



Australian Government
Department of Immigration and Citizenship

**SUBMISSION BY THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
TO THE CLARKE INQUIRY INTO THE CASE OF
DR MOHAMED HANEEF**

INTRODUCTION

1. The Department of Immigration and Citizenship (DIAC) welcomes the opportunity to participate in the Clarke Inquiry into the case of Dr Mohamed Haneef. We have indicated our willingness to co-operate with the Inquiry through correspondence between the Secretary and Mr Clarke, by providing this submission and all relevant supporting documents in accordance with the Inquiry's Terms of Reference.
2. This submission explains the role that DIAC played in the case of Dr Haneef, with a particular focus on the cancellation of his visa on character grounds, the effect of the criminal justice stay certificate, his immigration detention and his departure from Australia.
3. The Submission addresses the five key matters relevant to the Terms of Reference:
 - A. The Cancellation Decision
 - B. The Criminal Justice Stay Certificate
 - C. Dr Haneef's Immigration Detention and Removal from Australia
 - D. Judicial Review of the Cancellation Decision by the Federal Court
 - E. Liaison Between Commonwealth Agencies
4. For each of the first four matters, the submission provides an overview of the legislative and procedural framework, a timeline of the facts and events, and comment on DIAC's position. Finally, the submission ends with a discussion regarding the manner in which DIAC liaised with other agencies to handle the case.
5. DIAC acknowledges that this was a high-profile case of some complexity, and involved quickly evolving circumstances.

Migration Law and the Criminal Law

6. It is important to distinguish between the two legal processes involved in the case of Dr Mohamed Haneef – that of the migration law and that of the criminal law. In particular, the differences between these processes (and how and why they interact) explain the events that led to his charging, arrest, detention, visa cancellation, and removal from Australia.
7. Migration law is used to determine which non-citizens are able to enter and remain in Australia and under what conditions. While many of the processes, standards and obligations in migration law appear similar to those in the criminal law, they are distinct. In this context, detention under the migration law is not criminal detention – it is administrative detention. Similarly, decisions made under the *Migration Act 1958* (the Act) are administrative in nature and are not governed by the requirements derived from judicial proceedings, such as the notions of burden and standard of proof.

Documents provided to the Inquiry

8. DIAC has provided the Inquiry with a number of documents, a chronology and a list of officers who were involved in the matter.
9. DIAC does not have any documents that may have been produced or circulated exclusively within the former Minister's office.
10. In reviewing some emails, DIAC has become aware that there are some inconsistent displays of time on some emails for the relevant dates. This is an error which arose in DIAC's electronic document management system known as TRIM. The error was caused by a technical problem when TRIM was updated at the end of daylight saving. The effect is that emails printed after the update display a time which is one hour earlier than the true time for the document. In this submission DIAC has reflected the times when the events actually occurred, as established by the officers involved and other corroborating material.
11. Some material pertinent to this matter is "protected information" within section 503A of the Act. Section 503A protects certain information supplied by law enforcement or intelligence agencies. The section prohibits authorised migration officers from

disclosing, except in narrowly defined circumstances, information communicated to them by a gazetted agency, on condition that it be treated as confidential and the information is relevant to the exercise of a power under, among others, section 501 of the Act. A gazetted agency is defined by subsection 503A(9) to include an Australian law enforcement or intelligence body specified in a notice published by the Minister in the *Gazette*. By section 503D of the Act, if section 503A applies to protect information communicated by a gazetted agency to authorised migration officers, then section 503A applies to similarly protect the agency's details from being divulged, as if the details were the information communicated by the agency. The effect of section 503A and section 503D is that, in this public submission, authorised migration officers cannot disclose the name of the agency which provided that protected information or the protected information. A declaration under subsection 503A(3) of the Act has been made to allow officers to discuss, with the Inquiry only, the protected information relevant to the Inquiry.

Summary of Events

12. Dr Haneef, an Indian national, applied for a Subclass 457 Business (Long-Stay Visa) (the subclass 457 visa) on 24 July 2006 using DIAC's electronic visa application internet service. He was sponsored by Queensland Health. His visa application was processed by the Department's Brisbane Business Processing Office and granted on 30 August 2006. He arrived in Australia on 11 September 2006. Dr Haneef worked as a Senior House Officer for the Gold Coast Health Service District. DIAC had no further contact with him until after his arrest.
13. On Monday 2 July 2007, DIAC was contacted by the Australian Federal Police (AFP) requesting access to Dr Haneef's incoming passenger card (PAX card). DIAC holds incoming passenger cards, and arrangements exist under legislation for agencies such as the AFP to request such information.
14. Dr Haneef was arrested late on 2 July 2007 at the Brisbane International Airport. On Tuesday, 3 July 2007 DIAC was formally notified of his arrest at a National Counter Terrorism Committee (NCTC) meeting. Between 2 July 2007 and 12 July 2007, DIAC participated in a number of NCTC meetings. At this stage, the matter had a focus on national security and border security matters arising from the failed car bombing attacks

in London and the attack on the Glasgow airport (the UK incidents) on 29 and 30 June 2007¹. Following the NCTC meeting on 3 July 2007 and with the arrest of a non-citizen temporary resident, DIAC commenced contingency planning for possible visa cancellation, immigration detention and removal, consistent with its portfolio responsibilities for non-citizens who may be in breach of Australia's immigration law.

