

**20 May 2008**

The Secretary  
Clarke Inquiry  
PO Box 5365  
**Kingston ACT 2604**

Dear Sir/Madam,

### **Submission to the Clarke Inquiry into the case of Dr Mohamed Haneef**

The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

CCL appreciates the opportunity to make a submission to this Inquiry.

#### **Summary of Recommendations**

CCL makes the following recommendations to the Inquiry. Our reasoning for these recommendations is set out in the following section.

*Recommendation 1:* That the Inquiry ascertain how it came to be incorrectly asserted that the SIM card which Dr. Haneef gave to Sabeel Ahmed was found in the burning Jeep at Glasgow Airport.

*Recommendation 2:* That the Inquiry determine who in the Australian Federal Police (AFP) first obtained the information that Dr. Haneef's SIM card had not been found in the burning Jeep at Glasgow Airport, and when that information was obtained. It should

determine when the information was given to senior officers of the AFP, and why the information was not given to Dr. Haneef's lawyers, and why no correction had been made to information that was tendered to the Magistrate's Court in Brisbane.

*Recommendation 3:* That the Inquiry ascertain who in the AFP first obtained the information that an email had been sent by Kafeel Ahmed to his brother, Sabeel Ahmed which effectively demonstrated Dr. Haneef's innocence of the crime with which he was charged. It should determine when the information was given to senior officers of the AFP, and why the information was not given to Dr. Haneef's lawyers

*Recommendation 4:* That as a first step in restoring confidence in the AFP, the Inquiry's findings on the above matters be made public.

*Recommendation 5:* That the Inquiry ascertain how the AFP came to be interested in Dr. Haneef's immigration status and the reasoning which four AFP officers employed in coming to their decision to arrange for Dr. Haneef's visa to be cancelled. It should also ascertain which other persons participated in this plan.

*Recommendation 6:* That the Inquiry ascertain what information was given to the then Minister of Immigration, Mr. Andrews, which persuaded him that Dr. Haneef's visa should be cancelled. The Inquiry should in particular determine when Mr. Andrews learned of the email Kafeel Ahmed sent to his brother. It should investigate whether Mr. Andrews also was motivated by political concerns rather than an objective examination of the merits of Dr. Haneef's character; and the motivation of those who advised him on the matter.

*Recommendation 7:* That the Inquiry determine why so much money and time has been spent on investigations of Dr. Haneef subsequent to his visa being cancelled and subsequent to its restoration; and release the results to the public.

*Recommendation 8:* That the inquiry make recommendations as to ways in which public confidence in the AFP can be restored.

*Recommendation 9:* That the inquiry seek powers from the Attorney-General to compel witnesses and to require that evidence be given on oath.

*Recommendation 10:* That the Inquiry investigate ways in which the AFP and the Office of the Commonwealth Director of Public Prosecutions may be required to take the International Covenant on Civil and Political Rights into account when pursuing their investigations and prosecutions.

*Recommendation 11:* That the Inquiry recommend the enactment of a charter of human rights, and that the AFP be required to protect the rights enacted in it, and to ensure that its own actions do not infringe those rights.

*Recommendation 12:* That the Inquiry recommend that Section 501 of the Migration Act be amended so as to apply only to convictions of crimes which are recognised as serious crimes (carrying a two-year penalty) in Australia. The decision should be taken by a new, genuinely independent tribunal, whose members would have substantial fixed terms with an appeal available on leave to the Federal Magistrates Court. If the court gives leave to appeal, that appeal would be a true appeal on the merits of the case,

rather than judicial review.<sup>1</sup> The non-citizen, if already in Australia, should be able to be present at the hearings, and in any case to be represented by legal counsel of his or her choice. The rules of natural justice should apply, and the onus of proof lie with the state. The option of denying visas on this ground should not apply to stateless persons or persons entitled to protection; nor to persons who have lived in Australia for more than ten years, nor to persons who have lived in Australia for two years without committing a crime, nor to persons who will be subjected to human rights abuses if deported.

*Recommendation 13:* That the inquiry recommend that Section 196 of the Migration Act be repealed.

*Recommendation 14:* That the Inquiry recommend that a separate review be instituted to examine all anti-terrorist legislation, with a view to determining how terrorist offences may be treated as ordinary crimes, with procedures being in accordance with the long settled principles of the criminal law.

---

<sup>1</sup> See Julian Burnside, 2007: *Watching Brief: Reflections on Human Rights, Law and Justice*, Scribe Publications, Carlton North, Victoria pp. 121-3 for further argument.

## Submission

### A. Fairness and The Rule of Law

This submission relies on a chronology of the Haneef affair which was produced by Mohamed Haneef's barrister, Stephen Keim. A copy of that chronology is appended.

The chronology raises very serious questions concerning the probity of members of the Australian Federal Police (the AFP), their commitment to human rights and to fair trials, and their adherence to the rule of law. It also raises issues of concerning the Migration Act 1958 and Australia's Anti-Terrorist legislation.

