

The Rule of Law Questions Raised by the Case of Dr. Haneef, a paper delivered to a seminar of the Queensland chapter of the International Commission of Jurists at the Bar Common Room, Brisbane at 6.00pm on 16 April 2008
By Stephen Keim SC

The Rule of Law

1. In my opinion, the leading paper in recent years¹ on the content and nature of the rule of law is the Sixth David Williams Lecture delivered on Thursday, 16 November 2006 for the Centre for Public Law² by the United Kingdom's senior Law Lord, Lord Bingham of Cornhill.
2. In his speech, Lord Bingham stated the fundamental principle represented by the rule of law and then eight sub-rules which are integral to that principle. I will state them briefly as a backdrop to the events concerning Dr. Haneef.
3. The core of the rule of law, according to Lord Bingham, is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. The principle was stated pithily by John Locke in 1690 as "Where-ever law ends, tyranny begins"³.
4. The first sub-rule of Lord Bingham is that the law must be accessible and so far as possible, intelligible, clear and predictable.
5. The second sub-rule is that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion. The broader and more loosely-textured a discretion is, the greater scope for subjectivity and arbitrariness, which is the antithesis of the rule of law. The sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned determination.
6. The third sub-rule is that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
7. The fourth sub-rule is that the law must afford adequate protection of human rights. This is where modern rule of law theory departs from Professor Dicey. However, a failure to include a degree of substantive moral content in the concept has the potential to reduce the rule of law to facile legalism. Lord Bingham says:

¹ Although the recent case of *Corner House Research v Serious Fraud Office (the BAE Systems Case)* found at <http://www.bailii.org/ew/cases/EWHC/Admin/2008/71.html> (downloaded 16 April 2008) is another valuable source of discussion of the rule of law.

² Print and audio copies of 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 (downloaded 16 April 2008).

³ From the *Second Treatise of Government*, section 202.

“A state which savagely repressed or persecuted sections of its people could not ... be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp ... were the subject of detailed laws duly enacted and scrupulously observed.”

8. The minimum level of human rights protection or substantive moral content to amount to the rule of law will remain a matter of some controversy.
9. The fifth sub-rule is that means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
10. The sixth sub-rule is regarded by Lord Bingham as of fundamental importance. Ministers and public officers at all levels must exercise the powers conferred on them, reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.
11. The seventh rule is that adjudicative procedures provided by the state should be fair. This sub-rule includes the emphasis on open justice. It includes the need for independent and impartial adjudicators. It includes the disclosure of evidence (including evidence useful to the defence) and includes a meaningful right to be heard.
12. The final sub-rule is that the state must comply with its obligations in international law, the law which whether deriving from treaty or custom and practice, governs the conduct of nations.⁴
13. Lord Bingham’s speech, of course, expanded on this bare statement of the rule and sub-rules in a way which gave them life which may not have been present in this bare recitation.

Introducing Dr. Haneef

14. I now turn to discuss the events of the last nearly 10 months in which, according to Mr. Keelty, Dr. Haneef has been the subject of remorseless and unremitting expenditure of resources directed at Dr. Haneef’s reputation as a law abiding person.
15. The secret to all story telling, whether the novel; legal submissions; or documentary making is the chronology. This chronology of the State’s actions against Dr. Haneef has been modified many times as new events have come to my knowledge and to match the interest of various audiences. My experience has been that the chronology, itself, is powerful, dramatically, and I will try to exclude my editorial comment from

⁴ The New South Wales Council for Civil Liberties has published a number of documents looking at ways in Australia’s law enforcement agencies can be made to comply with Australia’s obligations under the *Second Optional Protocol to the International Convention on Civil and Political Rights aiming at the Abolition of the Death Penalty*. The treaty was ratified by Australia in 1990.

the narrative. At the end, I will engage in some musings trying to link the story to the principles espoused by Lord Bingham.

The Chronology

16. On 25 July 2006, Dr. Haneef gave his SIM card to his second cousin, Sabeel Ahmed.⁵ Dr. Haneef was about to leave Britain for his home in Bangalore and had no further use for the card.
17. On Friday, 29 June 2007, failed attempts were made to bomb two London nightclubs.
18. 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.⁶
19. Dr. Haneef was arrested at Brisbane Airport on Monday 2 July 2007.⁷⁸ He was questioned for 50 minutes at the airport from 11.05pm.
20. 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.⁹
21. 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.¹⁰ At 5.30pm, Mr. Gordon extended the investigation or questioning time by another 12 hours, the maximum allowed under part 1C Crimes Act.¹¹ An order to specify time during which Dr. Haneef could

⁵ The date is taken from the charge brought against Dr. Haneef.