15. Between Monday 9 July 2007 and Monday 16 July 2007, DIAC officers provided regular briefings and updates to the office of the former Minister for Immigration and Citizenship, the Hon. Kevin Andrews MP (the former Minister). Briefs on possible cancellation of Dr Haneef's visa were submitted to the former Minister's office on 10 July 2007 and 13 July 2007. Regular updates to the information provided in these submissions were provided as the situation evolved. During this period DIAC also liaised closely with other relevant government agencies².
16. On Saturday 14 July 2007, Dr Haneef was charged with intentionally providing resources to a terrorist organisation being reckless as to whether the organisation was a terrorist organisation, contrary to subsection 102.7(2) of the *Criminal Code Act 1995*. At approximately 10.15am on Monday 16 July 2007, the Brisbane Magistrates Court granted Dr Haneef bail, subject to a surety.
17. On 16 July 2007 at or about 1.00pm, the former Minister decided to cancel Dr Haneef's visa under subsection 501(3) of the Act. As a result Dr Haneef became an unlawful non-citizen and liable to immigration detention and removal from Australia³. As he did not meet the bail conditions set earlier on the same day he remained in criminal custody and did not enter immigration detention. Dr Haneef was personally notified of the decision to cancel his visa at the Brisbane Watch house at approximately 3.45 pm in the presence of his solicitor.
18. On Tuesday 17 July 2007 at 10.45am, the former Attorney-General, the Hon. Philip Ruddock MP (the former Attorney-General), gave a Criminal Justice Stay Certificate (CJSC) under section 147 of the Act. This prevented Dr Haneef from being removed from Australia⁴.

¹ This is further discussed in Part E: Liaison Between Commonwealth Agencies.

² This is further discussed in Part E: Liaison Between Commonwealth Agencies.

³ This is further discussed in Part C: Dr Haneef's Immigration Detention and Removal from Australia.

⁴ This is further discussed in Part B: The Criminal Justice Stay Certificate.

19. On 18 July 2007, lawyers representing Dr Haneef lodged an application in the Federal Court for judicial review of the decision to cancel his visa.
20. Between 17 July and 27 July 2007, DIAC officers continued to participate in the whole-of-government approach through the NCTC, Operational Briefings, Key Issue Briefings and daily liaison with the former Minister's office on contingency planning for immigration detention and removal, and in relation to Dr Haneef's judicial review application in the Federal Court.
21. On Friday 27 July 2007, the Commonwealth Director of Public Prosecutions (CDPP) withdrew the charge against Dr Haneef and he was released from criminal custody. However, as an unlawful non-citizen, he was subject to mandatory immigration detention under section 189 of the Act. On the same day, the former Minister made a residence determination under section 197AB, in respect of Dr Haneef. This allowed him to be held in community-based detention. Also on 27 July 2007, the former Attorney-General cancelled the Criminal Justice Stay Certificate⁵.
22. On Saturday 28 July 2007, Dr Haneef's lawyers wrote to DIAC requesting that he be allowed to leave Australia as soon as possible. DIAC facilitated Dr Haneef's return to India on the same day⁶.
23. On 21 August 2007, Justice Spender of the Federal Court overturned the former Minister's decision to cancel Dr Haneef's visa⁷. On 28 August 2007, the former Minister lodged an appeal to the Full Federal Court against Spender J's decision, after seeking and obtaining written legal advice from the Solicitor-General as to the prospects of appeal. On Friday 21 December 2007, the Full Federal Court affirmed Spender J's decision to overturn the former Minister's decision to cancel Dr Haneef's visa.

A. THE CANCELLATION DECISION

Legislative Framework

24. Under the Act, there are a number of powers which provide for the cancellation of a non-citizen's visa. These include (but are not limited to):

⁵ This is further discussed in Part B: The Criminal Justice Stay Certificate.

⁶ This is further discussed in Part C: Dr Haneef's Immigration Detention and Removal from Australia.

⁷ This is further discussed in Part D: Judicial Review of the Cancellation Decision by the Federal Court.

- section 109 (cancellation of visa if incorrect information provided);
- section 116 (general power to cancel);
- section 134 (cancellation of business visas); and
- sections 501, 501A or 501B (special power to refuse or cancel).