The CCL does not have independent knowledge of these facts. Much of the chronology is a matter of public record. On two crucial matters, however, Mr. Keim is reliant on press reports.

The first concerns whether and when the AFP received information that Sabeel Ahmed had received an email from his brother Kafeel which made it very probable that Sabeel had no knowledge of his brother's actions or plans, and was not part of a terrorist organisation that was involved in such plans. Since the charge against Dr. Haneef was dependent on the assertion that he had supplied his SIM card to Sabeel Ahmed, and that the latter was a member of a terrorist organisation, that information was important for Dr Haneef's defence.

The second concerns when the AFP were told that the SIM card had not been found in the burning Jeep at Glasgow Airport but in Liverpool, and when they became aware that the Prosecutor, Clive Porritt, had had told the court that it was found in the Jeep.

These two matters are crucial for judgements of the integrity and competence of the police involved.

In his Sir David Williams lecture 'The Rule of Law', Lord Bingham of Cornhill declares that the rule of law requires that the adjudicative procedures provided by the state should be fair.<sup>2</sup> Elaborating, he says, inter alia, that 'the accuser should make adequate disclosure of material helpful to the other party or damaging to itself...' He acknowledges that the prosecutor may be in possession of material which he is for public interest reasons unwilling or very reluctant to disclose to the defence. He declares, however, that as the [United Kingdom] law now stands, 'if [material which is] helpful to the point where the defence would be significantly prejudiced by non-disclosure, the prosecutor must either disclose or abandon the prosecution.'<sup>3</sup>

The Disclosure Policy of the Commonwealth Director of Public Prosecutions is in accordance with this rule:

#### *4.1 Obligation to disclose unused material*

---

<sup>2</sup> Page 26. The speech may be accessed at [http://www.cpl.law.cam.ac.uk/past\\_activities/the\\_rt\\_hon\\_lord\\_bingham\\_the\\_rule\\_of\\_law.php](http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php) Accessed April 29.

<sup>3</sup> Page 28. See also *Sheldrake v Director of Public Prosecutions*, Attorney General's Reference (No. 4 of 2002)[2004] UKHL 43, [2005] 1 AC 264.

The prosecution should disclose to the defence unused material.

For the purposes of this statement “unused material” is all information relevant to the charges against the defendant which has been gathered in the course of the investigation

and which:

- (a) the prosecution does not intend to rely on as part of its case, and
- (b) either runs counter to the prosecution case (i.e. points away from the defendant having committed the offence) or might reasonably be expected to assist the defendant in advancing a defence, including material which is in the possession of a third party (i.e. a person or body other than the investigating agency or the prosecution).<sup>4</sup>

This principle is asserted in the rules of professional organisations of lawyers (e.g. Rule 66 of the *Barristers’ Rules* of the NSW Bar Council, Rules A66 and A66A of the *Solicitors’ Rules* of the NSW Law Society, the NSW Director of Public Prosecution’s *Prosecution Guidelines*, The NSW Police *Commissioner’s Instructions*.)

This fundamental principle of fairness has been infringed in Haneef’s case. If the Inquiry is to ensure that Australians will in future have confidence in the work of the AFP, the public should be informed who in the AFP had the relevant information and when in each of these two cases. It should be told why the existence of the email was never disclosed to Dr. Haneef and his lawyers; how it came to be asserted that Dr Haneef’s SIM card was found at the scene of the Glasgow bombing attempt, and why no member of the AFP corrected this assertion before the story was broken on the ABC. And the public should be assured that changes have been put in place which will ensure that members of the AFP will in future scrupulously act in accordance with the principles of fairness and the rule of law.

For this last reason it should ascertain when the senior officers, including the Commissioner, were given the two pieces of information. If those transfers of information were anything other than prompt, the Inquiry needs to ascertain why. The Inquiry must not be satisfied with assertions that the information was not given to the officers supervising the Haneef investigations and prosecution.

**Recommendation 1:** That the Inquiry ascertain how it came to be incorrectly asserted that the SIM card which Dr. Haneef gave to Sabeel Ahmed was found in the burning Jeep at Glasgow Airport.

**Recommendation 2:** That the Inquiry determine who in the Australian Federal Police (AFP) first obtained the information that Dr. Haneef’s SIM card had not been found in the burning Jeep at Glasgow Airport, and when that information was obtained. It should determine when the information was given to senior officers of the AFP, and why the information was not given to Dr. Haneef’s lawyers, and why no correction had been made to information that was tendered to the magistrate’s court in Brisbane.

---

<sup>4</sup> <http://www.cdpp.gov.au/Publications/DisclosurePolicy> accessed April 28, 2008.

**Recommendation 3:** That the inquiry ascertain who in the AFP first obtained the information that an email had been sent by Kafeel Ahmed to his brother, Sabeel Ahmed which effectively demonstrated Dr. Haneef's innocence of the crime with which he was charged. It should determine when the information was given to senior officers of the AFP, and why the information was not given to Dr. Haneef's lawyers.