⁶ David Marr, *Police Ignored Strong Evidence Showing Haneef's Innocence*, SMH, 14 April 2008.

⁷ 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.

⁸ 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.

⁹ In fact, he declined to answer one question which sought his attitudes to the Iraq and Afghanistan conflicts.

¹⁰ 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).

¹¹ 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 2007.¹²

22. By 3 or 4 July, London time, UK police had accessed Kafeel’s email message.¹³ 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.¹⁴
23. On 5 July 2007, two AFP officers arrived in London to work cooperatively with UK authorities in relation to the investigation.
24. 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.¹⁵
25. I was engaged on Friday, 6 July 2007.
26. 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.¹⁶
27. 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

¹²¹² 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).

¹³ 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.

¹⁴ 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> .

¹⁵ This exclusion is documented in an affidavit by Anna Cappellano, read in a subsequent hearing before magistrate Gordon.

¹⁶ 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.

... A senior 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.)

28. 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.
29. 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.
30. Early on Saturday, 14 July, Dr. Haneef was charged with an offence pursuant to s.102.7(2) of the Code.¹⁷
31. 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.¹⁸
32. 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.¹⁹ 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.

¹⁷ 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.

¹⁸ 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.”

¹⁹ 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).

33. 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:

“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.”

34. 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.”²⁰

35. 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.

36. 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.

37. 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.

38. 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

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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.

concerned the allegation that the resources given (the SIM card) would help the organisation to whom it was given (the terrorist organisation) engage in a terrorist act.

39. 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.
40. As it turned out, on Friday, 27 July 2007, both Mr. Macsporrán SC, who appeared on the mention for the Crown, and Mr. Bugg, the Commonwealth Director of Prosecutions, announced that the charge would be discontinued.²¹ 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.
41. 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.²² Mr. Andrews suggested that the conversation supported his decision to cancel the visa.²³
42. 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.
43. On 21 August, Spender J. set aside the cancellation of the visa but stayed his own order to allow his decision to be appealed.²⁴
44. The Full Federal Court²⁵ 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).
45. 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.²⁶
46. On 16 January 2008, Chris Evans announced that he would not seek special leave to appeal the decision of the Full Federal Court.

²¹ 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.

²² A police translation of that chat room conversation is available in the record of Dr. Haneef's second interview with police.

²³ See <http://www.abc.net.au/news/stories/2007/07/31/1993348.htm>.

²⁴ See <http://www.austlii.edu.au/au/cases/cth/FCA/2007/1273.html>.

²⁵ Consisting of Black CJ, French and Weinberg JJ. See <http://www.austlii.edu.au/au/cases/cth/FCAFC/2007/203.html>.

²⁶ <http://www.abc.net.au/news/stories/2007/12/21/2125622.htm>.

Observations

47. The whole of the circumstances involving Dr. Haneef's treatment are to be inquired into by Mr. Clarke QC, a retired judge of the New South Wales Supreme Court. Accordingly, since I may be involved in that process, I cannot express definitive opinions about matters which may be the subject of that inquiry. However, I will outline matters which may conflict with the rule of law principles outlined by Lord Bingham.²⁷
48. The detention provisions in part 1C of the *Crimes Act* raise a number of rule of law questions. The way in which these proceedings were conducted raise further questions.
49. The issue of detention without trial is controversial. Although such provisions existed in the Crimes Act since 1991, they had not previously been used. One may ask what was extraordinary about what was alleged against Dr. Haneef to make use of such proceedings appropriate. It raises questions about the use of discretion to allocate rights in the criminal justice process.²⁸ It raises questions about the minimal human rights content of the law relating to criminal investigation.²⁹
50. The making of orders was until 13 July carried out on the basis of information not provided to the detainee or (when he had them) his lawyers. The information was only provided reluctantly and at the assistance of Dr. Haneef's lawyers. This raises questions about the fair and impartial conduct of proceedings which took away Dr. Haneef's liberties and had an adverse impact on his reputation.³⁰
51. The contact between the magistrate making the orders and the investigating police in private raised questions about impartiality and independence of the process. Those questions got to be argued but were not decided when the application was withdrawn.³¹
52. The conduct of the hearings in a non-open court situation raised questions about the openness of justice.³² The legislation does not proscribe open hearings but the parties to the hearing felt constrained even about even telling journalists who the magistrate hearing the applications was and the press felt constrained about publishing that information.