25. Section 501 of the Act is a discretionary power which allows the Minister to cancel a person's visa if they do not pass the character test. The character test is defined in subsection 501(6) of the Act (see paragraph 29 below).
26. Under section 501 of the Act, the Minister has two options for cancelling a person's visa. Under subsection 501(2), having provided a person with natural justice, the Minister may cancel a visa that has been granted to the person if:
- (i) the Minister reasonably suspects that the person does not pass the character test; and
 - (ii) the person does not satisfy the Minister that they pass the character test.
27. Under subsection 501(3), the Minister may cancel a visa that has been granted to a person if:
- (i) the Minister reasonably suspects that the person does not pass the character test; and
 - (ii) the Minister is satisfied that the cancellation is in the national interest.
28. Under subsection 501(3), the rules of natural justice do not apply (subsection 501(5)). Such decisions may only be made by the Minister personally (subsection 501(4)). The important requirement that the Minister is satisfied that the cancellation is in the national interest in order for subsection 501(3) to be used, reflects Parliament's intention that this power would only be exercised infrequently. Because the rules of natural justice do not apply to decisions made under subsection 501(3), a person whose visa is cancelled under this provision may seek to have the decision revoked under section 501C of the Act. Under section 501C, the Minister may revoke the decision if the person makes representations within seven days of the Minister's invitation to do so (reg 2.52), but only if the person satisfies the Minister that they pass the character test.

The character test

29. The discretion to cancel a person's visa under section 501 is only enlivened if the person is found not to pass the character test. The character test is defined in subsection 501(6) of the Act. It provides that 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.

National interest

30. 'National interest' is not defined for the purposes of the Act, including subsection 501(3). Generally, courts have been reluctant to attempt to define the meaning of the national interest in statutory contexts, but the national interest has been determined to be a different concept to the public interest.

31. In defining 'national interest' it is generally accepted that the word 'national' directs attention to the interests of Australia as a whole, as distinct from local or regional interests within Australia, which may fall within the notion of 'public interest'. The question of what is or is not in the national interest is ultimately for the Minister to

determine according to his or her satisfaction, which must nevertheless be attained 'reasonably'.

Section 503A Protected Information

32. In making a decision under section 501 of the Act, the Minister may take into account information that is protected under section 503A. As discussed above, the content of this information and the identity of the agency that provided the information, are protected from disclosure.

Operational Procedures

33. The Character Assessment and War Crimes Screening Branch was responsible for the program management of character assessments under the Act. This included visa cancellation considerations for non-citizens of character concern who were onshore, and visa refusal considerations for non-citizens who were offshore (and a small number of non-citizens who were onshore). At the relevant time the Character Assessment and War Crimes Screening Branch was headed by Mr Peter White, an Assistant Secretary. The Assistant Secretary, Character Assessment and War Crimes Screening Branch reported to DIAC's First Assistant Secretary, Compliance and Case Management Division and to the Deputy Secretary, Borders, Compliance, Detention and Technology Group.
34. The Character Policy Section was one of the Sections within the Character Assessment and War Crimes Screening Branch. The Character Policy Section was responsible for the management of policy issues relating to section 501 visa cancellation and refusal decisions, and for providing support to Mr White. The Director of this Section reported directly to Mr White. During the relevant period, Ms Zoë Clarke was the acting Director of the Character Policy Section.

Procedural Framework

Issues Papers

35. Section 501 cases are referred to a decision-maker in the form of an 'issues paper'. Issues papers are intended to provide the decision-maker with a succinct account of the information that is pertinent to the decision. To ensure that comprehensive information is

provided to a decision-maker, all evidence relevant to the case is included as an attachment(s) to the issues paper.

36. The structure of an issues paper is based on the considerations outlined in Ministerial Direction 21, a direction issued under section 499 of the Act⁸. Subsection 499(1) provides that the Minister may give written directions to a person or body having functions or powers under the Act if the directions are about the performance of those functions or the exercise of those powers. The Minister is not empowered to give directions that would be inconsistent with the Act or the Regulations (subsection 499(2)). Although the Minister is not bound by directions given under section 499 when exercising a power personally, it is normal practice for him or her to be guided by Direction 21, as was the case with Dr Haneef.

Statement of Reasons

37. If a decision is made to cancel a person's visa, they must be provided with a formal 'statement of reasons', which explains the reasons for the decision. The statement of reasons is the written record of the specific findings of the decision-maker and the weight that each consideration was given in coming to the decision. It is normal practice for DIAC to prepare a draft statement of reasons and provide this to a decision-maker electronically. This allows the decision-maker to amend the document to reflect their views, should this be necessary. In Dr Haneef's case, the former Minister did not require any amendments to the draft statement of reasons prepared by DIAC.