**Recommendation 4:** That as a first step in restoring confidence in the AFP, the Inquiry's findings on the above matters be made public.

## B. International Law and Haneef's Detention Without Trial

The principle that no person should be imprisoned without trial is enshrined in the *International Covenant on Civil and Political Liberties* (the ICCPR). Article 9 states:

- 1 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- 2 Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- 3 Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
- 4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- 5 Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

On November 2, 2007, *The Australian* revealed that its journalist had sighted email correspondence between four AFP officers, which involved a plan they were implementing to have Dr. Haneef's visa cancelled under the Migration Act.<sup>5</sup>

Some of the emails concerned are still accessible from the Australian site. A crucial sentence reads:

Contingencies for containing Mr. (sic) Haneef and detaining him under the Migration Act, if it is the case that he is granted bail on Monday, are in place as per arrangements today.

The sentence betrays an intention by the AFP to secure Dr. Haneef's detention on immigration grounds in the face of any decision by a court that he should be released. It is a matter of concern that the AFP should be interested in changing a person's immigration status. Further, it is a reasonable assumption that the officers in question did not start from a reasonable belief that Dr. Haneef was of bad character, and decide therefore that he should be refused permission to stay in Australia (with the unfortunate consequence that he would be detained until he could be deported), but that they believed that he should be detained, and sought to use Section 501 of the Migration Act to secure his continuing detention. Acting in this way is incompatible with Article 9.

---

<sup>5</sup> The account is at <http://www.theaustralian.news.com.au/story/0,25197,22688973-601,00.html>: accessed on May 2, 2008.

No reasons have been given to the public as to what knowledge the four officers had about Dr. Haneef that they thought might justify contravening international law. If such reasons have been given to his lawyers, that fact has not been publicly released. This silence has created public suspicion that the arguments used are in fact without substance.

**Recommendation 5:** That the Inquiry ascertain how the AFP came to be interested in Dr. Haneef's immigration status and the reasoning which four AFP officers employed in coming to their decision to arrange for Dr. Haneef's visa to be cancelled. It should also ascertain which other persons participated in this plan.

Subsequent to the sending of the emails, the then Minister for Immigration, Mr. Andrews, did cancel Dr Haneef's visa, under subsection 501(3) of the Migration Act. This involved the Minister determining that Dr. Haneef failed the character test specified in Section 501 in virtue of the latter's association with his second cousins.

It is of crucial importance that the Inquiry ascertain what information was given to the Minister concerning Dr. Haneef, and what information was withheld. In particular, it is crucial that it ascertain whether and when Mr. Andrews was informed about the existence of the email from Kafeel Ahmed to his brother. If the material was withheld, it is crucial that this information is released to the public; and that we are informed of any subsequent disciplinary action that has been taken in response to this failure. Otherwise, belief in the probity of the AFP will be eroded, to the detriment of law enforcement in Australia.

**Recommendation 6:** That the Inquiry ascertain what information was given to the then Minister of Immigration, Mr. Andrews, which persuaded him that Dr. Haneef's visa should be cancelled. The Inquiry should in particular determine when Mr. Andrews learned of the email Kafeel Ahmed sent to his brother. It should investigate whether Mr. Andrews also was motivated by political concerns rather than an objective examination of the merits of Dr. Haneef's character; and the motivation of those who advised him on the matter.



### **C. Subsequent AFP Investigations.**

It has been widely reported that the AFP has continue its pursuit of information about Dr. Haneef, at great expense. The motivation for this has, unsurprisingly in the circumstances, been questioned. This questioning is undermining public confidence in the AFP, and of the Commissioner in particular. It is likely to lead to reluctance to cooperate with them. It will lead to scepticism about information the AFP may give about threats to safety. It must affect the morale of AFP officers. Public harm will result. The situation can only be ameliorated by a public release of reasonable grounds for the investigations, or if these are not to be found, by the appointment of a new commissioner.

**Recommendation 7:** That the Inquiry determine why so much money and time has been spent on investigations of Dr. Haneef subsequent to his visa being cancelled and subsequent to its restoration; and release the results to the public.

**Recommendation 8:** That the inquiry make recommendations as to ways in which public confidence in the AFP can be restored.

**D. Compelling witnesses and evidence on oath.**

It is the belief of the CCL that those answers will not be relied upon unless they are supported by evidence taken on oath. Accordingly, the CCL recommends that the Inquiry seek powers from the Attorney General to compel witnesses and to require that evidence be given on oath.

**Recommendation 9:** That the inquiry seek powers from the Attorney-General to compel witnesses and to require that evidence be given on oath.

