



## DR MOHAMMED HANEEF

### OPINION

#### 1. Facts

On 29 June 2007, two cars in London were found containing explosives. Both were disarmed by police before detonation. On 30 June a car containing explosives was driven into Glasgow Airport passenger terminal. It burst into flames and was destroyed without detonation. Kafeel Ahmed ("Kafeel") was one of the two persons in the car and he was badly burned. Dr Sabeel Ahmed ("Sabeel") is suspected in relation to the London bombings. They are brothers. Both came from Bangalore, India. I will refer to them as "the Ahmed brothers". Sabeel is in custody in the United Kingdom and Kafeel is in hospital in the United Kingdom.

Dr Mohammed Haneef ("Dr Haneef") is a second cousin of the Ahmed brothers and he is also a doctor from Bangalore. He was the holder of a 457 business (long stay) (class UC) visa which enabled him to practise as an employed doctor at Gold Coast Hospital.

On 2 July Dr Haneef was arrested at Brisbane International Airport in possession of a one-way ticket to Bangalore. On 14 July he was charged with intentionally providing resources to a terrorist organisation consisting of persons including the Ahmed brothers, being reckless as to whether the organisation was a terrorist organisation. The alleged resources consisted of a UK Sim card.

Conditional bail was granted in the Brisbane Magistrates Court on 16 July. On the same day, the Minister for Immigration and Citizenship cancelled his visa under s 501(3) of the Migration Act on the basis that he failed the character test because he had an association with the Ahmed brothers who he suspected were involved in criminal conduct.

Dr Haneef has commenced proceedings in the Federal Court challenging the cancellation of his visa.

Subsequently a number of factual matters relied on by the Federal Police were shown to be incorrect or possibly incorrect. On 27 July, the charges against Dr Haneef were withdrawn and he was taken into immigration detention. On 28 July he was permitted to leave Australia for Bangalore.

## **2. Questions asked**

I am asked to advise:

- (1) whether there was material before the Minister on which he could validly make the decision to cancel the visa; and
- (2) whether, on the material now known to the Minister, he could have made the same decision had the visa remained in force.

## **3. Statutory Provisions**

S 501 of the Migration Act 1958 provides:-

- (1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: *Character test* is defined by subsection (6).

- (2) The Minister may cancel a visa that has been granted to a person if:
  - (a) the Minister reasonably suspects that the person does not pass the character test; and
  - (b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister--natural justice does not apply

- (3) The Minister may:
  - (a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).

*Character test*

(6) For the purposes of this section, a person does not pass the *character test* if:

(a) the person has a substantial criminal record (as defined by subsection (7));  
or

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in

activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the *character test*.

Section 501C provides:

**501C Refusal or cancellation of visa revocation of decision under subsection 501(3) or 501A(3)**

- (1) This section applies if the Minister makes a decision (the *original decision*) under subsection 501(3) or 501A(3) to:
    - (a) refuse to grant a visa to a person; or
    - (b) cancel a visa that has been granted to a person.
  - (2) For the purposes of this section, *relevant information* is information (other than non-disclosable information) that the Minister considers:
    - (a) would be the reason, or a part of the reason, for making the original decision; and
    - (b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.
  - (3) As soon as practicable after making the original decision, the Minister must:
    - (a) give the person, in the way that the Minister considers appropriate in the circumstances:
      - (i) a written notice that sets out the original decision; and
      - (ii) particulars of the relevant information; and
    - (b) except in a case where the person is not entitled to make representations about revocation of the original decision (see subsection (10))-- invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
  - (4) The Minister may revoke the original decision if:
    - (a) the person makes representations in accordance with the invitation; and
    - (b) the person satisfies the Minister that the person passes the character test (as defined by section 501).
- .....
- (10) The regulations may provide that, for the purposes of this section:
    - (a) a person; or
    - (b) a person included in a specified class of persons;
 is not entitled to make representations about revocation of an original decision unless the person is a detainee.

#### **4. Significance of Association**

The first matter to note is that s. 501(6)(b) does not define "Association". The word is extremely wide and does not necessarily involve either guilty association (in that the visa holder knows of the criminality) or actual criminality by the visa holder.

The leading case is the decision of Emmett J in *Minister for Immigration and Multicultural Affairs v Wai Kuen Chan* (2001) 34 AAR 94. In that case the Minister cancelled a visa on the basis of an association between a divorced wife (the visa holder) and her former husband who was suspected of being a member of a Triad society involved in criminal activity. The association consisted of a nine-year former marriage with three children, a joint visa application, residual financial links following a divorce settlement and contact between them from time in relation to their children.

The Tribunal had held that these links were insufficient and that there must be some nexus between the visa holder and the criminal conduct of the alleged associate. Emmett J set aside this decision. He accepted that the absence of such a nexus was a relevant factor in the exercise of the Minister's discretion but held that it did not go to the *existence* of the relevant association. It is clear from the judgment that he regarded the matters set out above as sufficient to constitute an association. He placed weight on the fact that the provision before 1999 had conferred a power of cancellation if the Minister was satisfied that the visa holder was not of good character because of the association. The amendment to the present form of the provision made it clear that guilt or guilty knowledge was not a prerequisite.

