 23CB of the Commonwealth Crimes Act 1914.

Cancellation of visa

The cancellation of Dr Haneef's visa pursuant of section 501 of the Migration Act 1958 without any opportunity to reply to allegations was entirely inappropriate.

At the time of cancellation, a magistrate had ruled Dr Haneef was entitled to bail and if the Minister had adverse information regarding the character test, then this could have been put to Dr Haneef for his response. As it turned out, the test used by the Minister was the incorrect test and charges were dropped. In *MIAC v Haneef* [2007] FCAFC 203, the Minister argued that any association, even an innocent one was caught by s. 501(6)(b), relying on the earlier case of *MIMA v Chan* [2001] FCA 1552. However the Full Court accepted the reasoning of the trial judge, Spender J, who rejected that view on the basis that given the statutory context of the provision, an innocent association is not enough to fail the character test and that the association must be criminal, not just innocent. Special leave was not sought for a High Court appeal.

The decision of the Minister to personally cancel a visa on the basis of the character test without the opportunity to reply should be restricted to few cases



of exceptional facts, and clearly this case did not come within these exceptional circumstances. Cancellation of a visa is a most serious matter and should not be undertaken lightly. In normal circumstances it should be considered only after the visa holder has had an opportunity to reply to adverse material otherwise it is a serious breach of the principles of natural justice.

Operation of sections 23CA & 23CB of the Crimes Act (Cth)

The Committee recommends that sections 23CA and 23CB of the Commonwealth Crimes Act 1914 (Crimes Act) be repealed and Part 1C be amended so that the period of detention between arrest and charge for any offence is capped at a short period, preferably 12 hours, excluding downtime.

This would exclude the possibility of a person being held for long periods, even indefinitely, after arrest and before charge, noting that Dr Haneef was held for twelve days before he was charged with an offence.

Traditionally, under English law imported into New South Wales in 1788, a person arrested was required to be taken before a Court "as soon as reasonably practicable" after arrest.

In 1933, the Supreme Court of NSW handed down a decision which is often cited as a precedent for the law of arrest. In that case, *Clarke v Bailey*¹, Bailey was arrested for illegal gaming. His lawyer, Percy Spender, later President of the International Court of Justice, argued on his behalf that a police officer's prime duty after arrest was to take the accused to court to be formally charged.

The facts were that the police officer concerned had arrested Bailey at his workplace and instead of taking him directly to be processed and then before a court, the officer took Bailey against his will into the bar of a nearby hotel to search him. The Supreme Court held that the deviation to the hotel was unlawful and infringed the principle that the arrested person must be taken without delay and by the most direct route before a justice.

Bailey's lawyer relied successfully on an 1825 precedent in England, a decision of *Wright v Court & Ors*² which decided that a constable arresting a person on suspicion of felony must take him before a justice to be examined "as soon as he reasonably can". Chief Justice Phillip Street and his two colleagues awarded Bailey £250 damages for the illegal police deviation and search, equivalent to about 6 months wages at the time.

The decision was referred to with approval by courts many times during the ensuing 70 years, including several times in the 1980s and 1990s by the High Court of Australia. In particular, it was approved in the case of *Williams v The Queen* (1986) 161 CLR 278, in which Justices Mason and Brennan wrote a joint decision in which they traced the history of the principle.

They first referred to the opinion of William Blackstone, in his famous 1765 work *Commentaries on the Laws of England*, that:

¹ (1933) 33 SR (NSW) 303

² (1825) 4 B & C 596, 107 ER 1182

...personal liberty was an absolute right vested in the individual by the immutable laws of nature and has never been abridged by the laws of England without sufficient cause.

They then quoted Justice Fullagar in a 1955 High Court decision, in which the judge described personal liberty as

"the most elementary and important of all common law rights",

and Justice Deane in a 1982 case, in which he said

"it is of critical importance to the existence and protection of personal liberty under law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed."

As in *Clarke v Bailey*, they went on to approve *Wright v Court* as an early court precedent for the principle.