## E. Commitment to human rights.

The constitution of Interpol lists the following two aims:

- (1) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the 'Universal Declaration of Human Rights';
- (2) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.<sup>6</sup>

The Inquiry should investigate ways in which the AFP and the Office of the Commonwealth Director of Public Prosecutions may be similarly bound to take the ICCPR and other human rights documents into account when pursuing their investigations and prosecutions. An important part of achieving this would be the enactment of a charter of human rights, and requirements that the AFP be bound by it, and required to protect the rights enacted in it.<sup>7</sup>

**Recommendation 10:** That the Inquiry investigate ways in which the AFP and the Office of Public Prosecutions may be required to take the International Covenant on Civil and Political Rights into account when pursuing their investigations and prosecutions.

**Recommendation 11:** That the Inquiry recommend the enactment of a charter of human rights, and that the AFP be required to protect the rights enacted in it, and to ensure that its own actions do not infringe those rights.

---

6

<http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenReg/constitution.asp#gp> accessed on May 2, 2008.

<sup>7</sup> See also the section on Terrorist Crimes and Legal Procedures below.

## **F. Section 501 of the Migration Act 1958**

Section 501 gives the Minister the power to reject or revoke a visa on character grounds. The CCL submits that the section is defective in multiple respects.

### **1. Procedural faults.**

Under subsection (3), there is no access to an independent tribunal for review on the merits of the Minister's decision. The rules of natural justice do not apply; so the person whose visa is cancelled (the non-citizen) need not be given an opportunity to demonstrate that the Minister is misinformed or mistaken. The Minister may make a factually perverse decision, and there be no way of combating it. Unless the Minister delegates the powers given in subsections (1) and (2), there is no appeal on the merits of the case under those subsections either.

These are recipes for inferior and mistaken decisions.

The consequences which follow a decision of the Minister that a person fails the character test may be that the non-citizen is detained and then deported, or if that is not possible, (where a person is at risk of death if sent to the country of his or her citizenship, or where the person is stateless), may be kept in detention for long periods, or even for life. It is entirely unacceptable, and contrary to the rule of law, that a person may be detained for long periods, without trial, without a hearing, without being told the grounds of the decision, and without the opportunity for a review on the merits of the case other than by the Minister.

Section 503A compounds the problem. By protecting information supplied by law enforcement agencies and intelligence agencies, it makes it likely that the bad reasons for bad decisions will not be made public. A culture of denial will remain unchallenged. It makes it possible, and it becomes increasingly likely, that innocent persons will be scapegoated to protect reputations and careers.

### **2. The onus of proof.**

Under subsections (1) and (2), it is left to the non-citizen to satisfy the Minister that he or she passes the character test. This reversal of the onus of proof is unreasonable. How are persons to prove that they have no criminal record in their countries of origin; that they have not their past conduct does not show that their character is suspect, that they have had no association with criminal groups, and that there is no significant risk that they will incite discord or threaten other people's property? In particular, how is a refugee to demonstrate these things in the face of hatred and lies from the authorities in their own countries?

### **3. Faults in the definition of 'substantial criminal record'.**

As it stands, subsection (7) defines 'substantial criminal record' on the basis of the penalty imposed. There is no requirement that the offence for which the person has been convicted is a recognised crime in Australia, and one which carries a similar penalty in Australian courts.<sup>8</sup>

### **4. Faults in the character test (Subsection (6)).**

---

<sup>8</sup> It could apply to a woman sentenced by a sharia court on the grounds of adultery, for example, or to religious offences.

Clause (6)(b) allows a visa to be cancelled because of an association with a person or an organisation that the Minister suspects has been involved in criminal conduct. There is no restriction on the degree of criminality, nor on whether the criminal conduct would be criminal conduct under Australian law.

Clause (6)(c)(i) is vague as to what criminal conduct is sufficient to show that the non-citizen is not of good character, while (6)(c)(ii) uses the even vaguer expression 'the person's past and present general conduct'. Legislation which carries such grave consequences should be clear and explicit; decisions should be made on objective criteria.

Clause (6)(d)(ii) combined with subsection (11) implies that a person fails the character test for merely threatening damage to someone's property.

### **5. General considerations.**

The temptation of the Minister or his or her advisors to use the character test for purposes other than that of keeping notorious criminals out of Australia has been made plain by the Haneef case. But this is not an isolated instance. Its misuse can also be seen in the cases of Stefan Nystrom and Robert Jovicic.<sup>9</sup>

**Recommendation 12:** That the Inquiry recommend that Section 501 of the Migration Act be amended to apply only to convictions of crimes which are recognised as serious crimes (carrying a two-year penalty) in Australia. The decision should be taken by a new, genuinely independent tribunal, whose members would have substantial fixed terms with an appeal available on leave to the Federal Magistrates Court. If the court gives leave to appeal, that appeal would be a true appeal on the merits of the case, rather than judicial review.<sup>10</sup> The non-citizen, if already in Australia, should be able to be present at the hearings, and in any case to be represented by legal counsel of his or her choice. The rules of natural justice should apply, and the onus of proof lie with the state. The option of denying visas on this ground should not apply to stateless persons; nor to persons who have lived in Australia for more than ten years, nor to persons who have lived in Australia for two years without committing a crime, nor to persons who will be subjected to human rights abuses if deported.

