



## **The case of Dr Haneef**

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Eighty years ago the Czech writer Franz Kafka described in *The Castle* and *The Trial*, the bureaucratic nightmare typical of the decaying Austrian empire. Once enmeshed in procedure it was impossible to escape or to know what was happening.

A similar scenario developed around Dr Haneef, the Indian doctor detained for 23 hours each day in a Brisbane prison and threatened with transfer to the Villawood detention centre in Sydney. Dr Haneef was granted bail by a Brisbane magistrate at his initial hearing on a charge of giving material assistance to a terrorist group. He had previously been interviewed on 3 July 2007, with 1600 questions. A transcript is now in the public domain on the internet, thanks to the enterprise of Haneef's barrister and the *Australian*. Only a fortnight later three Melbourne Tamils were granted bail after a charge of giving material assistance to the Tamil Tigers.<sup>1</sup>

The interview, which was correctly administered and agreed to by Dr Haneef, showed the following: that he was who he said he was and had no other names nor any recorded crimes; that he had associated with relatives, some of whom were involved in the British terrorist attempts in London and Glasgow; that he had given an expiring SMS card to one of these on leaving Britain for Australia a year ago; that he had sent money back to his family in India and had also borrowed from his relatives; that he was returning to India to visit his wife and new child when arrested; and that he denied any knowledge of or involvement in, terrorist activity. Despite great indignation about the leak and threats of prosecution by the Attorney General, Philip Ruddock, most of this was not new and had already been selectively leaked to the media in the previous week. The allegation that the SMS card was found at the Glasgow crime scene was later found to be untrue.

On being granted bail, Dr Haneef's 457 Visa was cancelled by the Minister for Immigration, Kevin Andrews, under s.501(3) of the 1958 *Migration Act*. The basis on which this was done is also on the internet in a Minute from the Department of Immigration and Citizenship, signed by Assistant Secretary Peter White on 16 July. On losing his visa Dr Haneef was immediately detained by the Department, and placed in a Queensland custodial facility pending transfer to the Department's

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<sup>1</sup> The *Australian*, 18 July 2007

Villawood detention centre in Sydney. He was thus unable to comply with his bail conditions, which included regular reporting to the police and raising a surety, and he was placed in restrictive custody. If transferred to Sydney he would be less accessible to his Brisbane legal representatives.

Technically all of this was done within the letter of the existing law, as the transcript and the Department memo are at pains to point out. From a broader perspective it elevated the power of the Department above that of the court. It left Haneef in a position where he could not defend himself against the charges detailed by the Minister, namely the 'suspicion that Dr Haneef does not pass the character test... that cancellation of Dr Haneef's visa would be in the national interest, (and) that the seriousness of Dr Haneef's suspected conduct, and to a lesser extent, the expectations of the Australian community outweighed all other considerations'.<sup>2</sup> That this finding might influence the pending trial of Dr Haneef was not a consideration.

Kevin Andrews is a new Minister in a complex portfolio and was carefully advised by his Department. But he went further than his brief in claiming that even if Haneef was found to be innocent by a court he would not get his visa back and would be removed from Australia. The effect of this would be to prevent him from returning to Australia, would put him on the international alert list which influences the admission decisions of many other countries; and could (at least in theory) oblige him to repay the costs of his detention. His wife and children have automatically been deprived of their family reunion visa. Of course there may be a new Minister if Haneef comes to trial, who may behave more humanely if Haneef is found to be innocent, as the record of police interview suggests.

The Minister's recorded decision, now publicly available, goes much further than the bureaucratic formulation justifying the abolition of the visa. He is obliged to give reasons, which the Minute details. These include: that Haneef was formally charged with intentionally providing resources to a terrorist organisation; being reckless as to whether the organisation was a terrorist organisation contrary to section 102.7 *Criminal Code Act 1995*; having on-line chat correspondence and 'association' with

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<sup>2</sup> DIAC Minute 16 July 2007

two of the terrorist suspects in Britain; and on the basis of protected (i.e. secret) information under s. 503A (of the *Migration Act*), that this association ‘is clearly a serious offence in national and international terms’.<sup>3</sup> Now that these reasons are public, they could be used in Haneef’s forthcoming trial even if they are only opinions on the criminality of maintaining links with relatives. Discrepancies in evidence presented to the court and to the Minister turned the proceedings into ‘farce’.<sup>4</sup>

As the case of Dr Haneef is pending and his loss of visa is under appeal, his guilt or innocence cannot be discussed here. But the whole saga is a continuation of a steady move away from the rule of law and towards administrative power which marks border protection policy since the attack on New York in 2001. Australia has very few constitutional protections against this. There is no mention in the Constitution of any civil rights other than the right to trial by jury (s.80), to religious worship (s.116) and to ‘just’ compensation for property acquired by the Commonwealth (s.51xxxi). While legally resident non-citizens are equal persons before the law, this status can end dramatically if a visa is revoked by ministerial decision. There are hundreds of thousands living in Australia who might end up in the same Kafkaesque dilemma as Dr Haneef. The intervention of the Indian government seems likely to save Australia from acute embarrassment.

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<sup>3</sup> *DIAC Minute—Statement of Reasons 1-7*

<sup>4</sup> *Sydney Morning Herald*, 21 July 2007.