Facts

38. On Monday 2 July 2007, Dr Haneef was arrested at Brisbane International Airport. Earlier that day, the AFP had contacted DIAC seeking his incoming passenger card.
39. On Tuesday 3 July 2007, DIAC officers attended a meeting of the NCTC. They were informed that Dr Haneef, an Indian national and subclass 457 visa holder, had been arrested at Brisbane International Airport. He was a person of interest to the UK Metropolitan Police Service Counter Terrorism Command's investigation into the UK incidents on 29 and 30 June 2007. DIAC is not a regular member of the NCTC but had been co-opted to attend this NCTC meeting and other NCTC meetings, for agenda items

⁸ Copy at Attachment A.

about the domestic Islamic community's reaction and border security issues arising from the UK incidents.

40. A number of meetings of the NCTC, Operational Briefings and Key Issues Briefings were held from 2 July to 27 July 2007. DIAC was initially co-opted on 2 July 2007 to attend the NCTC meetings, due to agenda items on the border security and community implications of the UK incidents. There was no discussion of Dr Haneef in that first meeting. DIAC was co-opted to continue to attend these meetings and briefings as part of the whole-of-government approach to managing the Haneef case.
41. On 3 July 2007 and the following days, DIAC commenced consideration of the possible implications that the arrest and ongoing investigations into Dr Haneef might have on his immigration status. Consideration was given to a range of matters including whether the circumstances which permitted the grant of the visa no longer existed (paragraph 116(1)(a)), whether his visa may be subject to mandatory cancellation in accordance with subsection 116(3) or whether he was liable to visa cancellation on character grounds (subsections 501(2) or 501(3)). In this regard, Mr Peter White (Assistant Secretary, Character Assessment and War Crimes Screening Branch) sought and received legal advice from DIAC's Special Counsel who is an employee of the Australian Government Solicitor (AGS).
42. On Sunday 8 July 2007, Mr White received a letter and section 503A protected information from a gazetted agency. This information was used by DIAC officers in preparing the first draft issues paper.
43. On Monday 9 July 2007, DIAC officers prepared a draft brief for the Chief of Staff to the former Minister concerning visa cancellation options. This brief, titled 'Options for Visa Cancellation Consideration for Dr Mohammed Haneef' (*sic*), was submitted to the Chief of Staff on Tuesday, 10 July 2007.
44. On Wednesday 11 July 2007, a gazetted agency provided updated information to Mr White that was section 503A protected.
45. From this information an updated brief to the former Minister's office was prepared by DIAC. This brief, titled 'Update on Options for Visa Cancellation Consideration for

Dr Haneef', was submitted on Friday 13 July 2007. On the same day, a gazetted agency provided further section 503A protected information to Mr White.

46. On Saturday morning, 14 July 2007, Dr Haneef was charged by the AFP with intentionally providing resources to a terrorist organisation being reckless as to whether the organisation was a terrorist organisation, contrary to subsection 102.7(2) of the *Criminal Code Act 1995*.
47. At approximately 10.15am on Monday 16 July 2007, the Brisbane Magistrates Court granted Dr Haneef bail subject to surety. DIAC also sent the most up-to-date protected information to the former Minister's office by secure fax.
48. At 10.23am on 16 July 2007, DIAC emailed a further draft of the issues paper to the former Minister's office. At 10.59am, an updated draft Statement of Reasons was emailed to the former Minister's office. These drafts had been updated to include the fact that Dr Haneef had been charged. Subsequently, DIAC emailed the final legally cleared issues paper and statement of reasons to the former Minister's office at 12.02pm. These documents had been updated with the outcome of the bail hearing.
49. Around 1.00pm on Monday 16 July 2007, the former Minister made the decision to cancel Dr Haneef's subclass 457 visa under subsection 501(3) of the Act on the grounds that he reasonably suspected that Dr Haneef did not pass the character test specified at paragraph 501(6)(b), and that he was satisfied that the cancellation was in the national interest. Accordingly, Dr Haneef became an unlawful non-citizen.
50. At 1.22pm, the signed decision pages from the issues paper and statement of reasons were faxed to DIAC National Office. These were incorporated into a 'Notice of Visa Cancellation' (the Notice). The Notice set out the ground under which the former Minister made his decision, the particulars of the information that was considered by him in making the decision (the Issues Paper) and his reasons for making the decision (the Statement of Reasons). The Notice also invited Dr Haneef to seek revocation of the visa cancellation decision within seven days as provided for in paragraph 501C(3)(b) and reg. 2.52(2). Mr White also discussed the former Minister's invitation to seek revocation of the visa cancellation decision with Dr Haneef's lawyers on 17 July 2007. In the event, Dr Haneef did not take up this invitation.