---

<sup>9</sup> Both of these were long-term residents of Australia, who, having committed crimes here, were deported to their countries of citizenship. Robert Jovicic was deported to Serbia, whose languages he could not speak, and became destitute. Stefan Nystrom, who had lived in Australia since he was 27 days old, was deported to Sweden.

<sup>10</sup> See Julian Burnside, *Watching Brief: Reflections on Human Rights, Law and Justice*, Scribe Publications, Carlton North, Victoria 2007 pp. 121-3 for further argument.

### G. Mandatory Detention.

If Dr. Haneef's visa had been validly cancelled, he would have become an "unlawful non-citizen", and subject to mandatory detention. Had he met the conditions of his bail, he would have been transferred to an immigration detention centre, probably to Villawood in Sydney.

Under Section 196 of the Migration Act, "unlawful non-citizens" must be kept in immigration detention until they are granted a visa or removed from Australia. Subsection (3) of that section prevents a court from releasing them, for example on the grounds that the detention is cruel, or unnecessary.<sup>11</sup>

In December 2002, a working group of the United Nations Human Rights Committee reported that the conditions of detention of in such centres were in many ways similar to prison conditions. They commented '...to the knowledge of the delegation, a system combining mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practised by any other country in the world'<sup>12</sup>.

An innocent man would thus have been confined in prison conditions, with no obligations on anybody to inform him of the reasons for the negative judgement of his character, and no opportunity to prove it mistaken. If the Minister had not relied on the wrong grounds for the cancellation (so that his action was deemed to be ultra vires), the mistaken decision would not have been corrected.

As Julian Burnside QC argues, 'Prolonged detention of innocent people is morally wrong. It is profoundly damaging to the individuals involved. In addition, it blunts the moral sensitivity of the community that tolerates it.'<sup>13</sup>

**Recommendation 13:** That the inquiry recommend that Section 196 of the Migration Act be repealed.

---

<sup>11</sup> For a longer discussion, see Burnside *Watching Brief* ch. 9.

<sup>12</sup> Quoted in Burnside, *Watching Brief* p. 121.

<sup>13</sup> *Watching Brief* p. 121. See also the section 'Crimes Against Humanity' pp. 28-29.

## H. Terrorist Crimes and Legal Procedures.

The investigation of Dr. Haneef began after a pair of failed attempts to set off bombs in the United Kingdom.

The CCL has long argued that terrorist crimes should be dealt with using the laws against murder. Our policy position has been that it is possible to protect Australia and Australians against terrorist acts by the use of the laws against murder, kidnapping, aiding and abetting, attempt, incitement, grievous bodily harm, criminal damage, arson, conspiracy and treason, and conspiracy to commit these offences. This list might be supplemented by the inclusion of an offence of mass murder.

Legislation for separate terrorist crimes, introduced in the near panic inspired by the 9/11 attacks, the Bali bombings and the Madrid and London Underground bombs, has brought about a culture in which human rights are routinely ignored or overridden by anti-terrorist laws; and in which the AFP and other police services have only to ask for new powers, with the minimum of argument, for them to be granted.<sup>14</sup> The new laws include new procedures depriving accused persons of the legal protections which even the most horrific criminals of the past were afforded.

In this culture, it is not surprising that the AFP were not concerned to protect Dr. Haneef's rights when investigating his supposed terrorist connections. It is also not surprising, though much to be deplored, that attempts are made to prevent Ministerial decisions from being reviewed by the courts.

**Recommendation 14:** That the Inquiry recommend that a separate review be instituted to examine all anti-terrorist legislation, with a view to determining how terrorist offences may be treated as ordinary crimes, with procedures being in accordance with the long settled principles of the criminal law.

The existence of this culture, and the treatment of Dr. Haneef that has resulted from it, provide further reasons for the adoption of a charter of rights. A charter would delay the introduction of alarm-driven legislation, encourage public debate and give time for cooler heads to prevail.

---

<sup>14</sup> The most recent example is the Telecommunications (Interception and Access) Amendment Bill 2008. The AFP/Attorney General's Department submission to the Senate's Legal and Constitutional Affairs Committee treats a major new invasion of privacy as though it were a mere technical modification. Similarly, the introduction of B-Party warrants in 2006 was done in spite of the fact that no single hypothetical example could be found where the warrants were necessary. See the transcript of proceedings at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/ti/hearings/150306.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/ti/hearings/150306.htm). The AFP did not even bother to put in a written submission.