In a separate concurring Judgment in the Williams case, Justices Wilson and Dawson referred to the purpose of arrest as being to bring a suspect:

"before a justice ...to be dealt with according to law"

In recent years, there has been much debate about precisely how long police should have in which to arrest an accused person, process him at a police station, and bring him before a court. As a result of a view that police should have a short period after arrest in which to gather evidence and question an accused, federal and state parliaments changed the law to allow such a period.

Accordingly, the Crimes Act (NSW) was amended some years ago to allow police four hours after arrest to bring an accused before a court or alternatively approach a Magistrate or justice of the peace for permission to extend that period. The period could be extended by no more than a further eight hours, making 12 hours in total. The paper work, processing and court appearance would need to occur within the 4 (or up to 12) hour period, unless the Court had adjourned for the day when the appearance would occur the following morning. If at the end of the period a charge was not laid, the person would need to be released immediately.

In 1991, Federal Parliament introduced a maximum investigation period between arrest and charge of four hours (which could be extended to twelve hours after application to a Magistrate). This provision was challenged in the ACT Supreme Court (*R v McKay* [1998] ACTSC 128 (2 December 1998)) on constitutional grounds. Justice Crispin (at paragraph 14) ruled that the provision was valid but only because the:

...length and circumstances of the detention contemplated are in my view significant. If the section had permitted detention for lengthy periods that may have suggested that the power conferred was penal in substance if not in form

and for that reason, may have been unconstitutional.

Subsequently, in the recent High Court decision of *Thomas v Mowbray*³, a majority of the Justices agreed with a view previously expressed by Justices Gummow and Kirby in *Fardon v Attorney-General of Queensland* (2004) 223 CLR 575). In *Thomas v Mowbray*, Justices Gummow and Crennan in a joint judgment expressed this view as follows (at paragraphs 114-115):

Exceptional cases aside, the involuntary detention of a citizen in custody by the state is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts.

Such a view is in line with the requirements of article nine of the *International Covenant on Civil and Political Rights* (ICCPR) and decisions of both the European Court of Human Rights⁴ and the House of Lords⁵ disapproving of the indefinite detention of terrorism suspects without charge.

Prior to the Fardon case, the High Court in *Lim* (1992)⁶ said that for a detention to be valid, it had to be non-punitive rather than punitive, a distinction which now seems to have been abandoned.

Conclusion

It is significant that the indefinite detention power in sections 23CA and 23CB is given to a Magistrate or Justice of the Peace, noting that neither is sitting as a Court. In other words, it is given to the executive government. It is quite possible that this power is unconstitutional as a result of *Thomas v Mowbray*, which was handed down after the Haneef case was dealt with at first instance in the Federal Court. (No question relating to pre-charge detention was before the Federal Court).

Whatever the constitutional position, the centuries-old arrest process, is essentially a mechanism to bring a person before a court on a charge. The idea that people can be deprived of liberty even though there may be no evidence likely to sustain a charge is a strike against two of the most fundamental rights we take for granted - the presumption of innocence; and even more importantly, the right to liberty.

It is the preservation of liberty which has most influenced the courts referred to above. They (and previously the legislatures) have ensured that only persons formally charged with the commission of a crime can be deprived of their liberty. Even then you have a right to request bail, which is granted more often than not.

The Committee submits that the period of detention between arrest and charge in terrorism cases may currently be indefinitely extended by executive action. This should be reviewed. There seems no good reason to treat terrorism cases any differently from other serious offences where the maximum period is generally 12 hours. However, if it is thought that 12 hours is too short in terrorism cases, then at the most 24 hours in total should be allowed, excluding downtime.

The Committee notes that such an amendment would prevent injustice, as seems to have occurred to Dr Haneef and would preserve basic human rights principles by setting

³ 2 August 2007 [2007] HCA 33

⁴ See *Aksoy v Turkey* (1996) 23 EHRR 553

⁵ See *A v Secretary of State for the Home Department* [2005] 2 AC 68.

⁶ *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1[

a limit on the amount of time a person can be held in detention after arrest and before charge in a terrorism matter.

If you require any further information regarding this submission please contact Sarah Sherborne-Higgins, Executive Officer, Human Rights Committee by phone on 9926 0354 or email ssh@lawsocnsw.asn.au .

Yours sincerely



Michael Tidball
Chief Executive Officer