51. At 1.34pm on 16 July 2007, the Notice was faxed from DIAC National Office to DIAC Queensland Office, to enable it to be delivered to Dr Haneef. At around 3.45 pm, officers from DIAC's Brisbane office personally delivered the Notice to Dr Haneef at the Brisbane Watch House in the presence of his solicitor.

DIAC's view

52. Dr Haneef came to DIAC's attention in the context of the whole-of-government approach to the UK incidents. At that time, a number of visa cancellation options were considered, including whether the circumstances which permitted the grant of the visa no longer existed and whether his visa may be subject to mandatory cancellation, for example, on national security grounds. As the case developed the character aspects under section 501 of the Act came into focus. Legal advice was sought from the earliest stages as to options in relation to Dr Haneef's immigration status for DIAC officers to advise the former Minister. DIAC is confident that all of its officers acted appropriately in the handling of the case and in providing advice to the former Minister.

B. THE CRIMINAL JUSTICE STAY CERTIFICATE

Legislative Framework

53. Under section 147 of the Act, the Attorney-General may give a Criminal Justice Stay Certificate (CJSC) that the stay of an unlawful non-citizen's removal or deportation from Australia is required for the administration of criminal justice. Once in force, a CJSC prevents the removal or deportation of the non-citizen (section 150). A CJSC may be necessary because under section 198, an unlawful non-citizen in various specified circumstances must otherwise be removed from Australia as soon as reasonably practicable.
54. Under section 159 of the Act, the Minister may grant to a person, about whom a CJSC has been given, a Criminal Justice Stay Visa (CJSV). By section 158, a criterion for the grant of a CJSV is that the Minister, having had regard to the safety of individuals and any other matters that he considers relevant, has decided, in his absolute discretion, that it is appropriate for the CJSV to be granted.

Facts

55. At 10.32am on Tuesday 17 July 2007, the former Attorney-General gave a CJSC under section 147 of the Act with regard to Dr Haneef, at the request of the AFP. The effect of the CJSC was to prevent Dr Haneef from being removed from Australia (section 150 of the Act).
56. A copy of the CJSC was faxed to DIAC at around 10.45am on Tuesday 17 July 2007. Later that day, DIAC prepared a submission to the former Minister for his consideration whether to grant a CJSV, titled 'Consideration of a Criminal Justice Stay Visa for Dr Mohamed Haneef'. At this time, Dr Haneef was not being held in immigration detention as he had not met his bail conditions and remained in criminal custody. DIAC understands that the submission was not considered by the former Minister.
57. When the charges were dropped on Friday 27 July 2007, the former Attorney-General cancelled the CJSC. This removed any restriction on Dr Haneef's removal from Australia.

DIAC's view

58. Dr Haneef became liable for removal from Australia once the CJSC was cancelled when the charges were dropped on 27 July 2007 and he entered immigration detention⁹. The CJSC ultimately had minimal impact on DIAC's operations as it was only in effect while Dr Haneef was in police custody or on remand. If Dr Haneef had met his bail conditions and thereupon entered immigration detention prior to 27 July 2007, the CJSC would have prevented his removal from Australia. As he did not enter immigration detention until 27 July 2007 the CJSC had no operative impact on DIAC's actions.

C. DR HANEEF'S IMMIGRATION DETENTION AND REMOVAL FROM AUSTRALIA

Legislative Framework

59. A non-citizen who wishes to enter or remain in Australia must be the holder of a valid visa. If they do not hold a valid visa they are an unlawful non-citizen. Under section

⁹ This is further discussed in Part C: Dr Haneef's Immigration Detention and Removal from Australia.

189, any person who is known or is reasonably suspected to be an unlawful non-citizen is subject to mandatory immigration detention.

60. Under subsection 198(1) of the Act, an unlawful non-citizen who asks the Minister, in writing, to be removed must be removed from Australia as soon as reasonably practicable. Under subparagraph 198(2A)(c)(i), a person who has been invited in accordance with section 501C to make representations to the Minister about revocation of a decision, would not be removed from Australia prior to expiry of the seven day period in which they could make those representations.

Facts

61. Following the NCTC meeting on 11 July 2007, DIAC's Deputy Secretary, Borders, Compliance, Detention and Technology Group, tasked the Assistant Secretary, Detention Operations and Client Services Branch, to commence operational planning in relation to detention and removal options in the event that Dr Haneef's visa was cancelled. At 12 noon on that day, a meeting/teleconference was held with representatives from Detention Operations Section (National Office), Compliance Operations Section (National Office), Character Policy Section (National Office) and Queensland Compliance to discuss these matters.
62. Following this meeting DIAC commenced formal contingency planning for detention and removal arrangements in the event that Dr Haneef's visa was cancelled. DIAC officers discussed options for removing Dr Haneef from Australia, including the possibility of an aircraft charter flight. Detention options were also being considered during this period. A Draft Action Plan, Draft Key Actions List and Draft Contingency Plan, were circulated within DIAC from Friday 13 July 2007 in preparation for possible visa cancellation.
63. Dr Haneef was charged with an offence under subsection 102.7(2) of the *Criminal Code Act 1995* on the morning of Saturday 14 July 2007. Dr Haneef's lawyers then applied for bail.
64. At 8.10 am on Monday 16 July 2007, Mr Peter White was sent a copy of an email from the AFP concerning the charge against Dr Haneef. This email also referred to a contingency plan to "detain Dr Haneef under the Migration Act" if the bail application was successful.

