

# Australian court overturns “terrorist” conviction based on torture

**David Taylor, Mike Head****22 August 2006**

In a serious blow to the Howard government, a Full Bench of the Victorian Supreme Court last Friday quashed the “terrorist” convictions against a young Melbourne worker, Jack Thomas. The ruling was based on the fact that the confession Thomas gave to police was illegally obtained in a Pakistani jail through torture and coercion by Pakistani, US and Australian authorities.

The prosecution, acting on behalf of the government, argued to the very end that the taped interview Thomas had given to Australian Federal Police (AFP) in Pakistan in March 2003 be used to convict him, even though the interview was clearly inadmissible as a matter of law. The interview not only involved a forced confession, extracted after two months of physical and psychological duress, but also a deliberate flouting by the AFP of Australian law, which requires a prisoner to be given access to legal advice before being interrogated.

Thomas had been the first person to be convicted by a jury under the Howard government’s barrage of “anti-terrorism” laws introduced since 2001 with bipartisan support from the Labor Party. But the panel of three judges freed him from custody after unanimously reversing his convictions and five-year jail sentence for two charges of accepting money from Al Qaeda and altering his Australian passport when he tried to leave Pakistan in January 2003.

The court ruling was the second major setback to the government in Thomas’s case. The jury at his trial in February this year had already thrown out the only two charges against him that alleged that he was actually involved in, or intended to carry out, terrorist acts. The first was that he had provided himself as a resource to Al Qaeda by training with it in Pakistan, and the second was that he had agreed to become an Al Qaeda “sleeper,” awaiting instructions upon his return to Australia in 2003.

Anxious to obtain convictions to justify the “war on terror” and the overturning of basic legal rights, the government made a last-ditch application to the court for a re-trial of Thomas based on entirely new evidence—a television interview he gave to the Australian Broadcasting Corporation (ABC) for broadcast after his trial. The court had already directed a verdict of acquittal, but accepted the re-trial submission from the Commonwealth Director of Public Prosecutions. It will be at least six weeks before the court decides whether Thomas has to go through the entire trial process again.

The judgment handed down by the three judges—court president Chris Maxwell and justices Frank Vincent and Peter Buchanan—was also a blow to the Australian media’s incessant demonising of Thomas as “Jihad Jack”. For the first time, the court revealed details of the torture inflicted on him in detention, and the Australian authorities’ complicity in that torture. Many of these facts were suppressed throughout Thomas’ protracted committal hearing and

trial, and were also kept secret from the jury.

After travelling from Australia in early 2001, Thomas was arrested in Pakistan in January 2003 when attempting to fly back home. He was incarcerated in military bases, secret houses and jails, often hooded and shackled, and moved from one city to another. He was subjected to beatings, solitary confinement and denials of food and water until he agreed to cooperate with intelligence operatives. He was threatened with indefinite detention at Guantánamo Bay or being sent over the border to Afghanistan to be tortured if he refused to act as a spy and agent provocateur against former acquaintances. Threats were also made to assault his wife Maryati in Australia.

Following four interrogation sessions from January 25 to 29 by Australian and Pakistani officers, Thomas was handed over to an American “Joe,” whom he believed to be from the CIA. The court said the US agent had: “Threatened to put Mr Thomas’s testicles in a vice and rape his wife and put her breasts in a vice if the former taxi driver did not agree to cross the border into Afghanistan wearing a recording device and feed intelligence to US authorities.”

The court accepted Thomas’s account of the ordeal: “He [‘Joe’] wasn’t believing me so he was ratcheting up the pressure. He said I would be sent back over the border into Afghanistan, where the latest technique to extract information was twisting testicles. ‘I love to hear the sound,’ he said, ‘when they twist their testicles. They just scream.’”

Thomas was then subjected to another two interrogation sessions by the AFP and Australian Security Intelligence Organisation (ASIO) before he was asked to submit to an admissible record of interview (ROI) conducted by two AFP officers, based on the statements already obtained from him.

The AFP knew that the interview did not comply with Australian law. Section 23G of the federal Crimes Act states unambiguously that the police must not question a person before allowing them to communicate with a lawyer and must arrange for the lawyer to be present during the questioning.

The judges quoted a letter sent by Rohan Pike of the AFP to the Pakistani Intelligence agency ISI on March 10, 2003 noting that since Thomas had been refused access to a lawyer *“the admissibility of that ROI in Australian Courts has been seriously compromised.”* (Emphasis added in judgment.)

The judges rejected the ruling of trial judge Phillip Cummins that Thomas had made a free choice to give the formal interview. They said: “Even the threat ‘Confess or be tortured’ can be said to involve a choice, and a chance that torture may not be applied. But it could never be regarded as a free choice in the relevant sense.”