## Appendix

### The chronology created by Stephen Keim, barrister for Dr. Haneef

1. On 25 July 2006, Dr. Haneef gave his SIM card to his second cousin, Sabeel Ahmed.<sup>15</sup> Dr. Haneef was about to leave Britain for his home in Bangalore and had no further use for the card.
2. On Friday, 29 June 2007, failed attempts were made to bomb two London nightclubs.
3. On Saturday, 30 June 2007, Sabeel's brother, Kafeel Ahmed, sent his brother access codes to an email. He then drove a Jeep Cherokee into Glasgow airport and, thereby, set himself alight. After being kept alive by life support machines, he passed away on 2 August 2007. Sabeel did not access the email message until some time after the Glasgow attack but, after his arrest, he failed for some time to tell police of the email and its contents.<sup>16</sup>
4. Dr. Haneef was arrested at Brisbane Airport on Monday 2 July 2007.<sup>17</sup><sup>18</sup> He was questioned for 50 minutes at the airport from 11.05pm.
5. Dr. Haneef was taken to AFP headquarters at Wharf Street. After Dr. Haneef waited for over two hours in an interview room at AFP headquarters, he was allowed to sleep and questioned the next day from 11.01 am. He did not want a lawyer present. He freely answered the nearly 12 hours of questions that the two police officers wanted to ask him.<sup>19</sup>
6. At 10.15am on 3 July 2007, an order was made by Mr. Jim Gordon, magistrate, extending the 4 hour questioning time by 8 hours.<sup>20</sup> At 5.30pm, Mr. Gordon extended the investigation or questioning time by another 12 hours, the maximum allowed under part 1C Crimes Act.<sup>21</sup> An order to specify time during which Dr. Haneef could

---

<sup>15</sup> The date is taken from the charge brought against Dr. Haneef.

<sup>16</sup> David Marr, *Police Ignored Strong Evidence Showing Haneef's Innocence*, SMH, 14 April 2008.

<sup>17</sup> Most of the facts that are not within my own knowledge are taken from an application by Adam Simms pursuant to s.23CA(8)(m) *Crimes Act 1914* (Commonwealth) ("the Crimes Act") and Statutory Declaration in support also by Mr. Simms, a Special Member of the Australian Federal Police ("the AFP"). These documents were provided to Dr. Haneef's lawyers on Wednesday, 11 July 2007. The application was tendered to the magistrate hearing the downtime applications, Mr. Jim Gordon, and the Statutory Declaration was made by Mr. Simms before the magistrate at approximately 2.30pm, that same day.

<sup>18</sup> The arrest was pursuant to s.3W Crimes Act. The alleged offence was pursuant to s.102.7(1) *Criminal Code* (Commonwealth) ("the Code"). The mental elements for this offence included an element that Dr. Haneef **knew** the organisation to which he supplied the SIM card was a terrorist organisation.

<sup>19</sup> In fact, he declined to answer one question which sought his attitudes to the Iraq and Afghanistan conflicts.

<sup>20</sup> Section 23CA(4) Crimes Act provides for a maximum investigation period of 4 hours. Section 23DA allows for extensions of the investigation period by a judicial officer. The maximum cumulative extension allowed is 20 hours. See sub-section 23DA(7).

<sup>21</sup> Subsection 23DA(7) Crimes Act.



be held without questioning (referred to as “downtime”) in an amount of 48 hours was made by Mr. Gordon at 11.05pm on that same evening, 3 July 2007.<sup>22</sup>

7. By 3 or 4 July, London time, UK police had accessed Kafeel's email message.<sup>23</sup> That message made it adequately clear that Sabeel had no knowledge of his brother's actions or plans and was not part of any terrorist organisation. That was accepted, last week by Justice Calvert-Smith on Sabeel's sentence hearing. The AFP has never made this information available to Dr. Haneef's defence lawyers. The AFP refuses to acknowledge if or when it received this information.<sup>24</sup>
8. On 5 July 2007, two AFP officers arrived in London to work cooperatively with UK authorities in relation to the investigation.
9. A further order for specified time of 96 hours was made 7.05 pm on Thursday, 5 July 2007. Dr. Haneef's solicitor, Peter Russo, was present but was excluded from the room while Mr. Gordon read secret information tendered to him by the AFP applicant.<sup>25</sup>
10. I was engaged on Friday, 6 July 2007.
11. On Monday, 9 July 2007, I appeared on an application for 5 days of downtime. I argued that a failure to provide the basis on which the application was being made was a breach of natural justice implied by s.23CB(6) which provides “the person, or his legal representative, may make representations about the application”. After my submissions, Mr. Gordon adjourned the matter for two days to allow the AFP to obtain legal advice. He made an interim downtime order for two days.<sup>26</sup>
12. On Wednesday, 11 July 2007, the AFP was represented by Mr. Howe, a Queen's Counsel from Canberra. Dr. Haneef's lawyers were provided with Mr. Simms' Application and Statutory Declaration in support. This material states, inter alia:

“The investigation in Australia and the UK has significantly progressed ... There is a continuing need to collate and analyse information sourced from overseas authorities ... To date, UK authorities have executed multiple warrants with many warrants still progressing ... Relevant evidential material has been, and continues to be, forthcoming from these warrants ... A senior

<sup>22</sup> Downtime is provided for in s.23CA(8). Many of the heads of downtime require no order. The categories include the time to convey the person to the holding facility (s. 23CA(8)(a)); suspension of questioning to communicate with a lawyer or family (s. 23CA(8)(b)); and so on. Specifying downtime by a judicial officer is provided in Section 23CB and referred to in s.23CA(8)(m).

