

# The **IMPORTANCE** of **NATURAL JUSTICE** in protecting individual rights

By Maria Mastroianni

It is important in a liberal democratic society to have a free press. The Haneef case clearly demonstrates that a free press is of greater significance to the protection of the rights of individuals than a bill of rights.

**A**ustralia's Constitution is about the division of power between the states and Commonwealth. There is no reference in it about protecting the individual's basic rights. Any protections that may exist are derived from the common law, which can be overridden by an Act of Parliament.<sup>1</sup>

Can a free press be a good substitute for a bill of rights? In light of the Haneef case,<sup>2</sup> the answer must be an emphatic 'no'.

## **NATURAL JUSTICE**

Natural justice (NJ), originally a common law doctrine of obligation, is an important administrative law principle imposing a code of fair procedure as a practical, not an abstract, concept.<sup>3</sup> It is a doctrine of indefinite scope, and has universal and long-standing appeal. NJ is a legal requirement that applies to government decision-making to ensure that it is fair and reasonable. It can be enforced by the courts, administrative tribunals and ombudsmen and, if a decision has breached NJ, a court can declare that decision to be invalid.

The High Court has repeatedly affirmed that breaches of NJ by Commonwealth officials warrant the grant of a constitutional remedy under s75(v) of the Australian Constitution.<sup>4</sup>

The essence of NJ is that it sets standards and procedures that must be observed in administrative decision-making, such as the prior hearing rule, bias rule,<sup>5</sup> probative evidence rule and the duty of inquiry and, although not authoritatively endorsed by the High Court, these standards and procedures influence other stages of the decision-making process. The presumption is that NJ applies to the exercise of judicial power by a court.

The courts' reasoning process must involve due consideration of implication, exclusion and content. Full and impartial consideration of all the relevant issues results in decisions that are correctly made, ensuring public confidence in that decision-making process; otherwise, the

doctrine of NJ would be brought into disrepute.<sup>6</sup>

An obligation to impose (or deny<sup>7</sup>) NJ can be expressly specified in legislation<sup>8</sup> and unless there is legislative intention to exclude it, the implication is that NJ applies.<sup>9</sup> There is a duty to act fairly by applying procedural fairness to decisions that affect rights, interests and legitimate expectations.<sup>10</sup>

When determining whether NJ applies, courts must also consider statutory exclusion,<sup>11</sup> the statutory framework for making/reviewing a decision,<sup>12</sup> the criteria for a decision,<sup>13</sup> the nature of the power being exercised,<sup>14</sup> the character of the decision-maker,<sup>15</sup> the effect or impact of the decision,<sup>16</sup> and issues such as the need to make an urgent decision, national security or the risk that a hearing will frustrate the objective of the statute.<sup>17</sup>

## **TERRORISM**

Does anti-terrorism legislation (ATL), which trespasses on the basic notion of NJ, deliver both security and justice? The assumption in a free society is that any legal restrictions on our freedoms should be kept to a minimum, and there must be good reasons for imposing any limitations on those freedoms. The exercise of special (unaccountable) powers to identify terrorism, by interfering with an individual's person and liberty constitutes 'grave infringement of the most elementary and important of all common law rights',<sup>18</sup> especially if the person is not a suspect and may not even be a sympathiser of terror.

A person may be detained in custody, virtually incommunicado, without even being accused of involvement in terrorist activity, on grounds that are kept secret and without the effective opportunity to challenge the basis of his or her detention. By excluding access to the courts and restricting a court's access to material used to determine the validity of an exercise of a power, the rule of law is denied.<sup>19</sup>

In the recent case of *Thomas v Mowbray*,<sup>20</sup> the court held that a 'control order' issued under ATL was valid and did not contravene the Constitution. However, Justice Kirby



(dissenting) said that the court should 'reject legal and constitutional exceptionalism'.<sup>21</sup>

The Haneef case<sup>22</sup> set new precedents, where the old rules no longer applied, and highlights some of the more serious erosions of NJ issues. The charging and detention of Dr Haneef represented the first test of some of the more extraordinary provisions of Australia's ATLS, comprising over 40 pieces of security-related legislation, passed by the Howard government since 11 September 2001.