65. Also on that morning, officers from DIAC's Queensland Office spoke with the Queensland Police Service (QPS) Commissioner's office. The QPS Commissioner's office verbally agreed to hold Dr Haneef in the Brisbane City Watch House as a place of immigration detention for up to 72 hours should his visa be cancelled and he therefore be required, under the Act, to be taken into immigration detention.
66. Also on 16 July 2007, Magistrate Payne granted bail to Dr Haneef, subject to sureties of \$10,000.
67. At around 1.15pm on 16 July 2007, the former Minister held a press conference. He advised that he had cancelled Dr Haneef's visa and that, if released from police custody, Dr Haneef would likely be transferred to Villawood Immigration Detention Centre (VIDC). VIDC was considered as an appropriate place to detain Dr Haneef because there was no immigration detention facility in Queensland and he could be held at the Brisbane City Watch House for only 72 hours. An Information Brief was sent to the Minister on 17 July 2007 titled 'Dr Mohammed Haneef – Possible transfer to Villawood IDC' (*sic*). As Dr Haneef did not meet his bail conditions, this option never eventuated. Instead, Dr Haneef continued to be remanded in custody until 27 July 2007.
68. On 17 July 2007, Dr Haneef's lawyers wrote to DIAC seeking his immediate removal from Australia under subsection 198(1). As he had not made bail he was not in immigration detention. On 18 July 2007, the AGS responded on DIAC's behalf stating that the CJSC prevented Dr Haneef's removal.
69. Between 17 July and 27 July 2007, a range of internal discussions took place regarding Dr Haneef's possible immigration detention and removal should he come into immigration detention. Further discussions were also held regarding the CDPP's announcement that he was reviewing the case, and whether a possible decision by him to drop the charge against Dr Haneef would have any effect on the validity of the former Minister's visa cancellation decision.
70. On the morning of Friday 27 July 2007 DIAC was advised that there was a possibility that the charge against Dr Haneef may be dropped. The former Minister's office requested that an urgent oral advice be sought from Mr Henry Burmester AO QC, Chief General Counsel, Australian Government Solicitor, on the possible implications of this for the former Minister's visa cancellation decision.

71. Mr Burmester was briefed by the AGS's Special Counsel to DIAC on the matter during the course of the morning. On or about 1.00pm, Mr Burmester advised the former Minister in a teleconference that his preliminary view (given the short time he had to familiarise himself with the matter) was that the visa decision was valid but that the dropping of the charge may be a material change which the former Minister could take into account in determining his future course of action.
72. At around 3.00pm on 27 July 2007, the CDPP decided to withdraw the charge against Dr Haneef on the basis that there was "no reasonable prospect of conviction" on the available admissible evidence.
73. The former Minister then called a media conference where he advised that he would be seeking further advice from the Solicitor-General as to whether or not the decision of the CDPP to withdraw the charge had any implications for the visa cancellation decision which he had made under the Act¹⁰.
74. The former Minister subsequently sought formal written advice from the Solicitor-General on this matter in the context of the on-going Federal Court action. This advice was provided on Tuesday 31 July 2007.
75. On Saturday 28 July 2007 the former Minister issued a media statement indicating that the Solicitor-General had orally advised him that despite the charge being withdrawn, it would still be open to him to now reach the same conclusion as he originally did. The former Minister requested the Solicitor-General to commit that advice to writing¹¹.
76. Upon the decision to drop the charges, Dr Haneef was released from criminal custody and taken into immigration detention as he was an unlawful non-citizen. DIAC has no immigration detention facility in Queensland, and the former Minister made a residence determination under section 197AB of the Act in respect of Dr Haneef. This allowed Dr Haneef to be held in community-based detention.
77. DIAC was advised by the Attorney-General's Department that the former Attorney-General had cancelled the CJSC on the basis that Dr Haneef's presence in Australia was no longer required for the administration of criminal justice.

¹⁰ Copy at Attachment A.

¹¹ Copy at Attachment A.

