Australian MP appeals against conviction for migration fraud

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Andrew Theophanous, a former senior Labor parliamentarian of nearly 20 years standing who once served as a cabinet secretary to Prime Minister Paul Keating, was this month sentenced to a total of six years jail on four charges of migration fraud. Although Theophanous supported Labor's immigration policy, which included the introduction of mandatory refugee detention in 1992, he was viewed in official circles as an irritating critic of government policy.

His conviction followed an extraordinary illegal police entrapment operation, followed by a series of legal rulings that have set dangerous precedents for use against government opponents. In the first known operation of its kind, the Howard government authorised the National Crime Authority (NCA) to conduct extensive secret surveillance, phone-tapping and undercover entrapment against Theophanous, while he was still a sitting MP during 1998 and 1999.

The media has done its best to obscure the issues at stake and to poison public opinion. It greeted the conviction with sensationalised headlines such as "Disgraced" and "Bribes, lies and sex put former federal MP behind bars". Variants included: "Numbers man begins counting days inside" and "Crimes that go beyond criminality." The tabloid press demanded that the judge apply the maximum sentence of 34 years. Labor leader Simon Crean joined in the chorus of denunciation.

It must be noted that the main charges against Theophanous did not relate to bribery or corruption, but to supplying allegedly false information in support of visa applications by two Chinese people seeking to stay in Australia. He was sentenced to five years jail for "conspiracy to defraud the Commonwealth" and three years for "defrauding the Commonwealth" by trying to mislead the immigration department about the marital status and plans of the two applicants.

After a two-month trial in the Victorian County Court, he was cleared of two charges of seeking fees for providing immigration assistance. He was convicted of, but strenuously denied, two charges of asking for and receiving money to assist two other Chinese citizens who had overstayed visas.

Theophanous filed an appeal on June 21, maintaining his innocence and objecting that his trial was unfair. His grounds of appeal include Judge Graeme Crossley's decision to admit the NCA's unlawfully-obtained evidence and the judge's instruction to the jury not to take into account Theophanous' political motives in seeking to assist visa applicants.

In his electorate, centred on the northern Melbourne working class and immigrant suburb of Broadmeadows, Theophanous routinely sought, as part of his parliamentary duties, to help constituents with visa problems, often making representations on their behalf to the immigration department and minister.

Starting in mid-1998, the NCA targetted him for extensive surveillance, launching what was officially codenamed Operation Legume. Estimated to have cost $5 million in total, the operation was orchestrated at the highest levels. Attorney General Daryl Williams was officially informed in early August 1998. NCA chief John Broome met with immigration department chief Bill Farmer and senior official Andrew Metcalfe the following month to secure their cooperation. Immigration Minister Phillip Ruddock appears to have been informed at the same time. As early as October 1998, NCA officers discussed the operation with Director of Public Prosecutions Mark Pedley.

When weeks of telephone tapping failed to produce any evidence of wrongdoing, an undercover police agent with the false name of Frank Cheung was assigned to bribe and entrap the MP. A convicted heroin dealer, Cheung had been given an early prison release in 1997 and immediately became a registered informant on an annual salary of $90,000. Three of the charges against Theophanous directly resulted from Cheung's activities.

The most serious, the conspiracy charge, arose from Theophanous allegedly organising with Cheung and an intermediary, Peter Yau, to obtain a visitor's visa for Chen Qing, who was supposedly Cheung's girlfriend in China. Unknown to Theophanous, the immigration authorities were part of the plot, readily accepting an application sponsored by Cheung, whose criminal record barred him from acting as a visa sponsor.

Conspiracy is known in legal circles as a notoriously vague and arbitrary offence. In the case of a police frame-up, the accused can be convicted of conspiracy even though his co-conspirators are not charged, as happened to Theophanous. Moreover, conspiracy serves to transform a relatively minor charge into a serious crime.

Operation Legume proceeded contrary to a 1995 High Court ruling that criticised the gathering of evidence by undercover police agents using unlawful methods. The court warned that such evidence could be excluded from trials on public policy grounds. The Crimes Act was amended in 1996 to permit these methods, but only in undercover narcotics operations.

Similar entrapment methods were employed to obtain the two bribery convictions, which Theophanous insists resulted from his

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efforts to find out what Cheung was up to. Theophanous said he accepted a payment of $2,000 from Cheung, whom he began to suspect of foul play, in order to persuade Cheung to give him enough information to locate the Chinese couple he was endeavouring to assist.

Much larger sums were allocated to ensnaring Theophanous. At one point, the NCA advanced a float of $26,000 for Cheung to offer Theophanous, but this backfired when Peter Yau, the intermediary, stole the money.