The Australian Federal Police (AFP) used powers under Part 1C of the *Crimes Act* 1914, to detain Dr Haneef for almost 12 days (using the mechanism of 'dead time'), at the end of which it charged Haneef with the relatively minor terrorist offence of providing support to a terrorist organisation (whether 'recklessly' or 'intentionally' is a matter of contention).<sup>23</sup>

When these laws were passed in 2004, the government assured a Senate inquiry that the duration of detention time being contemplated was likely to be 16 or 24 hours before the person would have to be charged, however, no cap was placed on 'dead time'. Nor was the promise that laws would be reviewed after one year fulfilled.<sup>24</sup>

In the interest of national security, ATL provides for increased investigatory powers authorising greater surveillance and intelligence-gathering and an expanded range of terrorist offences with low evidentiary thresholds, without the long-established legal principles guaranteeing due process. The result is increasing infringements of people's human rights.<sup>25</sup>

Australia has a separation of judicial powers, and people are entitled to a fair trial and a fair process. However, after detaining Haneef for almost two weeks, all the government could come up with was a very mild terrorism charge against him.<sup>26</sup>

People charged with serious offences have the right to make a bail application, but there is no provision in ATL for similar applications to be made, and no surety of NJ.<sup>27</sup> The Commonwealth opposed bail for Haneef, but when this was unexpectedly granted, no appeal was lodged. Instead, the Minister for Immigration invoked his discretion to revoke Haneef's visa for failing the 'character test'. The effect of this was that Haneef's immediate liberty was ultimately determined not by an impartial judicial process but by executive decree.

The right to life and liberty, freedom from torture, tyranny and oppression are all examples of absolute rights, and should be protected by the rule of law.<sup>28</sup> Balancing these rights with national security is not appropriate.<sup>29</sup> Security objectives are not advanced by diminishing these absolute rights.<sup>30</sup> Tough ATL can lead to executive over-reach, and this does not make us any safer.

## TERRORISM v RIGHTS

Australia is the only democratic nation without a national Bill of Rights.<sup>31</sup> The courts of other major countries now base their decisions on human rights principles to which our courts cannot refer because we have no Bill of Rights to interpret.<sup>32</sup>

In *Al-Kateb v Godwin*,<sup>33</sup> Justice McHugh obviously felt the injustice of the situation, but was constrained by the law to find as he did; he said that Australia was criticised for being one of the few countries in the Western world that does not have a Bill of Rights.<sup>34</sup> Former High Court Chief Justice Gerard Brennan said that it was possible for fundamental human rights to be extinguished by statute, because Australia does not have a Bill of Rights.<sup>35</sup>

Australia has adapted anti-terror laws from other nations such as Britain, but without incorporating the safeguards such as Britain's *Human Rights Act* 1998, which sets out the basic standards of liberty needed for a democracy and ensures that ATLS do not undermine the values that they are meant to protect. If we had a similar Act in place, Haneef's treatment would have been quite different.<sup>36</sup>

The Commonwealth's handling of the alleged terrorism case against Haneef illuminates the fact that a national Bill of Rights is required<sup>37</sup> to safeguard the rules of NJ and human rights. Therefore, Australia must take extra precautions to make sure that our ATLS operate fairly, without political interference, and observe the rule of law and NJ.

## IMMIGRATION/PERSONAL RIGHTS

The modern trend has been to treat all immigration decisions, including visa applications, as decisions affecting a person in a direct and individual way, thus attracting a right to a hearing. >>

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*Kioa*<sup>38</sup> was the first decision of the High Court to decide unequivocally that NJ applied to immigration decision-making (involving personal matters). It was seen as a most important development that warranted a change to the common law principles as to when NJ applies.

After the Court's decision in *Haoucher*<sup>39</sup> (which held that the Minister's decision to reject an AAT recommendation favourable to Haoucher was invalid, as the Minister had not accorded Haoucher NJ and this exercise of statutory power deprived Haoucher of a benefit or privilege that he had a legitimate expectation of obtaining or continuing to enjoy), Parliament responded, in 1992, by enacting a new scheme for reviewing immigration decision-making.

In *Aala*,<sup>40</sup> it was held that the principles of NJ can only be excluded by plain words of necessary intendment, and that a breach of NJ should lead to a decision being overturned, unless it is insignificant and the result would inevitably have been the same.

