Notes for a Talk to a General Meeting of Safety Chicks held at the offices of Sparke Helmore, Lawyers, 240 Queen Street, Brisbane on Thursday, 21 November 2013 at 5.00 pm

Introduction

Interestingly, when I thought that the arrest of my client, Dr Mohamed Haneef, the collapse of the case against him, and the subsequent cancellation of his visa were both ancient and forgotten, I seem to have noted a fresh interest in those events.

In order to test that theory, I am going to recount his story to you, tonight. Please tell me afterwards if, indeed, you had no interest and you feel that the story should have been left in the archives.

I want to tell the story as a study in advocacy. My other theory is that we are all advocates. Safety Chicks, as I understand it, as well as being a brilliant pun that would make most sub-editors jealous, is an organisation concerned with industrial safety or safety in society, more generally.

I assume that some of you are regulators and enforcers of the existing law. Some of you are defenders of those who are accused of breaking the law as it relates to safe operations. Some of you promote industrial safety within a commercial or industrial enterprise. Some of you investigate and mop up after accidents have occurred. The point is that, while each of you is concerned with making our society safer and less accident prone, we all have different roles in that process and sometimes those roles have one or more of us contending against others.

We all have a message to communicate and to promote. We are all advocates.

My role in Dr Haneef's adventure with the legal processes in Queensland was also as an advocate. Indeed, it was a very challenging time for me as an advocate.

I will tell the story of the adventure. And, at the end, I will see what lessons can be drawn for the practice of advocacy in general.

Let's go.

Dr Haneef's Adventure

The Arrest

Dr. Haneef was arrested on the evening of Monday, 2 July 2007, late at night, at Brisbane Airport. He was traveling in his own name. He had all his identifying documents with him. He had arranged leave for one week from the Gold Coast Hospital where he worked. He was traveling to his home in Bangalore to visit his wife and newly born daughter and he and his family and his wife's family were well known in that city.

Part of the explanation for his arrest was that it was suspicious that he was leaving the country.[1] The police knew, when they arrested Dr. Haneef, that Dr. Haneef had, that evening, rung the mobile

[1] For example, see this quote from then Attorney-General., Phillip Ruddock:
"The distinguishing factor in relation to Dr. Haneef from the others was that he was intent on leaving Australia ... he had a one-way ticket," at http://www.news.com.au/story/0,23599,22041012-2,00.html. The circumstances of Dr. Haneef's leaving the country may be found in the records of his interviews with police on 3 July and the night of 13-14 July 2007.

number of a London police officer whom, he had been told by his family in Bangalore, wanted to speak to him but had not had his phone calls answered.

The Offence

The offence for which Dr. Haneef was arrested was that he had, in breach of s.102(7)(1) *Crimes Act* (Commonwealth), some 11 months and six days earlier, in the United Kingdom, intentionally given his SIM card (something that could be used to commit a terrorist act) to a terrorist organisation consisting of a group of persons including his second cousins, Sabeel and Kafeel Ahmed, knowing that the organisation was a terrorist organisation.

It was known by the police that the SIM card had been given to Sabeel. But it was the other brother, Kafeel, who was the person who had attempted to commit terrorist acts some days before the arrest of Dr Haneef.

The First Interview

The next day, Dr. Haneef was interviewed for 12 hours. He answered all the questions the police had but one.[2]

The Hearings

The police who arrested and interviewed Dr. Haneef made a number of applications and obtained orders pursuant to part 1C of the Crimes Act. Dr. Haneef was asked if he wanted a lawyer but declined. It appears that he was not given an opportunity to attend these hearings before magistrate, Jim Gordon. Orders were made allowing him to be questioned for 24 hours in all and to be detained until the Thursday of that week.

By the Thursday after the Monday, 5 July 2007, Dr. Haneef wanted a lawyer to act on his behalf. However, the lawyer, solicitor, Peter Russo, was not allowed to see the documents that the police gave to Mr. Gordon and was forced to go out of the room while the magistrate read the material and made his decision. That decision was that Dr. Haneef could be detained for another three days.