In my view the decision of Emmett J is clearly correct. There is a dictum suggesting the contrary in the decision of Lee J in *Godley v Minister for Immigration and Multicultural and Aboriginal Affairs* (2003-4) 83 ALD 411 at [47] but that dictum was quite irrelevant to the issues before His Honour, it did not refer to the decision of Emmett J, nor were any reasons given for it. It was very much a throwaway line not deserving of significant regard. This dictum was not referred to by the Full Court ((2005) 141 FCR 552) which affirmed His Honour's actual decision. The decision on appeal therefore adds no weight to the dictum.

It follows from *Wai Kuen Chan* that neither knowledge of the associate's criminality nor guilty participation is necessary for a person to fail paragraph (b) of the character test. The policy of the provision is that a person may have a visa cancelled if the Minister reasonably suspects that that person has any association with a person he reasonably suspects of being involved in criminal conduct. The guiltiness of the association and the conduct of the visa holder are relevant to the exercise of the Minister's discretion as are the extent of the association and the degree of criminality of the associate. Obviously, if the associate were Osama bin Laden, a very slight association might well be sufficient as a matter of discretion to cause a visa holder to fail the character test. On the other hand, if the associate were reasonably suspected of traffic offences, a different view would probably be taken even if there were a much closer association.

There is a second difference between criminality under the general law and the test under s 501(6)(b). In criminal proceedings, guilt must be proved beyond reasonable doubt. In civil proceedings, the plaintiff need only establish the necessary facts on the balance of probabilities. This is why, for example, there is no inconsistency between the civil and criminal verdicts in the O. J. Simpson case in the United States. The test for the Minister, however, depends on reasonable suspicion both of the existence of the association and of the fact that the associate has been or is engaged in criminal conduct. This is a test significantly lower than even the civil standard.

**5. Information before the Minister relevant to association and criminality**

There were six matters before the Minister relevant to the existence of an association between Dr Haneef and the Ahmed brothers. These were:-

- a. They were second cousins.
- b. They had stayed in the same boarding house accommodation in the United Kingdom.
- c. Kafeel had lent money to Dr Haneef.

- d. Dr Haneef had left his mobile phone with some credit remaining on his Sim card to Sabeel. (There was no suggestion in the material before the Minister that the phone or card had been found in one of the cars).
- e. There had been conversations in an Internet chat room with Sabeel, mainly relating to family matters
- f. Part of the material supplied to the Minister protected under s 503A referred to a chat room conversation between Dr Haneef and his brother Shuaib in India on 2 July. Obviously Shuaib was also a second cousin of the Ahmed brothers. In the conversation, Shuaib informed Dr Haneef that "nothing has been found out about you" and asked when he would be getting out. Haneef replied "today". Shuaib asked whether he had permission from his hospital to leave and what he told the hospital to take leave. Dr Haneef said that he had told them that his baby was born in an emergency caesarean. Shuaib said "tell them you have to as you have a daughter born, do not tell them anything else." Shuaib then told Dr Haneef not to delay his departure and not to let anyone else use his number in Australia or give it to anyone. He added that "Aunty told that brother Kafeel used it; he is in some sort of project over there." and that "that disturbance (incident) which happened, it happened like this, Kafeel told that he will come and fix everything up." Shuaib also said that there was no contact with Kafeel. The protected material concluded with the following paragraphs:-

"40. AFP investigators suspect that the Internet conversation between Haneef and his brother may be evidence of Haneef's awareness of the conspiracy to plan and prepare the acts of terrorism in London and Glasgow.

41. AFP investigators consider Haneef's attempted urgent departure from Australia, on a one-way ticket, for a purpose which appears to be a false pretext, to be highly suspicious and may reflect Haneef's awareness of the conspiracy to plan and prepare the acts of terrorism in London and Glasgow."

In my opinion the first five of these matters ("a" to "e" above) were sufficient to enliven the Minister's discretion. They established an association between Dr Haneef and both the Ahmed brothers. In exercising his discretion, the Minister was entitled to have regard to a number of other matters including the criminal charge, the enormity of the suspected criminality of the Ahmed brothers, the extent of the association and the conversation with Shuaib which was capable of raising suspicions about Dr Haneef's own knowledge or involvement. On the basis of these and other discretionary factors relied on by the Minister, I am satisfied that it was open to him to decide that Dr Haneef failed the character test.

## **6. Changes in Information**

As I have indicated, further investigations revealed a number of matters:-

- a. The Minister had been told that the phone and Sim card were found in Sabeel's possession when he was arrested. The fact is that the Sim card was found at Sabeel's home. The phone has not been found. This change is not of great significance to the question I am asked because it was not suggested to the Minister that either the phone or the Sim card was found in Glasgow or in any of the cars. In any event, it is a fact of no relevance to the association between Dr Haneef and either of the Ahmed brothers.
- b. Contrary to the original suggestion that Dr Haneef had admitted that he had shared accommodation with Sabeel, it has now been suggested that this was a misunderstanding of his statement that he had resided there after Sabeel had left but had visited him on occasions.
- c. The prosecution has been withdrawn. The pendency of a prosecution is a matter relevant to discretion although not to actual association. Similarly, the withdrawal of that prosecution would be relevant to the Minister's discretion if he were making the original decision today for the first time.

In my opinion, if the Minister were making the original decision today in relation to a subsisting visa based on what is now known,

his discretion would still be enlivened. As a matter of discretion, the second and third changes are discretionary factors in Dr Haneef's favour but it would still be open to him to come to the same decision. This has no legal significance because there is no visa cancellation issue before the Minister but it may have relevance to the course to be taken by the Minister.

## 7. Conclusions

I answer both questions asked "Yes".

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David Bennett  
Solicitor-General

Chambers  
31 July 2007