78. Dr Haneef and his legal representatives had expressed concerns to DIAC officers regarding his privacy, given the high level of media presence outside the Wolston Correctional Centre. DIAC therefore arranged for an officer to act as a decoy and to travel away from the correctional centre to draw the media with him.
79. In the meantime, DIAC facilitated Dr Haneef's move into community-based detention at an apartment in Brisbane. (Initially, Dr Haneef's place of detention was intended to be his apartment in Southport. However, as Dr Haneef no longer had a lease, DIAC officers consulted with him and his lawyers and made mutually agreed arrangements for him to be placed elsewhere to help protect his privacy.) The effect of the Residence Determination was that although technically in immigration detention, Dr Haneef was able to move about in the community without being "accompanied or restrained" by an immigration officer.
80. On 28 July 2007, Dr Haneef's lawyers wrote to DIAC requesting that he be removed from Australia as soon as possible. This enlivened the removal power in subsection 198(1) of the Act. Accordingly, officers from DIAC's National Office Detention Operations area worked with officers in the Brisbane office to facilitate Dr Haneef's voluntary removal from Australia to India on Saturday, 28 July 2007. For this purpose DIAC's Brisbane office assisted Dr Haneef to purchase clothes, and paid for economy class airline tickets to India for him, his cousin and his lawyer. In consultation with Dr Haneef and his lawyers, at the airport DIAC processed him in the airside office and arranged for private access to the airport departure lounge to protect his privacy. A DIAC liaison officer was also provided, as part of usual procedures, to ensure that there were no difficulties in transit and to arrange smooth arrival procedures in the destination country.
81. On Tuesday 31 July 2007, the former Minister met with the Solicitor-General and received his formal written advice¹². Later that afternoon the former Minister called a media conference¹³ where he advised that he had met with the Solicitor-General and received his written opinion which confirmed that there was material before the former Minister on which he could validly make a decision to cancel Dr Haneef's visa. A copy of the advice was released publicly along with the former Minister's media release.

¹² Copy at Attachment A.

¹³ Copy at Attachment A.

DIAC's view

82. Dr Haneef spent around 24 hours in immigration detention. He was in police custody or criminal custody from his arrest on 2 July 2007 until 27 July 2007 when the charges against him were dropped by the CDPP. He was not released from such custody when granted conditional bail on 16 July 2007 as he failed to meet the bail condition. His immigration detention therefore commenced once his criminal custody ended on 27 July 2007.
83. DIAC's view is that the AFP's email of 16 July 2007 which stated that "contingencies ... are in place" refers to AFP contingency planning. DIAC was not aware of the terms of such planning at that time or at any point prior to the former Minister's decision to cancel Dr Haneef's visa. DIAC was not involved in contingency planning by the AFP. The former Minister was not briefed by DIAC on AFP contingency planning, as it was not relevant to any of the considerations that he was likely to take into account in making the visa cancellation decision.
84. From the time the former Minister received the submission concerning possible cancellation, a decision on cancellation could have been made at any time. Therefore contingency plans needed to be in place to respond to possible scenarios, including the grant of bail. These plans were only designed to come into effect if the former Minister decided to cancel the visa. Unless the visa was cancelled, DIAC had no statutory authority to detain and remove Dr Haneef.
85. Once Dr Haneef entered immigration detention and requested to leave Australia, DIAC made every effort to facilitate his voluntary removal as quickly as possible, with all due regard to Dr Haneef's dignity and well-being.

D. JUDICIAL REVIEW OF THE CANCELLATION DECISION BY THE FEDERAL COURT

Legislative Framework

86. Section 476A of the Act provides that the Federal Court has original jurisdiction to review a section 501 decision made personally by the Minister. The Federal Court has no jurisdiction to review the merits of the Minister's decisions.

87. The principal issue for consideration by the Federal Court was the meaning of an ‘association’ in paragraph 501(6)(b) of the Act, which was used by the former Minister in cancelling Dr Haneef’s visa. At that time, the relevant legal precedent was *Minister for Immigration and Multicultural Affairs v Chan* [2001] FCA 1552. In *Chan*, Emmett J inferred that a mere connection or combination or mere family ties were sufficient to ground an ‘association’.
88. An extensive submission¹⁴ was lodged to the Federal Court at first instance by the Solicitor-General on behalf of the former Minister on 7 August 2007. The submission set out DIAC’s understanding of the law as it stood at that time and the legislative history of the relevant provisions.