On the following Monday, 9 July, I appeared and submitted that Dr Haneef (and his lawyers) had a right to know the case by which Dr. Haneef was to be detained for another 5 days. The magistrate, perhaps because he felt these were novel concepts for the police to deal with, ordered that Dr. Haneef be detained for two more days while the police obtained their own legal advice.

On Wednesday, 11 July, the police gave Dr. Haneef's lawyers a copy of the material they were relying on for a fresh application that he be detained for three days. I then asked Mr. Gordon to disqualify himself since he had made a number of orders in the absence of Dr. Haneef. Mr. Gordon's response was to adjourn the matter for two more days so he could think about the application.

[2] That question related to Dr. Haneef's opinion of the Iraq and Afghanistan conflicts. Dr. Haneef said he did not want to talk about political matters.

On Friday, 13 July, the police decided (through my powerful advocacy, they had already obtained another 5 days of detaining Dr. Haneef) that they did not need to detain my client any longer and they withdrew their application for any further extension.

The Second Interview

That night Dr. Haneef was questioned for another 12 hours. Again, he answered all the questions. While it seemed as if he might be released when the interview ended, the result was that, in the morning, he was charged with a criminal offence. The offence was similar to the one for which he had been arrested. However, it was less serious in one respect. It was now not alleged that Dr. Haneef knew the organisation to which he had given the SIM card was a terrorist organisation. It was now alleged that Dr. Haneef was reckless about whether the organisation was a terrorist organisation.

The Jihad Email

I need to make a small digression at this point. It relates to the background to the charge against Dr. Haneef and shows why, in fact, there was no proper case against him at any time.

Before he committed his second terrorist act in Glasgow and gave himself life destroying injuries, Kafeel Ahmed sent his brother an SMS message which allowed him to access an email. This email was not accessed by Sabeel until after Kafeel had crashed his jeep into Glasgow airport.

The email says things like: “this was the project I was working on for some time now … everything else was a lie. And I hope you can forgive me for being such a good liar.”

On Friday, 11 April 2008, a judge in the United Kingdom, accepted that the email proved that Sabeel had no knowledge of his brother’s activities prior to his opening the email.

But Dr. Haneef, a whole year earlier, in July, 2006, had given his SIM card to Sabeel, the innocent brother.

The Australian Federal Police were in possession of this email from 8 July 2009, the day before I made my first appearance in court on behalf of Dr Haneef.[3]

The police never gave that email to Dr. Haneef or his lawyers. They did not give it to Mr. Gordon. They did not give it to the magistrate who later heard Dr. Haneef’s application for bail. They did not give it to the DPP officer who argued the bail application on behalf of the Commonwealth.

The email shows that the person to whom Dr. Haneef gave his SIM card was not part of a terrorist organisation. Yet, 5 days after the AFP received that document, Dr. Haneef was charged with giving his SIM card to a terrorist organisation, a terrorist organisation that was alleged to include the innocent person to whom Dr. Haneef gave his SIM card.

[3] Report of the Honourable John Clarke into the Case of Dr Mohamed Haneef at http://pandora.nla.gov.au/pan/84427/20090121-0022/www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/%283A6790B96C927794AF1031D9395C5C20%29_Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf , (2008), volume 1, page 157 (accessed 19 November 2009)

Arguing Bail

None of this was known to me at the time, of course, and so, having concluded my digression, I can get back to the main story.

On Saturday, 14 July 2007, I applied for bail on behalf of Dr Haneef. The court was told that the SIM card was found in the burning jeep involved in the second terrorist act. It was not. It was found several hundred kilometres away with Sabeel, the brother to whom the SIM card was given by Dr. Haneef. You now know, of course, that Sabeel was not a member of any terrorist organisation.

