DR HANEEF AND HIS FRIENDS AT THE AFP: AN ADMINISTRATIVE LAWYERS' FEAST DAY?

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An introduction: the rule of law

The Petition of Right of 1628 is a heartfelt cry for the rule of law. In clause X, the various matters canvassed earlier in the document are brought together with the following words:

> [The present Parliament assembled] do humbly pray your most excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan benevolence, tax, or such like charge, without common consent by act of parliament; and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or refusal thereof; and that no freeman, in any such manner as is before mentioned, be imprisoned or detained …[1]

The Petition of Right was not, immediately, a great success. The turbulence of the Civil War; the Commonwealth; the Restoration; and a series of further battles had to be endured before the principles sought in the Petition became a fundamental part of the protections contained in the Bill of Rights of 1689.[2]

I am always extremely conscious of this heritage when I head to s 20 and following of the *Judicial Review Act 1991* (Qld) or other codifications of administrative law principles. The ability to challenge government decisions and the obligations imposed on government officials to conduct their decision-making, appropriately, comprise the rule of law in action. And when our access to such remedies is restricted or excluded, the rule of law, itself, becomes muted and ineffective.

It also follows that administrative law principles are very useful in many other areas of law, especially, where government decision-making is involved.

Part 1C *Crimes Act 1914* (Cwlth): extraordinary powers

Part 1C was inserted into the Crimes Act in 1991. However, amendments passed in 2004 extended its provisions to terrorism offences. The provisions which relate to terrorism offences are different in some respects to those which deal with the other serious offences for which the legislation was originally enacted.

The purpose of Part 1C is to interfere, in certain circumstances, with the traditional rights of a criminal suspect. The traditional right of an arrested person is to be taken as soon as practicable before a justice to be dealt with according to law.[3] In practice, this means that an arrested person will be taken to the watchhouse to be processed by the staff of the watchhouse. If appropriate, the person will be given a form of watchhouse bail releasing them into the community. If watchhouse bail is not given, the arrestee is taken before the

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nearest Magistrates Court to be charged. On this first appearance, a further bail application may be made and, again, the person may be allowed back into community, absolutely or conditionally, or remanded in custody which places the arrestee in the hands of the corrective services system.

Part 1C imposes a different regime. The obligation to take the arrestee before a justice is suspended. The arrestee may be detained for certain limited purposes, namely, to investigate whether the arrestee committed the offence for which the arrest was made or, in the case of a terrorism offence, to investigate another terrorism offence which an investigating official reasonably suspects the arrestee of committing.[4]

The regime created by Part 1C recognises investigation time, which is the primary period for which Part 1C was enacted. However, there is also provision for periods during which the investigation (principally, questioning of the arrestee, cannot be reasonably carried out)[5] and these downtime periods allow the detention to continue without using up the investigation time.

Section 23CB, which allows a justice of the peace or a Magistrate to specify additional periods of downtime, was added to the 2004 amending Bill after a report of a Senate Committee indicated concerns about Part 1C being used to detain persons for unreasonable periods (like more than 24 hours).[6] The Committee declined to recommend any upper limit to the period of detention. In retrospect, that may have been an error of judgement on the part of the Committee.

Part 1C contains a number of safeguards. A detainee must be treated with humanity and respect for human dignity.[7] Questioning must be tape recorded and transcripts and a copy of the tape must be made available to persons so questioned.[8] Although the Australian Federal Police appear to be still in the process of providing some transcripts of interviews with Dr Mohamed Haneef, some 15 months after the event, it does seem that both investigating police and watchhouse staff took their duties to treat Dr Haneef humanely and with respect, seriously.

One more piece of law

Dr Haneef was arrested pursuant to s 3W Crimes Act. The detention regime is dependant upon the existence of a lawful arrest. Subsection 23 CA(1) provides: 'If a person is arrested for a terrorism offence, the following provisions apply.'

Section 3W requires, inter alia, for an arrest without warrant to occur, that an arresting officer must believe, on reasonable grounds, that the person has committed (or is committing) the offence for which they are arrested.

It seems to follow that, if the status of the arrest of Dr Haneef was other than lawful, then any actions taken pursuant to Part 1C also lost their approval of Parliament. Section 3W also provides that, if at any time before the person is charged, the constable in charge of the investigation ceases to believe on reasonable grounds that the person committed the offence, the person must be released.

As Dr Haneef quickly provided explanations of any matters raised with him which might have at first raised suspicion, it is very likely that any grounds for a continued reasonable belief (if they ever existed) had evaporated within a short time after the arrest. This also would place action taken pursuant to Part 1C outside the protection of the law.

What is this thing called Part 1C?

Mr Peter Russo was engaged on the evening of Thursday, 5 July. His appearance before Mr Gordon, Magistrate, that same evening, resulted in Mr Russo being excluded from the room while the Magistrate received and read the application and supporting material for further down time to be specified. Mr Russo did not get to see the material and Mr Gordon made the requested order.

I was engaged the next day and I spoke to Mr Russo that evening. Mr Russo had a printout of Part 1C which had been provided to him by the AFP officers.