<sup>23</sup> See David Marr, *Police Ignored Strong Evidence Showing Haneef's Innocence*, SMH, 14 April 2008. Marr's source suggests that UK police had accessed the email within 72 hours of Sabeel Ahmed's arrest.

<sup>24</sup> This information is taken from press reports. As well as Marr's article (footnote 13 above), see Natalie O'Brien at <http://www.theaustralian.news.com.au/story/0,25197,23552271-2702,00.html> .

<sup>25</sup> This exclusion is documented in an affidavit by Anna Cappellano, read in a subsequent hearing before magistrate Gordon.

<sup>26</sup> The order was unnecessary. Section 23CA(8)(h) has the effect of authorising downtime during the time it takes to decide an application for downtime.

UK officer has arrived in Australia to assist with the investigation ... Two AFP officers were sent to the UK (arriving on 5 July)". (Emphasis added.)

13. I argued that Mr. Gordon should disqualify himself on the ground of apprehended bias in that he had spent time alone with the applicant in previous applications where Dr. Haneef and his lawyers were not present; when he had sent Mr. Russo out of the room; and when he had heard and granted applications for search warrants. Mr. Gordon adjourned until Friday to consider the matter.
14. On Friday, 13 July 2007, the AFP withdrew their application for more downtime. Mr. Gordon did not have to decide the application to disqualify himself. That evening, going into the next morning, Dr. Haneef was questioned for another 12 hours using up the balance of the available 24 hours of questioning time.
15. Early on Saturday, 14 July, Dr. Haneef was charged with an offence pursuant to s.102.7(2) of the Code.<sup>27</sup>
16. On that Saturday, I applied for bail for Dr. Haneef before magistrate, Ms. Jacquie Payne. Pursuant to s.15AA *Crimes Act*, I needed to show that there were "exceptional circumstances". One of the grounds relied upon to show exceptional circumstances was the weakness of the Crown case. I relied on Mr. Simms' material as indicating the weakness of the case as well as aspects of the submissions by the DPP officers who appeared for the Crown.<sup>28</sup>
17. Unbeknownst to any of Dr. Haneef's lawyers, shortly after the bail application finished, four senior Australian Federal Police officers, David Craig, Frank Prendergast, Ramzi Jabbour and Luke Morrish, discussed the possibility that the bail application might be successful.<sup>29</sup> They came up with a contingency plan. They would get the Minister for Immigration to cancel Dr. Haneef's visa. This would allow them to keep Dr. Haneef in detention. At 5.22pm on Saturday, Mr. Craig was able to report that these "contingencies" were "in place". Mr. Craig does not say to whom in the Minister's office or to whom in the Department of Immigration and Citizenship he spoke, to put the plan in place. On Monday morning, 16 July 2007, at 8.10 am, Mr. Morrish, one of the Australian Federal Police officers, forwarded Mr. Craig's affidavit to Peter White, a high ranking officer in the Department of Immigration and Citizenship. Mr. White would, shortly thereafter, prepare all the documentation which would allow the Minister for Immigration, Mr. Andrews to cancel Dr. Haneef's visa.
18. At approximately 11.30am on that Monday, bail was granted by Ms. Payne, subject to sureties amounting to \$10,000. In her decision, Ms. Payne said:

---

<sup>27</sup> The mental element for this offence only involves recklessness as to whether the organisation to which the SIM card was given was a terrorist organisation. This was different to the charge on which Dr. Haneef had been arrested where the mental element was knowledge that it had been a terrorist organisation.

<sup>28</sup> One of those officers, Mr. Porritt, said on the question as to what matters were relied on by the Crown to show that Dr. Haneef was reckless as to whether the persons to whom he gave the SIM card constituted a terrorist organisation,: "He lived with these people [since acknowledged to be wrong]; he may have worked with these people; he associated with them."

<sup>29</sup> See <http://www.theaustralian.news.com.au/story/0,25197,22688973-601,00.html> . This page includes the link to the emails discussed (viewed 5 November 2007).

“The case against [Dr. Haneef] as told to me on Saturday, was a SIM card which belonged to [Dr. Haneef] was left in the United Kingdom with his second cousin with whom he was residing. There was no evidence before me the SIM card was used in any terrorist activity.

Further, the SIM card was given to the UK suspect 2 [Sabeel], more than 12 months ago, and, in relation to the element of the offence there have been no submissions to support the element of the offence that the defendant was reckless, other than that he was living with UK suspects 1 and 2 {Kafeel] and he gave the SIM card to UK suspect 2.”