Facts

89. On 18 July 2007, Dr Haneef’s lawyers lodged an appeal of the former Minister’s visa cancellation decision. On Friday 17 August 2007, DIAC sent a submission to the former Minister’s office titled ‘Dr Mohamed Haneef - options open to you in the event of the Federal Court setting aside your decision to cancel Dr Haneef’s visa’. On Tuesday, 21 August 2007, Spender J set aside the former Minister’s cancellation decision of Dr Haneef’s visa on the basis that the former Minister had incorrectly applied the character test under the Act. His Honour found that the former Minister had applied a test of association for paragraph 501(6)(b) of the Act which was wide enough to encompass links that could not conceivably have had any bearing on Dr Haneef’s character. (*Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40). Spender J noted that there could be grounds for cancelling the visa, but that the former Minister had incorrectly interpreted and applied the association test. He also rejected the assertion that the former Minister had acted for an improper purpose in cancelling Dr Haneef’s visa. Following this decision, the former Minister applied for and was granted a stay of Spender J’s decision. This suspended the operation of the judgment, including the reinstatement of Dr Haneef’s visa, pending appeal.
90. On 28 August 2007, the former Minister lodged an appeal to the Full Federal Court against Spender J’s decision, after seeking and obtaining written legal advice from the Solicitor-General as to the prospects of appeal. On Friday 21 December 2007 the Full

¹⁴ Copy at Attachment A.

Federal Court affirmed Spender J's decision to overturn the former Minister's decision to cancel Dr Haneef's visa. As a result, Dr Haneef's visa was reinstated and will remain in force until 30 August 2010.

DIAC's view

91. The findings of the Court significantly changed the law. The former Minister's decision to cancel the visa and the legal advice from Mr Burmester AO QC and the Solicitor-General were based on the understanding of the law that had existed for some years and which had been applied at the relevant time. Although the Court found that the former Minister had incorrectly applied the association ground of the character test, the former Minister's decision was consistent with the relevant Federal Court authority that existed at that time: *Minister for Immigration and Multicultural Affairs v Chan* [2001] FCA 1552. In *Chan*, the court held that it was not necessary that there be a nexus between the visa holder and the criminal conduct of the person or group with whom the visa holder is or was associated. The Full Federal Court has overturned *Chan*, and held that such a nexus is necessary for the purposes of paragraph 501(6)(b).

E. LIAISON BETWEEN COMMONWEALTH AGENCIES

National Counter Terrorism Committee

92. The Department of Prime Minister and Cabinet (PM&C) is the convener of the National Counter Terrorism Committee (NCTC), the key Commonwealth/State/Territory co-ordination body on counter-terrorism issues. DIAC is not a regular member of the NCTC but may be co-opted to attend for specific agenda items as required to undertake specific tasks or to provide expert advice. Deliberations of the NCTC are subject to national security considerations.
93. DIAC was initially co-opted on 2 July 2007 to attend the NCTC meetings, due to agenda items on the border security and community implications of the UK incidents. There was no discussion of Dr Haneef in that first meeting. DIAC's role gradually extended to providing immigration advice in participation in the whole-of-government approach to managing Dr Haneef's case.

94. During the period from Monday 2 July 2007 through to Thursday 12 July 2007, DIAC officers attended a number of NCTC meetings. DIAC has separately provided confidential details of those meetings to the Inquiry because of national security considerations which were discussed.
95. In addition to these meetings, DIAC participated in daily inter-agency Operational Briefings and Key Issues Briefings convened by PM&C on weekdays between 11 July and 27 July 2007. To the best of DIAC's knowledge, no formal minutes were kept for these teleconferences.

Contact Officers

96. DIAC regularly liaised with other government agencies, particularly the AFP, and with the former Minister's office. Records of all briefings were not specifically kept, however documents and formal briefings produced during this time evidence the ongoing liaison in which DIAC participated. Much of the work generated in this period stemmed from discussions with other agencies and with the former Minister's office.
97. To assist in this regard, and in order to ensure the consistency and accuracy of communication between relevant agencies, DIAC nominated a central contact officer. DIAC's nominated contact officer was responsible for answering enquiries and providing updates and briefings to other agencies, as well as amending and clearing the immigration aspects of the whole-of-government talking points and providing written briefings. The contact officer's name has been provided to the Inquiry.

DIAC's views

98. DIAC considers that the NCTC liaison, teleconferences and contact officer arrangements worked satisfactorily.

DIAC'S CONCLUDING COMMENTS

99. DIAC participated in the whole-of-government process in order to provide an immigration perspective in the management of Dr Haneef's case. In advising and supporting the former Minister in exercising his powers under the Act and otherwise

undertaking their duties, DIAC is confident that its officers at all stages acted properly and in accordance with the requirements of the relevant legislation.

Department of Immigration and Citizenship

23 July 2008

Index of attached documents

Footnote No.	Reference	Title
8		Ministerial Direction No. 21.
10	Friday, 27 th July 2007, KATO43/07	The Hon Kevin Andrews MP, Doorstop, Treasury Place, Melbourne
11	Saturday, 28 July 2007, KA 064/07	The Hon Kevin Andrews MP, Statement,
12	31 July 2007	Solicitor-General: Dr Mohammed Haneef – Opinion
13	31 July 2007	Kevin Andrews MP, Media Release: Dr Haneef – Advice from Solicitor-General
14	7 August 2007	DIAC's submission to the Federal Court