We knew that the Thursday night downtime order expired on Monday evening and that a fresh application was likely. Preparation was difficult to start in that Part 1C seemed to be missing something. I was confused because I thought the orders being made were preventive detention orders or at least I expected Part 1C to contain provisions preventing me or anyone else from speaking about the fact that Dr Haneef was being held in custody. Since everyone was talking about this fact, things didn't seem quite right.

I had printed out some articles on anti-terror laws. In reading one such article, I discovered that PDOs with their restrictions on communication were part of the 2005 amendments to the *Criminal Code* and that the detention provided for in Part 1C Crimes Act was a different animal.[9]

My preparation could now proceed although I had no application or affidavit material from the police and, apparently, I was not going to receive anything any time soon.

When in doubt, go natural justice

The hearing took place in one of the court rooms in the new Magistrates Court building on Monday morning, 9 July 2007. Although the legislation makes no indication, either way, the hearing proceeded as a closed hearing.

Mr Rendina, a lawyer working for the AFP, appeared for Mr Simms, the seconded Queensland police officer, who was making the application while I appeared for Dr Haneef.

Neither Mr Rendina nor Mr Simms nor the Magistrate explained to me what the application was. It was just handed to the Magistrate. It was just assumed that everything could be kept secret. Mr Gordon kept on referring to 'highly protected' material although no claim was ever made for public interest immunity nor was any affidavit tendered explaining why material should not be disclosed. I was trying to join a game which had been going on for a week and no one thought I needed to know the rules.

I read and filed an affidavit by Dr Haneef in which he denied any connection with terrorism, explained the birth of his daughter and the purpose of his trip to India and deposed to a willingness to allow the police to retain his passport and to attend at any reasonable time to be further questioned.

The notes which I tendered and spoke to, that day, are five and a half pages long. They point out that the power to detain is dependant upon the need to investigate specific offences which Dr Haneef was suspected of committing. A global suspicion of Dr Haneef having done something wrong was not enough.[10] The notes point out that, a week earlier, the applicant got an extension of questioning time to 24 hours. They question how the applicant could have had enough knowledge to know he needed 24 hours of questioning time, but still did not have enough knowledge to actually ask any questions.

The notes stressed that the provisions must be construed in accord with their purpose of facilitating questioning and not as a general holding provision. Section 15AA *Acts Interpretation Act* got a mention as did *Coco v The Queen*[11] on the need to avoid construing provisions in legislation which impinge on common law rights beyond what was necessitated by clear and express language.

However, it was natural justice that I talked most about during the hearing. The argument commenced with the right, expressed in Part 1C, of a detained person to make submissions (either personally or by his legal representative).[12] This right implied, it was said, a right to make informed decisions. I referred to *Kioa v West*[13] ('procedural fairness requires that he be given an opportunity of responding to the matter'); *Minister for Immigration v Kurtovic*[14] ('incumbent upon the Minister to give notice of the matters … on which he intended to rely so that submissions could be made in relation to those matters'); and *Annetts v McCann*[15] ('by defining those issues he can effectively assist the identification of the topics on which counsel can relevantly and usefully address').

Mr Rendina and Mr Simms did appear to make faces towards their support staff in the back of the room during my oral submissions. The expressions seemed to say: 'What language is this turkey speaking?'

Mr Gordon may have had the same question. In circumstances where an individual had been locked up without charge for 11 days and without any application by the legal representative in Court, instead of making a decision on the issues I had raised, Mr. Gordon offered to the AFP applicant and his legal representative an adjournment of two days to allow them to obtain legal advice.

He also made a two day interim specified down time order.

What's that other bit of natural justice called?

I was walking to the railway station on Wednesday morning, to catch my usual train to work when it struck me. Mr Gordon had spoken at some length on Monday about how he had taken control of this matter and dealt with all the search warrant applications as they arose. I recalled also that he had kicked Mr Russo out of his room while he sat with the AFP applicants, read the secret material and made his decision. I thought Mr Gordon might be prevented from continuing to make decisions in this matter. These previous contacts, in the absence of anyone representing Dr Haneef, could well give rise to a reasonable apprehension of bias.

Meanwhile the AFP had sought and obtained legal advice. A silk from Canberra rang me and said he hoped to be able to give me some of the highly protected information that had been withheld from Dr Haneef for nine days and from his lawyers for the last 5 days. I said I was going to ask Mr Gordon to disqualify himself.

That day, about midday, I received the application and supporting statutory declaration by Mr Simms that would be sworn and tendered at 2.30 that afternoon. It was agreed that I would need time to assess that material so the argument on the merits of the application would not take place that day. The applicant had managed four days further detention just by withholding information from the detained person. The application that Mr Gordon should disqualify himself was argued that afternoon.

On the recusal application, I read and filed an affidavit from my instructing solicitor, Ms Cappellano, repeating Mr Gordon's statements as to his previous involvement in issuing various search warrants and his observations that he thought the police officers were working very hard (because one of them looked tired and had told Mr Gordon the wrong time

of another search warrant application that was to be made). I also read an affidavit of Mr Russo detailing his exclusion from the earlier downtime application while the police officers remained with the decision-maker Magistrate. (Mr Rendina later filed an affidavit that said the material placed before Mr Gordon on the search warrant applications did not go beyond the adverse statements about Dr Haneef in the downtime specification applications.)