It was not the fault of the DPP officer who appeared on the bail application that this false information was given to the court. It was regrettable, however, that no one bothered to tell the magistrate that this information was wrong until, six days later, an ABC journalist found out that it was wrong by talking to his sources in the United Kingdom.

I argued that Dr Haneef should be granted bail. I had to contend with a legal requirement that there be exceptional circumstances to grant bail. I mentioned his perfect character. I also relied on the fact that, since his picture had appeared numerous times on every newspaper in the world, he could hardly run away.

After the bail application, some senior police were afraid that bail might be granted when the court resumed on the Monday. A plan was devised to keep Dr Haneef detained by cancelling his visa which had allowed him to work at the Gold Coast hospital. The idea was that Dr. Haneef would be kept in immigration detention. Emails from the time show that, by Sunday evening, the plans were "in place".

On Monday, senior police sent emails to a senior immigration officer. This officer prepared documents for the Minister to sign cancelling Dr. Haneef's visa. The minister signed those documents that afternoon.

This, too, of course, was unknown to me at the time.

The decision was handed down shortly after 9.30am. Our application for bail had been successful. We needed to obtain sureties amounting to $10,000 but that could be achieved. I had proved to be an effective advocate after all. The unbelievable had happened. Dr. Haneef had been granted bail for a terrorism offence.

The Surprise Aftermath

Three hours later, I had repaired to my office. A journalist rang me. The plan had been launched. I listened to Mr. Andrews' press conference over the phone as Mr. Andrews announced that he had decided to cancel Dr. Haneef's visa. It seemed and was extraordinary. Visas are cancelled, from time to time, because a person has committed a criminal offence. But that only occurs after someone has been convicted and has served much of their sentence. To cancel someone's visa (and, thereby, place the person in detention) when no trial has been conducted and after the Court had concluded that it was fine for the person to be in the community pending the trial seemed to me outrageous.

Releasing to the Winds

My colleague, Peter Murphy,[4] had previously worked with Mr. Hedley Thomas, then a journalist with the *Australian*, a national newspaper. Mr. Thomas rang Peter and told him that he would like to speak to me if I was willing to talk to him.

I agreed and, in the conversation, Mr Thomas told me a couple of things. He said he believed, from listening to government spokespeople, that the government knew that the case against Dr. Haneef was weak. He said that, despite Peter (Russo's) fabulous work answering media questions, the government's relentless PR machine was starting to convince the public that Dr. Haneef must be guilty.[5] He asked if he could see some of the documentation in the case. I allowed Mr. Thomas to read Dr. Haneef's record of interview. However, I stated that this had to occur in my office and that Mr. Thomas was not allowed to use the information unless and until I gave him permission to do so.

Then the visa was cancelled.

The challenges I had faced as an advocate up to this point were pretty exciting. I was dealing with new legislation. No one really understood how the legislation worked. I had little time to prepare for numerous hearings. I worked hard, thought carefully, and called things as I saw them to be. I resorted, for guidance, to general principles of the law such as the idea of natural justice where no other guidance could be found.

The cancellation of the visa, however, was a challenge, not only new, but of another order of magnitude to that which I had previously faced.

I thought that the effect of this, including Mr. Andrews' continuing efforts to explain and sell his decision, were very damaging for Dr. Haneef's reputation and prospects in any future trial. Dr. Haneef was not just an accused person. He was someone whose character was so bad that his visa must be cancelled and he must be locked up. Even if the Courts found Dr. Haneef innocent, Mr. Andrews was saying, Dr. Haneef must be expelled from the country. And this had come after acres of media space had already been filled with damaging speculation about the events in London and Glasgow and Dr. Haneef's assumed involvement in those events.

I had very little guidance as to how I should react as Dr. Haneef's advocate. How could I protect his interests against these threats? There was very little guidance. I was in uncharted waters.