²⁷ There are fundamental questions about the nature of our anti-terrorist laws which were obvious well before Dr. Haneef was arrested. I do not intend to address those broader questions. For discussion of the broader questions, see Andrew Lynch, Edwina MacDonald and George Williams, editors: *Law and Liberty in the War on Terror*, The Federation Press, 2007 and *Watching Brief: Reflections on Human Rights, Law and Justice* by Julian Burnside, Scribe Publications, 2007.

²⁸ The second sub-rule.

²⁹ The fourth sub-rule.

³⁰ The seventh sub-rule.

³¹ Again, the seventh sub-rule.

³² Open administration of justice is mentioned in Lord Bingham's primary statement of the rule.

53. The recent revelations about the Jihad email and its implications for the position of Sabeel Ahmed raise questions about the bona fide of the police investigation. The failure of the investigators ever to pass this information on to Dr. Haneef's lawyers or to the public raises questions about the respect given to disclosure obligations and fair and open justice.³³
54. The attitude of police and prosecutors to a fair and impartial justice system has also been raised by the incident of the misleading SIM card information. Prosecutor, Clive Porritt, probably, by accident, told the Court that the SIM card was found in the burning jeep in Glasgow. That was wrong. Dr. Haneef and his lawyers had no idea where the SIM card was found. It seems that many people in the AFP would have known that the SIM card was found in Liverpool when Sabeel Ahmed was arrested. However, no one, prosecutor or police officer, bothered to tell the court or the public that this information was wrong until on 20 July 2007, when ABC journalist, Raphael Epstein, using UK sources, broke the truth of the matter. No one has explained why the courts and the public were misled for 6 days or how long this might have continued. This raises real questions about the principle that the courts be impartial and that they be places where the procedure and system is fair. A keystone of a fair court system is that the prosecutors; the police; and all lawyers who appear before the courts must never mislead the court as to factual matters or matters of law. Any failure by authorities to comply with this obligation raises real questions for the rule of law.³⁴
55. The dropping of the criminal charge against Dr. Haneef by DPP, Mr. Bugg, suggests that the criminal case was always weak. Subsequent information about the Jihad email strengthens that impression. It is to be remembered that Dr. Haneef gave very full answers in both his interviews. This weakness of the case raises a lot of questions about the decision making which resulted in continued detention of Dr. Haneef and, after two weeks of detention, the charging of Dr. Haneef. Was this decision making being made professionally by considering relevant material and without extrinsic factors being given weight? If this did not occur, any failure goes to the heart of the criminal law being an example of the application of the rule of law.³⁵
56. There has been a perception in the community that the discretions under Migration Act to deport people on character grounds are broad and impartial. There is a perception that Mr. Andrews, although he has always denied this, may have exercised his discretion for reasons associated with politics and not the merits of Dr. Haneef's character. The doubt about this issue is strengthened by the fact that Mr. Evans, presumably on very similar information, from the same source, came to a completely opposite conclusion. Mr. Keelty has contributed to this impression by his statement that he always considered the criminal case against Dr. Haneef was weak and had told

³³ The primary statement of the rule of law and the seventh sub-rule are two aspects of the rule of law raised by these factors.

³⁴ The seventh sub-rule in particular.

³⁵ The sixth and seventh sub-rules.

prosecution authorities of these doubts.³⁶ These matters raise the element of the rule of law that requires discretions to be exercised transparently and only for the purpose for which they were granted.³⁷

Conclusion

57. Time (both in delivery and preparation) has allowed a consideration of only some of the questions raised by Dr. Haneef's treatment. However, this very incomplete analysis does indicate that many questions going to the principles expressed by Lord Bingham are raised by the treatment of Dr. Haneef by Australian institutions.
58. Hopefully, Mr. Clarke's inquiry will elucidate a lot of the factual matters in due course. The normative questions which arise may be debated for a long time into the future.

Stephen Keim SC
Chambers
16 April 2008

³⁶ See <http://www.austlii.edu.au/au/cases/cth/FCA/2007/1273.html> . The statement was made in an interview published in the now defunct *Bulletin* magazine.

³⁷ See the second and sixth sub-rules.