Consequently, in *Al Khateb v Godwin*<sup>41</sup> and *Al Khafaji*,<sup>42</sup> the majority of the High Court said that, provided the Immigration Minister retained the intention of eventually deporting such people, their detention would be valid, even if it was potentially indefinite.

### IMMIGRATION/EVIDENCE

Six months after the *Aala* case, the contentious role played by the NJ doctrine in immigration litigation came to the fore again, in another proceeding commenced under s75(v) of the Constitution. In the *Miah*,<sup>43</sup> case, the majority of the High Court held that a breach of NJ had occurred, and concluded that an onus rests on a decision-maker to initiate disclosure of adverse information to an applicant and offer him or her an opportunity to respond to it before acting on it or reaching a decision.

Taken together, *Kioa*, *Haoucher* and *Miah* make it problematic for a decision-maker to reject an application of any kind without first disclosing to the applicant both a draft of the statement of rejection and any internal briefing note that contains a candid or adverse comment.

History shows that every time the courts have handed down a pro-rights decision, Parliament has effectively nullified it by amending the *Migration Act* 1958 (*Migration Act*), with provisions seriously breaching the individual's rights to NJ in decision-making, and ignoring international treaties and conventions that Australia has ratified.

Revocation of Haneef's visa focuses attention on fundamental breaches of human rights and the rule of law under the *Migration Act*. Section 501(3) (that is, the section applied to Haneef) empowers the Minister to refuse or cancel a visa based on a person's character and is extraordinary in stating that NJ does not apply to it; that the decision has no right of merits review, and has only limited grounds of judicial review. Section 503A compounds the problem by protecting the 'information supplied by law enforcement or intelligence agencies'. However, this provision can be overridden by written declaration by the Minister to make the material available to a court or tribunal.

Australia's adversarial system relies on each party being

able to answer material provided by the other, and depends on cross-examination, countering evidence, the possibility of challenge and contradiction. It relies on judges weighing countervailing evidence and arguments. If 'protected information' is not subject to this process, judges are denied a key aspect of the adversarial system and forced to make decisions in a vacuum, comprising evidence from only one side (which has huge resources/powers at its disposal).<sup>44</sup>

The Minister's decision to deny Haneef his liberty (and the opportunity to put his case forward) was based on 'secret' information that was not presented to the court during the criminal proceedings.

Such power should be restricted to only the most serious of cases and not used to trump the decision of a magistrate approving bail to someone accused of serious offences. Section 501 should not be abused by using it in cases where it is clearly unwarranted.<sup>45</sup>

The Minister used the visa cancellation as a mechanism to override the decision of the magistrate and to ensure that Haneef, whether guilty or not guilty of terrorism charges, never tasted freedom again in Australia.<sup>46</sup>

Numerous representatives from the legal profession have been vocal in criticising the government's decision by saying the decision to cancel Haneef's visa was a 'threat to the rule of law' (President of the Australian Bar Association, Stephen Estcourt QC); using migration laws to continue to imprison a man, whom the court had ordered to be released 'was a clear abuse of power' (Tony Morris QC); legislation should not unnecessarily impinge on the rights of individuals and rights that have been established over centuries (Tim Bugg, President Law Council of Australia),<sup>47</sup> and Haneef's treatment was deplorable and represented a radical departure from the course of NJ.<sup>48</sup>

The idea of the rule of law is that everybody is constrained by the law, including raw executive power. However, the cancellation of the visa demonstrates that the scope of executive discretion can empower the government to achieve objectives that the ordinary criminal justice process has thwarted.<sup>49</sup>

A bail magistrate had already said that, on the facts of this case, Haneef was entitled to be at large pending his trial, but an hour later the Minister trumped that by withdrawing his visa – not with the intention of removing Haneef, but in order to keep him in jail (all based on secret evidence), pending his trial. This appears to be an abuse of power for a very clear purpose. If a person's rights can be permanently destroyed by the government acting on secret evidence, our democracy is at serious risk and we are heading towards dictatorship.<sup>50</sup>

Subsequently, the court ruled that the Minister had applied the wrong test (that is, s501(3)) and that he had erroneously relied on the decision in *Wai Kuen Chan*<sup>51</sup> to argue that any association is sufficient to satisfy the test. For the Minister to exercise valid ministerial power, he must be able to identify an association by the visa-holder with a person, group or organisation that reflects adversely on the character of the visa-holder, and that this is a consequence of his or her association with the person or group suspected



of the criminal activity.