Amid much media publicity, in July 1999 the Director of Public Prosecutions (DPP) laid 27 charges of bribery, corruption and conspiracy against Theophanous, including charges that he had received $34,000. A year later, the DPP dropped 20 of the charges.

After five weeks of pre-trial hearings last year, Judge Crossley decided that the NCA's evidence was admissible, despite the fact that Liberal Party president, millionaire businessman John Elliott, succeeded in having illegally obtained NCA evidence ruled inadmissible during a 1996 case against him for fraud through overseas financial transactions.

In a damning admissions document, which was never seen by the County Court jury, the NCA admitted that a number of breaches of immigration law were perpetrated by Cheung and sanctioned by Metcalfe.

During the two-month trial, Labor frontbencher and former trade union leader Martin Ferguson claimed that Theophanous had "lost it with respect to a balanced approach to immigration" and portrayed his erstwhile colleague as a flamboyant demagogue. This helped the prosecution argue that Theophanous merely feigned indignation over immigration policy as a smokescreen for his purported agenda, the corrupt pursuit of bribes for immigration advice.

The prosecution sought to turn public opinion against Theophanous by selectively releasing stretches of secretly taped conversations with Cheung, in which the MP made sexual comments about a Chinese woman. Theophanous maintains that he made these remarks only in order to elicit more information from Cheung. Furthermore, he was never charged with any offence relating to the woman, let alone with seeking sexual favours. Yet Judge Crossley fueled the media frenzy in his sentencing, telling Theophanous: "You abused your power for money and even sexual gratification."

For a number of years Theophanous has been regarded as a thorn in the side of the immigration department. In 1993, he was influential in the Keating government's decision to allow 40,000 Chinese students to remain in Australia after their temporary visas, issued after the 1989 Tiananmen Square massacre, expired. An estimated 100,000 family members have since migrated to Australia.

Under the Howard government, Theophanous publicly opposed the discriminatory two-tier system of visitors' visas to Australia. On one hand, tourists from 29 wealthy countries are granted visas electronically, virtually automatically. For poorer countries however, the government imposes a reverse onus of proof on applicants, requiring them to prove they will not overstay their visas, and officials routinely deny applications.

In March 2000, Theophanous lost Labor preselection for his seat of Calwell after the NCA operation provided his factional enemies with ammunition against him. He resigned from Labor and remained in parliament as an Independent until last November's election. Last September, he was the only House of Representatives MP to vote against the "Border Protection" laws, which gave the government the right to use military force to prevent refugees seeking asylum in Australia. Labor MPs unanimously backed the legislation.

In a June 11 statement condemning Theophanous' imprisonment, Ian Fry, his former electoral officer, said of the authors of this policy, "It is they who should have been in the dock: not Andrew Theophanous for anything he did to undermine a system involving the entrenched abuse of human rights."

Bill Cope, director of the Office of Multicultural Affairs under Keating, also issued a statement denouncing Theophanous' conviction and pointing to the political motives behind it. "I can vouch that he was legendary as an irritant to public servants on difficult immigration matters."

Announcing Theophanous' decision to appeal, his wife Kathryn Eriksson stated: "Andrew gave a great deal of evidence about the political conflict between himself and DIMA [immigration department] over the implementation of immigration policies that he saw as discriminatory. This was Andrew's real motivation behind the Visitor's Visa issue in the conspiracy charge. Yet the judge specifically told the jury that they could not take account of Andrew's motivations in reaching their decision. We believe this was a wrong direction to the jury and will form one of many bases for appeal.

"My husband and I and our broader family are devastated by what has occurred, as are his many friends and supporters. We cannot believe that in Australia, which touts human rights and democratic freedoms, it is possible for citizens to be relentlessly pursued by covert operations against them, including tapping of thousands of phone calls of elected representatives who have no prior convictions."

Eriksson told the WSWS: "No one's going to tell me that for 17 years Andrew didn't charge people money for help, then suddenly decided to set up an immigration racket." She criticised Crean and his predecessor as Labor leader, Kim Beazley, for distancing themselves from her husband. "For them to think that his whole career is a sham is really quite strange."

She also warned that law enforcement bodies had "endless funds to attack people. We had some assets so we could fight this. What about people who don't have any assets? What about people who don't have the ability to deal with the evidence and fight back?

"The whole concept of putting someone in prison for this is just wrong. I've lived in many countries in the Middle East. I'm just appalled at what's happened in Andrew's case, by what is happening in Australia. I just didn't think it could ever happen here."

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