

Dr Haneef and a miscarriage of justice!

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By Jamie Fellows (Lecturer at James Cook University)

This discussion puts forward the argument that the failure to devolve specific evidence on which the Director of Public Prosecutions sought to detain and later charge Dr Mohamed Haneef represents a clear miscarriage of justice. Fundamental principles of natural justice require an accused perpetrator to have available the evidence for which accusations of wrongdoing are based unless there exist reasons for the contrary. National security was given as a reason for not disclosing the evidence. Matters of an evidentiary nature were not provided to the accused or the accused's legal council, yet the same evidence was used in secret to obtain prolonged periods of detention. Haneef's case when viewed from a human rights perspective, reinforces the need for the rules of evidence to be carefully assessed on balance of the individual's rights versus the perceived threat to national security.

The arrest, detention and subsequent threatened deportation of Dr Mohamed Haneef represents a clear miscarriage of justice as a direct result of suppressing vital evidence which could not be challenged by the defence. The issue was compounded by the actions of the then Federal Government and the Commissioner of the Australian Federal Police ("AFP") by leaking select pieces of information to the public in the guise of evidence to prove Dr Haneef's guilt.

Courts do have legal authority to order certain information or evidence to be suppressed in the public interest, particularly for national security. However, in the Haneef affair, it is unclear that such an order was warranted given the lack of evidence on which the accused was charged. What has become clear is that the political motivations behind suppressing the evidence was greater than any danger that Dr Haneef posed for the community.

The Haneef case raises a number of questions relating to the legitimacy of suppressing evidence, particularly in relation to criminal matters where the consequences are great. This discussion seeks to examine the various grounds for suppressing evidence and in doing so, argues that suppression of evidence is an abrogation of the rule of law and can lead to a violation of human rights.

The Haneef Affair – Background

On 2 July 2007, Dr Haneef was arrested at Brisbane Airport and detained by the Australian Federal Police until 14 July without charge by virtue of Part 1C of the *Crimes Act 1914* (Cth).^[1] While in custody on 14 July, Dr Haneef was charged

with an offence under the *Criminal Code 1901* (Cth)[2] in violation of anti-terrorism provisions that he allegedly provided a SIM card to suspected terrorists in the United Kingdom. What followed was a series of court appearances and arguments from the police that Dr Haneef should remain in custody while police carry out further investigations.[3]

Much of the argument presented by the prosecution was argued in secret without the defence being allowed to be present to hear specific evidence put to the magistrate.[4] The reasons for this was argued on the basis that much of the evidence was sensitive and disclosure could jeopardise investigations already underway in Australia and overseas.[5] Despite the prosecution formally withdrawing the charges, Dr Haneef's work visa was subsequently cancelled by the then Minister for Immigration Kevin Andrews on the basis that Dr Haneef was of bad character.[6] This meant that Dr Haneef could be detained in immigration detention under the *Migration Act 1958* (Cth).[7]

The Current Law of Evidentiary Non-Disclosure

The legal basis for the suppression of information is generally argued in the pretext of public policy since on the basis that it is not in the public interest to disclose all relevant information in court proceedings in all situations.[8] Courts must then balance the public interest against the interest of the administration of justice.[9] The issue for the courts is further compounded when the Crown is seeking to suppress evidence, the grounds for which give the appearance of being politically motivated[10] or over zealous paranoia.[11]

In *Sankey v Whitlam*[12] it was stated by Gibbs ACJ and Stephen J that the court 'will not compel or permit the disclosure of information where to do so would be injurious to state interests'. Damage to 'state interests' can be broadly taken to mean the detriment occurring to national security or other national interests and there does not appear to be a fixed description of what constitutes national interests.[13]

A claim to public interest immunity is based on an argument that particular documents belong to a 'class' of documents and by virtue of their very nature should not be given to a party in a proceeding.[14] Such documents include but do not appear to be limited to, Cabinet papers, governmental papers, minutes of discussions between heads of departments, Cabinet submissions and documents relating to high level government policy.[15] The threat to national security can arise when the defence or diplomatic relations of a nation are in jeopardy by disclosing specific evidence.[16]

Proponents of suppressing evidence argue that some information is so sensitive and important to the state that the need for non-disclosure would outweigh the 'administration of justice'.^[17] Usually this arises in time of war and in the case of *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd*^[18] the distinction was drawn between the nature of the information sought to be protected. In that case it was held that the information must be more than merely confidential as opposed to where the information will be harmful to the general public interest and cause actual detriment to the state.^[19] Further examples show that the courts are willing to suppress documents that are specifically related to the production of submarines and other defence infrastructure since there is a specific risk to national security were that information fall into the hands of the enemy.^[20]