My written submissions on the apprehended bias application went to just over seven pages. As well as the facts in the affidavits, the submissions rely on the fact that the Magistrate had been given secret material on the Monday without any application for public interest immunity having been made. This meant that he had had an opportunity to absorb that material without its relevance or the basis for immunity from disclosure being established or able to be challenged by the lawyers acting for Dr Haneef. He had also expressed himself satisfied as to Part 1C criteria for the purpose of making the interim order. These factors, it was submitted, added to the reasonable apprehension that a reasonable observer might hold which could not be taken away by subsequent provision of some of that material.

The submissions relied upon *Re JRL; ex parte CJL*[16] ('It is a fundamental principle that a judge should not hear evidence or receive representations from one side behind the back of the other … [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').

The appropriate test was taken from *Livesey v New South Wales Bar Association*[17] ('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 suspicion that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it …')

Mr Gordon reserved his decision for two days. He promised that, if he were to accede to our application, he would arrange for another Magistrate to be available to hear the merits of the downtime application.

As it turned out, Mr Gordon was not called on to decide the question of his own disqualification. My Canberra colleague approached me (I was carrying another 16 pages of outline, this time addressing the merits) as I got to the Court, to tell me that Mr Simms was withdrawing his application for more downtime.

Mr Gordon was informed of these matters and so did not take any further steps in the matter.

Dr Haneef was questioned for 12 hours that night, using up the investigation time which Mr Gordon had approved, 10 days earlier. Mr Simms who had done everything up to that point, including conducting the 12 hours of the second interview, for reasons still unexplained, was not the person who charged Dr Haneef. The National Coordinator, Counter-Terrorism, Domestic of the AFP, Ramzi Jabbour, signed the charge sheet and swore the bail affidavit.

Despite Mr Gordon not being called upon to make his decision on the issue of apprehended bias, the AFP, through documents provided in response to Freedom of Information applications, has published the following: 'At 1350 Magistrate GORDON advised that he was intending to disqualify himself. No further application was presented by the AFP.' There is no public confirmation available of that claim.

Conclusion

The downtime applications were not the end of the process by which administrative law principles were useful to Dr Haneef. With the assistance of Nitra Kidson and Darryl Rangiah,

my two excellent juniors, an application was made to review a decision by the Minister for Immigration to cancel Dr Haneef's visa.[18] The application was successful at first instance and on appeal and the decision to cancel the visa was set aside. The new Minister, Mr Evans, declined to re-cancel Dr Haneef's visa.

In addition, it was the threat of an application to set aside the charge that was the catalyst for the Commonwealth Director of Public Prosecutions, Mr Bugg, to take a closer look at evidence or lack thereof to support the offence with which Dr Haneef had been charged. On 27 July 2008, counsel acting on behalf of Mr Bugg advised the Court that the Crown would not be presenting any evidence and the charge was struck out by Magistrate, Ms Cull.

Dr Haneef's experience, despite all of the delays which left him in detention, remains a good example of the rule of law at work in Australia. Administrative law principles are a crucial part of the content of that important doctrine.

Endnotes

1 A copy of the Petition may be found at http://www.constitution.org/eng/petright.htm .
2 A copy of the Bill of Rights may be found at http://www.yale.edu/lawweb/avalon/england.htm.
3 This normal state of affairs is recognised in s 23 CA(3)(b) Crimes Act. See also, *Williams v The Queen* [1987] HCA 36; (1986) 161 CLR 278.
4 Section 23 CA(2) Crimes Act.
5 The periods of time to be so disregarded are set out in subs 23CA(8). They include time to convey the arrestee to the police station; time to talk to one's lawyer; and time while one is waiting for one's lawyer to attend.
6 See Senate Legal and Constitutional Legislation Committee *Report into the Provisions of the Anti-Terrorism Bill 2004*, pp 20-22.
7 Section 23Q Crimes Act.
8 Section 23V Crimes Act.
9 The article was Gregory Rose and Diana Nestorovska, *Australian counter-terrorism offences: Necessity and clarity in federal criminal law reforms* (2007) 31 Crim LJ 20. See especially, p 41 for discussion of preventive detention, now contained s 105 *Criminal Code*.
10 I did not twig, at that stage, to the dependency of the powers upon a continuing lawful arrest for a specific offence.
11 [1994] HCA 15; 179 CLR 427, 437.
12 See s.23CB(6) Crimes Act.
13 (1985) 159 CLR 550, 587.
14 (1990) 21 FCR 193, 197.
15 (1990) 170 CLR 596, 601.
16 (1986) 161 CLR 342 at paragraphs 4 and 11.
17 (1983) 151 CLR 288, 293-4.
18 See Haneef v Minister for Immigration and Citizenship [2007] FCA 1273 (21 August 2007), per Spender J. and Minister for Immigration Citizenship v Haneef [2007] FCAFC 203 (21 December 2007) (Black CJ and French and Weinberg JJ.)