Thomas himself explained in his testimony: “You can’t imagine,

when there's a superpower on one side of a little table and you're with your handcuffs behind your back, how you have no choice but to co-operate."

The judges concluded that by the time Thomas was asked to participate in the ROI, "cooperation was far more important than reliance on his rights under the law. Indeed, it is apparent that he believed—and, we would add, on objectively reasonable grounds—that insistence upon his rights might antagonise those in control of his fate."

The appeal judgment indicated that a high-level decision was taken in Canberra to undertake the crucial interview despite the refusal of the Pakistani regime to allow Thomas to contact a lawyer. His fate was the subject of negotiations involving at least one meeting between the Australian High Commissioner and the ISI on February 24, 2003.

From a legal standpoint, the appeals court decision is impeccable. The judges quoted passages from a long line of judgments by the Australian High Court, the country's supreme court. In the words of one authoritative ruling: "If [a] statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary".

Citing other High Court judgments, the judges also spelled out the underlying concern of the courts not to become discredited in the eyes of the public by becoming complicit in police illegality. They quoted former High Court justice William Deane who warned: "[I]t is necessary to ensure that the courts are not themselves demeaned by the uncontrolled use of the fruits of illegality in the judicial process".

The response of the AFP, the government and the media to the ruling expresses a virulent contempt for legality. An AFP spokesman defended the police conduct, while agreeing—as if it were an issue—that the AFP would abide by the court's ruling. While declining to comment further while the case was still running, federal Attorney-General Philip Ruddock refused to rule out changing the law to abolish the right to silence and legal representation for Australian residents detained overseas.

Asked on ABC Radio National whether he supported those basic rights, even for "terror suspects," Ruddock said that while it was appropriate for Australian courts to determine the admissibility of evidence, there might be "lessons to be learnt from this particular matter".

His comments followed tirades in the Murdoch newspapers denouncing the judgment and demanding that judges disregard the law in order to obtain "terrorist" convictions. A front-page comment in the *Weekend Australian* ridiculed the "nice legal arguments that favour yesterday's decision" and asked why the judges "could not find a reason to protect society from this man?" It declared there was "an urgent need for some rapid amendments to ensure that no judge can make the same mistake".

Every day so far this week, the *Australian* has run rabid editorials along the same lines, essentially calling for all legal restraints to be either ignored or removed to pursue the "war" against "Islamic fascists".

Media outlets claimed that the families of victims of the 2002 Bali bombings supported such sentiments. However, former Adelaide magistrate, Brian Deegan, whose 22-year-old son Josh lost his life in the Bali blast, applauded the court decision, declaring that justice had been served because the investigating officers had "broken the rules".

Prominent lawyers and civil liberties representatives also welcomed the ruling, while warning that Ruddock would seek to change the law. "I think the Attorney-General is likely to be bitterly disappointed,"

Phillip Boulton, SC, of the Criminal Defence Lawyers Association, said. "He's likely to seek advice about how he can amend the laws and he will seek further ways to restrict the rights of people held in custody."

Over the past five years, the government has seized upon the "war on terror" declared by US President George Bush to introduce previously unthinkable police state-style measures, including semi-secret trials, "preventative" detention and the ability to impose life sentences without any evidence of an actual terrorist act. It has also exploited the "war" for wider domestic and international purposes. Under the guise of combating terrorism, it has participated in the US-led invasions of Afghanistan and Iraq and tried to divert attention from mounting economic and social problems at home.

Yet, for all the orchestrated government and media hysteria, the government has had great difficulty in securing convictions. In April 2005, a jury dismissed the first "terrorist" case that went to trial, finding 21-year-old Zeky "Zak" Mallah not guilty of preparing to kill unnamed government officials in a bizarre, supposed suicide mission.

This June, a Sydney architect, Faheem Khalid Lodhi, became the first individual to be found guilty by a jury of any involvement in domestic terrorism. In a disturbing precedent, he was convicted on purely circumstantial evidence of preparing to commit an unspecified terrorist act, under amendments rushed through last year to allow convictions even where there is no evidence of any actual terrorist activity or plan. Lodhi, who is still awaiting sentence, is likely to appeal.

The only other conviction was obtained via a guilty plea in dubious circumstances. In May 2004, after months of collaborating with the intelligence and police services, Jack Roche suddenly pled guilty during his trial in Western Australia on charges of conspiring to bomb the Israeli embassy.

The official reaction to Thomas's acquittal is a warning that the political establishment is desperate to create a political climate in which it can remove all limitations on the powers of the police and intelligence apparatus, including the use of torture.



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