In criminal proceedings, the suppression of evidence on the basis of public interests is generally given to protect the identity of police informers and in Queensland, such prohibition is incorporated into statute.^[21] Suppression of information for criminal proceedings can also be permitted where the likelihood of disclosure would lead to failed investigations. In the case of *Attorney General (NSW) v Stuart*, where police investigations were on foot immunity was given since the production of information that could have been used as evidence in a trial, would have had serious implications for the future direction of other related investigations.^[22]

There is little disputing that there exists sufficient precedent allowing the AFP to apply for a suppression order in the case of Dr Haneef on the basis of national security or other public interests. However what has come to light in the collapse of the prosecution's case, is that there was insufficient evidence from the beginning to not only substantiate a trial but also to keep Dr Haneef detained for extended periods.^[23] The fact that the AFP were able to obtain a number of judicial orders keeping Dr Haneef in detention without disclosing evidence was in itself a miscarriage of justice.

Miscarriage of Justice: The Right to a Fair Trial

In the Haneef affair, an actual miscarriage of justice occurred in the prolonged detention of Dr Haneef resulting from the defence not being able to scrutinise important information used as the basis on which to detain and subsequently withdraw Dr Haneef's work visa.^[24] The consequences of suppressing that information could have lead to a trial where the defence had to prepare submissions blind to much of the substance behind the allegations. A further consequence of which may have lead to the incarceration or deportation of Dr Haneef. Such a failing to disclose specific evidence is a clear violation of the accused person's liberty, right

to know the case against him, the right to a fair hearing and the presumption of innocence.^[25]

The suppression of evidence violates the principles of a fair trial and open justice in criminal trials.^[26] The issue is relevant to natural justice and procedural fairness which themselves are regarded as fundamental principles in the rule of law as recognised in modern democratic societies.^[27] A general principle of the rule of law doctrine operates whereby 'all individuals and groups recognise an obligation to comply with law, and act accordingly'.^[28] Walker argues that a fundamental component in the rule of law is that any law should be based on the respect for the 'supreme value' of humanity.^[29] Such respect entails that the law provide dignity and equality for those who come before it.^[30]

The preamble to the Universal Declaration of Human Rights (UDHR) states that 'inherent dignity' is the foundation of peace and justice.^[31] Article 1 of the UDHR states that 'all human beings are born free and equal in dignity and rights'. Dignity is therefore a universally recognised right and an essential component for the well being of all mankind. The meaning of 'dignity' can be described as a quality of state of being^[32] in humans and is as much associated with how an individual sees themselves as are perceptions as to how others see one's self.^[33] The violation of dignity is associated with 'dehumanising and turning the individual into a cog in an impersonal social machine'.^[34]

Justice Spigelman of the New South Wales Supreme Court has written that a fair trial to an accused is paramount and;

'The right of an accused to fair and timely disclosure of the Crown case and to materials held by the Crown, so that all relevant evidence must either be led by the Crown or made available to the defence is well established.'^[35]

Maccormick argues further that legal certainty with regards to evidence is a hallmark trait of a fair trial.^[36] Certainty in the law is fundamental since such certainty provides society with specific rules and standards by which citizens' conduct will be judged and the legal requirements they must satisfy to provide for legal validity of those acts.^[37]

Conclusion

The former Attorney-General, Mr Phillip Ruddock argues that terrorism is one of the greatest threats society now faces.^[38] Such sentiment is the underlying philosophy for the previous Government's counter-terrorism policy, subsequent legislation^[39] and trials that have followed. Such a philosophical reasoning has

appeared to have permeated the courts as Gleeson CJ states in the context of control orders;

'the exercise of [such] powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would ordinarily be regarded as a good thing, not something to be avoided. To decide that such powers are exclusively within the province of the executive branch of government would be contrary to our legal history, and would not constitute an advance in the protection of human rights.'^[40]

It seems therefore, that the courts are willing to give wide interpretation to the new anti-terror laws and this has been shown in the case of *Thomas v Mowbray* where a control order was placed on an individual despite there being a complete lack of evidence for which to convict the accused in an Australian court.^[41]

However, as exposed by the Haneef affair, there is a fundamental problem in deviating from providing the accused with a fair trial by suppressing evidence on the basis of national security or other public interests. The problem leads to a violation of the rule of law with the way evidence is presented in court in absence of making same available to the defence for scrutiny. This problem was only exposed due to the high degree of media attention and as such it raises the question whether this type of incident is isolated only to the area of suspected terrorism or can occur in any criminal case.^[42]

Perhaps Benjamin Franklin said it best when he stated that 'any society that would give up a little liberty to gain a little security will deserve

^[1] Peter Russo, 'Haneef: Peter Russo's Story' (2008) 35(2) *Brief* 6.