The court was emphatic that the rule of law requires ministers, even when acting to protect national security, not to use their ministerial powers erroneously and that it is the court's role to ensure that limits on executive power are respected.

The overturning of a ministerial discretion (exercised in the absence of any evidence that the person adversely affected had anything other than an innocent connection with the suspected wrongdoers) is an important example of the rule of law in action.<sup>52</sup>

## CONCLUSION

Dr Haneef was held in detention without criminal charge for a period of 12 days. He was then charged under one of the many terrorism offences drafted so broadly as to enable their application to activities far removed from a terrorist attack or attempt. Bail was opposed by the Commonwealth, but then was unexpectedly granted. If the prosecution had disagreed with the grant of bail, it could have appealed. Instead, the federal government took away Haneef's right to a fair hearing by using immigration detention powers as a substitute for pre-trial detention, which is an illegitimate circumvention of the legal process and an abuse of power.

The Minister's action reveals the true face of the terrorism measures. Dangers lurk not only in ATL's extraordinary detention powers, the restrictions on the ability to obtain bail and the ill-defined offences with very severe penalties, but also in the readiness with which the executive branch of government subverts the protections accorded to the accused by the legal process, the willingness that it shows to ignore the doctrine of the separation of powers, and its ability to become the judge and jury as well as the investigator and prosecutor.

Haneef's case exposed serious problems with Australia's ATL and similar injustice can easily be seen in other laws that have yet to be pressed into service.<sup>53</sup> This case has eroded public confidence in the agencies entrusted to safeguard public security, and highlights the importance of the courts' role in ensuring that the principles of NJ prevail, so as to ensure that people's rights are properly protected.<sup>54</sup> ■

**Notes:** **1** Malcolm Fraser, *Finding Security in Terrorism's Shadow: The Importance Of The Rule Of Law*, University Of Melbourne Lecture, 25 October 2007. **2** *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273. **3** *Re Minister for Immigration and Multicultural Affairs*; *ex parte Lam* (2003) 195 ALR 502. **4** *Aala v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 204. **5** Robin Creyke & John McMillan, *Control of Government Action, Text, Cases and Commentary*, LexisNexis Butterworths, 2005, p514. **6** *McInness v Onslow-Fane* (1978) 1 WLR 1520. **7** *Commissioner of Police v Tanos* (1958) 98 CLR 383. **8** *Coco v R* (1993) 179 CLR 427. **9** *Cooper v Board of Works for Wandsworth District* (1863) 143 ER 414; *Ridge v Baldwin* (1964) AC 40. **10** *Kioa v West* (1985) 159 CLR 550. **11** *Tanos* see 7, *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Miah* (201) 206 CLR 57; *South Australia v O'Shea* (1987) 163 CLR 378; *Twist v Randwick Municipal Council* (1976) 136 CLR 106. **12** *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. **13** *Ridge* see 9, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *O'Shea* see 11. **14** *Coutts v Commonwealth* (1985) 157 CLR 91; *Bread Manufacturers of New South Wales v Evans* (1981) 180