19. In setting out her reasons for granting bail, Ms. Payne also said:

- “1. The Crown does not allege that the defendant has any direct association with any terrorist organisation and further [concerning] the provision of the resource, the SIM card, the defendant ...was reckless as to whether the organisation was a terrorist organisation.
2. There is no evidence or submission that the SIM card was used or associated with any terrorist attack or activity other than being in a vehicle that was used in a terrorist attack.”<sup>30</sup>

20. Shortly after 1.00 pm, the same day, Mr. Andrews cancelled Dr. Haneef’s work visa, thus executing the arrangements of the AFP officers who had been party to the emails. If Dr. Haneef were to meet his bail sureties, he would immediately be taken into immigration detention.

21. On the following afternoon, I placed an envelope containing a copy of the transcript of Dr. Haneef’s first interview by the AFP in a taxi which I directed to Mr. Hedley Thomas, journalist for the *Australian* newspaper. On the following day, I acknowledged that I had been the source of the transcript upon which Mr. Thomas had reported.

22. On Friday, 20 July 2007, ABC journalist, Raphael Epstein, broke a story on ABC news and current affairs programs, that UK police had not found the SIM card in the burning Jeep at Glasgow airport but in Liverpool near where Sabeel Ahmed was arrested. No one from prosecution or AFP sources had corrected Mr. Porritt’s statement in the intervening 6 days.

23. Ms. Payne had adjourned the criminal proceedings until 31 August 2007 for a committal mention. Dr. Haneef’s lawyers filed an application seeking that the charge be struck out or amended on the basis that it had omitted a crucial element of the offence charged. This application was made returnable on 30 July. The element concerned the allegation that the resources given (the SIM card) would help the

<sup>30</sup>

Mr. Porritt had told the Court in response to a direct question from the magistrate that the SIM card was found in the burning Jeep at Glasgow airport. That statement was not corrected even though there was a later hearing on the Saturday (the magistrate wanted assistance as to cases on “exceptional circumstances). There was no attempt to correct the statement when the Court reconvened on Monday, 18 July 2007.

organisation to whom it was given (the terrorist organisation) engage in a terrorist act.

24. The Commonwealth agreed with the need to amend the charge. However, they sought to have it put off to until the committal mention date at the end of August. Dr. Haneef's lawyers insisted that the matter be dealt with on the proposed mention day, 27 July 2007.
25. As it turned out, on Friday, 27 July 2007, both Mr. Macsporrans SC, who appeared on the mention for the Crown, and Mr. Bugg, the Commonwealth Director of Prosecutions, announced that the charge would be discontinued.<sup>31</sup> Magistrate, Ms. Wendy Cull, struck the charge out. Mr. Bugg announced that he had considered the evidence held by the Crown as well as evidence likely to be obtained from investigations still being carried out in considering whether there was any prospect that a conviction would be obtained. The prosecution had collapsed.
26. On Tuesday, 31 July 2007, Mr. Andrews released an extract from a chat room conversation of 2 July between Dr. Haneef and his younger brother. The extract was singularly selective.<sup>32</sup> Mr. Andrews suggested that the conversation supported his decision to cancel the visa.<sup>33</sup>
27. On Wednesday and Thursday, 8 and 9 August 2007, Geoffrey Spender J. heard a case seeking to set aside the decision of Mr. Andrews cancelling the visa.
28. On 21 August, Spender J. set aside the cancellation of the visa but stayed his own order to allow his decision to be appealed.<sup>34</sup>
29. The Full Federal Court<sup>35</sup> heard the appeal on 15 and 16 November 2007. On 21 December 2007, they upheld Spender J.'s decision. They found that Mr. Andrews had acted on a misapprehension of the proper construction of the character provisions in s.501 *Migration Act 1958* (Commonwealth).
30. On the day the decision was handed down, new Minister, Chris Evans, announced that he had considered an up to date brief from the AFP and that he would not cancel Dr. Haneef's visa.<sup>36</sup>
31. On 16 January 2008, Chris Evans announced that he would not seek special leave to appeal the decision of the Full Federal Court.

---

<sup>31</sup> See <http://www.news.com.au/heraldsun/story/0,21985,22143907-661,00.html>. Mr. Bugg had announced, some days earlier, that he was conducting a full review of the case.

<sup>32</sup> A police translation of that chat room conversation is available in the record of Dr. Haneef's second interview with police.

<sup>33</sup> See <http://www.abc.net.au/news/stories/2007/07/31/1993348.htm> .

<sup>34</sup> See <http://www.austlii.edu.au/au/cases/cth/FCA/2007/1273.html> .

<sup>35</sup> Consisting of Black CJ, French and Weinberg JJ. See <http://www.austlii.edu.au/au/cases/cth/FCAFC/2007/203.html> .

<sup>36</sup> <http://www.abc.net.au/news/stories/2007/12/21/2125622.htm> .