I made a decision to release Dr. Haneef's record of interview. It was an uncensored statement of the questions that he was asked and the answers he had given. Dr. Haneef had been asked why he was leaving the country on the night he was arrested at the airport. He explained that he was returning to see his then seven day old daughter, Hanniyah, who had been born in his home town of Bangalore. He explained also that he wanted to clear up questions about an old phone card of his which was said to be linked to the terrorist events in London and Glasgow.

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4 Now a Justice of the Family Court

5 This is my paraphrase of what Mr. Thomas said.

He was asked why he was leaving on a one way ticket. He explained that he had asked his father-in-law to buy the ticket and it was his father-in-law's decision to buy the ticket one way only. Dr. Haneef had arranged a week's leave from his job at the hospital. Dr. Haneef was asked about various financial payments shown in his notebooks and bank accounts. He carefully explained the loans made to him by relatives and friendly doctor colleagues and the repayments made so that every transaction was carefully explained. It was a most impressive explanation by a suspected person of the matters that were causing concern to the police. He showed that these matters of concern had perfectly simple and innocent explanations.

The record of the interview would show, I reasoned, the basis of my client's arrest and charge. It would also show his explanations of the matters raised against him in the interview. The interview, I thought, provided a dramatic but, ultimately, fair presentation of the facts.

That afternoon, I put the transcript in an envelope and put it in a taxi bound for Newspaper House at Bowen Hills, Brisbane, the building where Queensland employees of the *Australian* had their offices.

The record of interview was covered broadly in the media. However, the release of the document caused a lot of criticism to be directed at Dr. Haneef's lawyers as a group.

My decision as an advocate was backfiring. I had to react to this new situation before my client and my colleagues were overwhelmed by this negative publicity.

I had to make another decision.

Accordingly, I decided to confirm publicly that it was, indeed, I who had released the document. This decision appears to have borne fruit. My defence of my decision to release the record of interview also received broad coverage.

Looking back, I think that day was important. There had been a press campaign by the government. The target of that campaign was my client, Dr. Haneef. The government then attacked the anonymous person who had released the document. When the anonymous person struck back, the criticism by Mr Howard, the prime minister, and Mr Ruddock, the attorney-general, appeared overblown and self-serving. The momentum changed that day and the government was, thereafter, on the back foot when it came to trying to attack Dr Haneef's reputation.

The Director of Public Prosecutions intervened and, within 14 days of the charge being laid, the charge was dropped and Dr Haneef, although still persona non grata in Australia, was released into the community.

The Aftermath

There were other chapters to run before my Dr. Haneef adventures were over.

I was the subject of complaints about my ethics for having released the record of interview. They were dismissed. The decision to cancel Dr Haneef's visa by Mr Andrews was overturned by the Federal Court and the setting aside was confirmed on appeal.

Dr Haneef brought a civil action for compensation for his the traumatic experiences he had had to endure and that was settled, favourably, a couple of years later.

Dr. Haneef and his wife have a slightly precocious young school girl, Hanniyah, and another child, a lovely young boy called Abdullah. Dr. Haneef's wife, Firdous, and I exchange family photographs on FaceBook.

The Lessons for Advocates

But what are the lessons?

I think they include the following.

It is good to be passionate about our role as advocates. Without passion, there is no joy and less energy.

At the same time, we have to be clear headed. Paradoxically, we have to act dispassionately. We have to cultivate objectivity. We have to be clear about our role. My role was to protect Dr. Haneef's rights to be treated fairly. This included a right to know the case against him; not to be detained except according to the law; and to a fair trial if there was evidence that he had committed an offence.

It is important that we do not let our role to cause us to be carried away. We must make the necessary judgements by considering the merits of the case before us. I was Dr. Haneef's defence counsel. As it turned out, he was completely innocent. From the evidence available to me, the Crown case looked pretty weak. However, it was not helpful to me or him for me to have a passionate belief in Dr. Haneef's innocence. It was important just to deal with the questions before me on their merits and as they arose.