^[2] Section 102.7(2).

^[3] Stephen Keim, 'Whither Now?; Pondering the Haneef Case' (2008) 30(3) *Bulletin* 8, 21.

^[4] Peter Russo, 'Haneef: Peter Russo's Story' (2008) 35(2) *Brief* 6.

^[5] *Ibid*, 6-7.

^[6] Stephen Keim, 'Trials and Tribulations' (2008) *Australasian Law Management Journal* 16, 16-17.

^[7] Section 501; Andrew Lynch, 'Achieving Security, Respecting Rights and Maintaining the Rule of Law' in Andrew Lynch, Edwina Macdonald & George Williams (eds) *Law and Liberty In the War on Terror* (2007) 222, 226.

^[8] J D Heydon, *Cross on Evidence* (7th ed, 2004) 868.

- [9] Suzanne McNicol & Debra Mortimer *Evidence* (3rd ed, 2005) 73; see also, *Australian National Airlines Commission v Commonwealth* (1995) 132 CLR 582.
- [10] Waleed Aly, 'Axioms of Aggression: Counter-Terrorism and Counter-Productivity in Australia' (2008) 33 *Alternative Law Journal* 20, 24.
- [11] Joanne Knight 'Exorcising Terrorism' (2008) 3 *Dissent* 38, 39.
- [12] (1978) 142 CLR 1, 38.
- [13] J D Heydon, *Cross on Evidence* (7th ed, 2004) 874.
- [14] Suzanne McNicol & Debra Mortimer *Evidence* (3rd ed, 2005) 73.
- [15] *Ibid.*
- [16] J D Heydon, *Cross on Evidence* (7th ed, 2004) 874-5.
- [17] *Ibid.*, 875.
- [18] [1916] 1 KB 822.
- [19] *Ibid.*
- [20] *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624.
- [21] *Evidence Act 1977* (Qld) ss21A-21K.
- [22] (1994) 34 NSWLR 667.
- [23] Joanne Knight 'Exorcising Terrorism' (2008) 3 *Dissent* 38, 39.
- [24] Dr Haneef was detained for 12 days before a bail application was successfully lodged. The AFP tried unsuccessfully to keep Dr Haneef detained while they gathered sufficient evidence for which to proceed to trial.
- [25] Andrew Lynch, 'Achieving Security, Respecting Rights and Maintaining the Rule of Law' in Andrew Lynch, Edwina Macdonald & George Williams (eds) *Law and Liberty In the War on Terror* (2007) 222, 231.
- [26] Nicholas Niarchos 'Terrorism Laws and the Abrogation of the Rule of Law in Australia' (2008) 84 *Precedent* 10, 13.
- [27] Geoffrey De Q Walker, *The Rule of Law* (1988) 1-7.
- [28] *Ibid.*
- [29] *Ibid.*, 6.
- [30] *Ibid.*
- [31] *Universal Declaration of Human Rights*, New York, 10 December, 1948, Preamble.
- [32] Merriam Webster Online Dictionary < <http://www.merriam-webster.com/dictionary/dignity> > at 26 May, 2008.
- [33] Johnathan Mann, 'Dignity and Health: The UDHR's Revolutionary First Article' (1998) 3(2) *Health and Human Rights* 31, 31-34.

- [34] David Lindsay, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law' (2005) 4 *Melbourne University Law Review* <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MULR/2005/4.html?query=human%20dignity#fn142>> at 29 May, 2008; For a general discussion of dignity and morals see, generally Max Weber, *The Theory of Social and Economic Organization* (1947).
- [35] Hon JJ Spigelman AC, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 37.
- [36] Neil McCormick, 'Rhetoric and the Rule of Law' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (1999) 163.
- [37] Neil McCormick, 'Rhetoric and the Rule of Law' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (1999) 165.
- [38] Philip Ruddock, 'Law As A Preventative Weapon Against Terrorism' in in Andrew Lynch, Edwina Macdonald and George Williams (eds) , *Law and Liberty* (2007) 3.
- [39] See, *Anti-Terrorism Act (No 2) 2005* (Cth).
- [40] Philip Ruddock, 'Law As A Preventative Weapon Against Terrorism' in in Andrew Lynch, Edwina Macdonald and George Williams (eds) , *Law and Liberty* (2007) 3.
- [41] (2007) 81 *Australian Law Journal Review* 1414.
- [42] Stephen Keim, 'Whither Now?; Pondering the Haneef Case' (2008) 30(3) *Bulletin* 8, 21.