CLR 404 at 432. **15** *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *O'Shea* see 11; *FAI* see 13. **16** *Durayappah v Fernando* (1967) 2 AC 337; *Kioa* see 10, *Willarra Pty Ltd v McVeigh* (1984) 6 FCR 587; *Peko-Wallsend* see 15. **17** *South Australia v Slipper* (2004) FCAFC 164; *Kioa* see 10, *Ridge* see 9. **18** *Trobridge v Hardy* (1955) 94 CLR 147, 152. **19** The Hon Sir Gerard Brennan, AC, KBE, *Law for All; Justice for Each*, 2007 Law and Justice Address, Law And Justice Foundation, 2007, Justice Awards Parliament House, Sydney, 31 October 2007. **20** *Thomas v Mowbray*, [2007] HCA 33. **21** *Ibid.* **22** *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273. **23** Law Council of Australia, *Federal Election 2007 - Key Issues: Responses – Detention Provisions under the Terrorism Legislation*, 13 August 2007. **24** 'A Culture of Unaccountability', *Lawyers Weekly Online*, [http://www.lawyersweekly.com.au/articles/A-culture-of-unaccountability\\_z138339.htm](http://www.lawyersweekly.com.au/articles/A-culture-of-unaccountability_z138339.htm), 6 December 2007. **25** Claire Macken, *Haneef Caught in New Anti-Terrorist Law Net*, ABC News, <http://www.abc.net.au/news/stories/2007/07/19/1982220.htm>, 19 July 2007. **26** Andrew Lynch, 'Law Expert Slams Haneef Visa Cancellation', *The Australian*, 16 July 2007. **27** Peter Russo, *Haneef 'Denied Natural Justice'*, [http://www.News.Com.Au/Story/0,23599,22048122-29277,00.html?From=Public\\_Rss](http://www.News.Com.Au/Story/0,23599,22048122-29277,00.html?From=Public_Rss), 10 July 2007. **28** *United Nations Universal Declaration of Human Rights*, 1948. **29** Ben Golder And George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism', *Journal of Comparative Policy Analysis*, Vol. 8, No. 1, 43 – 62, March 2006. **30** Andrew Lynch, *Sacrificing Rights Us At Risk*, <http://www.theaustralian.news.com.au/story/0,25197,22120057-7583,00.html>, 24 July 2007. **31** *Ibid.* **32** Geoffrey Robertson QC, *Only A Bill Of Rights Will Do*; Opinion ABC News Accessed At <http://www.abc.net.au/news/stories/2007/08/30/2019719.htm>, 29 August 2007. **33** *Al-Kateb v Godwin*, see 41. **34** *Ibid.*, para 73. **35** Former High Court Chief Justice Gerard Brennan, <http://www.theaustralian.news.com.au/story/0,25197,22343219-5001561,00.html>. **36** Cathy Alexander, 'Haneef "Shows Need" For Bill Of Rights', *Canberra Times*, 29 July 2007. **37** 'Haneef Case Prompts Bill Of Rights Call', <http://www.abc.net.au/news/stories/2007/07/28/1990855.htm>, 28 July 2007. **38** *Kioa* see 10. **39** *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648. **40** *Aala* see 4. **41** *Al Khateb v Godwin* [2004] HCA 37. **42** *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38. **43** *Miah* see 11. **44** Jocelynnne A Scutt, *Poor Law, Poor Decisions: Immigration vs Dr Haneef*, <http://www.abc.net.au/news/stories/2007/07/31/1992436.htm>, 31 July 2007. **45** Kerry Murphy, *Law Overboard In Pythonesque Section 501 Application*, <http://www.eurekastreet.com.au/article.aspx?aeid=3189>, Volume 17 No. 14, 26 July 2007. **46** Mark Davis, *Finding A Way To Keep Haneef Locked Up*, <http://www.smh.com.au/news/national/finding-a-way-to-keep-haneef-locked-up/2007/07/16/1184559684506.html>, 16 July 2007. **47** Clare Buttner, *Profession Defends Rule Of Law In War On Terror*, [http://www.lawyersweekly.com.au/articles/Profession-defends-rule-of-law-in-war-on-terror\\_z69922.htm](http://www.lawyersweekly.com.au/articles/Profession-defends-rule-of-law-in-war-on-terror_z69922.htm), 3 August 2007. **48** Tom Percy QC, Australian Lawyers Alliance. **49** Andrew Lynch, *Dr Haneef*, *The Law Report*, <http://www.abc.net.au/rn/lawreport/stories/2007/1985125.htm>, 24 July 2007. **50** Julian Burnside, *Dr Haneef*, *The Law Report*, <http://www.abc.net.au/rn/lawreport/stories/2007/1985125.htm>, 24 July 2007. **51** *Minister for Immigration and Multicultural Affairs v Chan* [2001] FCA 1552. **52** Andrew Lynch, *A Triumph For The Law*, <http://www.theage.com.au/news/opinion/a-triumph-for-the-law/2007/08/21/1187462262339.html?page=fullpage#contentSwap1>, 22 August 2007. **53** George Williams, *Dodgy Outcome Demands Review*, <http://www.theaustralian.news.com.au/story/0,25197,22167987-7583,00.html>, 1 August 2007. **54** Anne Goolley, *How ASIO Is Eroding The Rule Of Law*, <http://www.theage.com.au/news/opinion/how-asio-is-eroding-the-rule-of-law/2007/08/24/1187462515474.html>, 25 August 2007.

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