Similarly, if you are a regulator and compliance enforcer, you must act on the evidence before you. You should answer the questions relevant to your task. You may be a passionate supporter of better industrial safety. That should not lead you to act as if every person at all connected with an incident should be sent immediately to jail. Objectivity in an advocate is one of the most important virtues. We need to be able to make cool considered decisions that address the available evidence.

Equally, if you act for people who get into trouble on the safety front, you must not start every case with the view that it must be someone else's fault.

As I said, making your judgements, objectively, based on the evidence as it becomes available is the key.

The other lesson I would draw concerns the notion of uncharted territory. In our jobs, we look to whatever guides are available. They may be statutes; they may be regulations; they may be handbooks; they may be the precedent of what someone else has done before you.

Always, however, there is the chance of being beyond the guides. Always, there is the threat that we will have to make a judgement for ourselves, without help. What do we do in these situations?

We should stay calm. We should have confidence in ourselves as professionals. We should retain our objectivity. We should trust in those bedrock principles that underlie the work of our profession. We should be familiar with the available evidence.

And, having done all that, we need to have the courage to make the call. It will not always be right. But I have always thought that, if a decision is really difficult, there are no right and wrong answers. And to make a call and to act on it, is always better than being indecisive and standing helplessly by.

Sometimes, I think, the fact that a decision is made is more important than the actual content of the decision.

Conclusion and Afterword

Acting for Dr. Haneef in what was very much a crisis was a difficult gig. Nonetheless, I very much enjoyed it and, if results are a proper measure, I did okay.

However, it is also important that we learn from experiences such as that. I hope, by sharing my thoughts on that subject, I have convinced me, if not you, that I did learn something.

I am engaged in a different advocacy task at the moment. The state government has embarked on a legislative project to change dramatically the way in which our justice and enforcement system operates. The latest aspect of this wave of legislation is an omnibus amendment Bill called the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill*. This Bill is a hundred and seventy-five pages long. None of us has sufficient time to discuss all the concerning aspects of the changes proposed by the Bill.

I am concerned about a broad swathe of the Bill which will change people's lives whether as prisoners or as electricians, builders and workers in other trades on the untested information in police files.[6] In the case of the occupational legislation, people's ability to earn a livelihood will be severely diminished. The regulator in each case has little choice but to act on the information.[7] Theoretically, an affected person can seek judicial review of what has happened to them. But this is made virtually impossible.[8] Access to the basis of the refusal of a licence is restricted.[9] They must show jurisdictional error and they will be unable to see or know the information on which the decision was made.[10]

The fact that they are innocent or the information is of no relevance to their work and character is not a basis for establishing jurisdictional error on judicial review.

These aspects are very concerning.

However, I will not go into those provisions in detail. Since Dr Haneef's experiences show us the importance of bail to being able to maintain personal liberty and the failures of law enforcement officers that can occur in the handling of information that points to an arrested person's innocence, I thought it would round our discussion off nicely to talk about proposed changes to the Bail Act. These are no less concerning than those other changes that I mentioned in passing.

[6] For example, see the proposed new ss. 65A and 65B *Electrical Safety Act 2002*
[7] For example, see the proposed new s. 59 combined with the new ss. 65A and 65B *Electrical Safety Act 2002*
[8] For example, see the proposed new ss. 173 and 174 *Electrical Safety Act 2002*
[9] For example, see the proposed new subs. 64 (3) *Electrical Safety Act 2002*
[10] For example, see the proposed new subs. 173(3) *Electrical Safety Act 2002*

The law concerning bail has, with rare exceptions, taken the approach that the Crown has to prove that a defendant is an unacceptable risk.[11] The liberty of a person who is charged with an offence but presumed by the law to be innocent has been regarded as an important value in our society.

The proposed changes destroy these principles for an undefined and unfortunate group in the community and will require those people to prove that their liberty should not be removed pending trial of the allegations against them.[12]

This occurs if the person charged with an offence is alleged by the police to be, or is alleged, at any time, to have been, a member of a criminal organisation.[13]

Two things may be noted. First, the police do not have to produce any evidence. They just have to make the allegation. Second, it does not matter whether the membership was thirty years ago when the person was 17 years of age. The requirement to prove your entitlement to be free in the community still applies.

There are a number of ways in which a criminal organisation may be said to exist.[14] The government can declare any group of people a criminal organisation by regulation.[15] Another way to qualify is where the group has, as one of its purposes, the commission of one or more offences described as serious criminal offences.[16] However, the definition is very broad and includes any offence carrying a maximum penalty of seven years.[17] This includes many offences that are, in themselves, not serious such as smoking a joint. So three young people who share a joint are capable of qualifying.[18]

Another way a group may qualify is if it is declared as a criminal organisation by a court under the *Criminal Organisation Act 2009*.

Without going further into the technicalities, it is clear that a person does not have to be a biker to be accused of having been at some stage in their lives a member of a criminal organisation. There is a let out clause if the person can prove that the organisation dis not have as one its purposes the commission of any criminal offence.[19] But, since it is so easy to get in the mesh, that will be very hard to prove.[20]

The amending legislation, however, spells out how foolish and unfair this legislation will be.

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[11] See, for example, s. 16(1) Bail Act 1980
[12] See the proposed new ss. 16(3A), (3C) and (3D) Bail Act 1980
[13] See the proposed new ss. 16(3A) Bail Act 1980
[14] The definition of a criminal organisation is that in s. 1 of the Criminal Code 1899. That uses a number of alternative definitions including drawing on the processes of the *Criminal Organisation Act 2009.*
[15] Criminal Code 1899, s. 1
[16] This alternative includes an additional requirement that the group represent an unacceptable risk to the safety, welfare or order of the community. However, since the standards of "serious criminal offence" and "serious criminal activity" are so low, the police would have little difficulty in being justified in alleging this element as well.
[17] See ss. 6 and 7, *Criminal Organisations Act 2009*
[18] The maximum penalties for simple possession of a dangerous drug in s. 9, *Drugs Misuse Act 1986* range from 15 – 25 years. In reality, an offence may result in a fine or less for possession of small amounts of a drug.
[19] The proposed new subs. 16(3D) Bail Act
[20] For example, if a group of friends are sharing a joint, it is obvious that one purpose of their associating is to share a joint

It expressly says that it does not matter how trivial the offence for which the person is charged.[21] A speeding offence would certainly be sufficient. Second, it says that it does not natter that the alleged offence happened at a time when the person had no connection at all with the alleged criminal organisation.[22] And, third, it says that it does not matter that there is no connection at all between the alleged offence and the alleged criminal organisation.[23]

It is a fundamental principle of our society[24] that we are all equal before the law. These proposed changes to the Bail Act will cause a very broad group of people, at the whim of the arresting police officer, to have their right to be free in the community decided on a different basis to others similarly accused of an offence. Since I regard equality before the law as an important part of the rules which distinguish democratic societies from corrupt societies, this change causes me concern. And, since I think society should be very careful about removing a person's liberty simply because they are accused of an offence, I am even more concerned.

However, returning to my main theme, the changes that are taking place in our criminal law represent an advocacy challenge. If I, with others who are similarly concerned, am to succeed in meeting this challenge, I have to remain cool headed and make good judgement calls about the best way to persuade my fellow citizens of the importance of these concerns and the dangers of the legislative changes to our way of life.

Hopefully, I can follow my own advice.

Stephen Keim SC
Chambers
21 November 2013

[21] The proposed new paragraph 16(3C)(a) *Bail Act*
[22] The proposed new paragraph 16(3C)(b) *Bail Act*
[23] The proposed new paragraph 16(3C)(c) *Bail Act*
[24] And of international human rights law