

# Australian court orders re-trial on terrorist charges

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The same Victorian Court of Appeal that four months ago quashed two terrorist-related convictions against Melbourne man Jack Thomas, last week ordered a re-trial. In a case that has become a symbol of the determination of the Howard government and sections of the media to pursue the “war on terror” at all costs, the decision sets another dangerous precedent for flouting fundamental legal and democratic rights.

Thomas, a 33-year-old father of three, was originally detained at Pakistan’s Karachi airport in January 2003 as he tried to return to his family in Melbourne. From all the available evidence, he was a somewhat disoriented young man who found himself in the wrong place at the wrong time. Having grown up in Melbourne’s working class western suburbs, he had converted to Islam during the 1990s and went to Afghanistan in March 2001, six months before the September 11 attacks, in an effort to defend the fundamentalist Taliban regime against the warlords of the Northern Alliance.

For five months, from January to June 2003, Pakistani, US and Australian intelligence and police officials tortured him, using intense physical and mental abuse during interrogations. Finally, the Australian Federal Police (AFP) recorded a formal interview, deliberately flouting Australian law by denying Thomas access to legal advice beforehand.

Throughout these interrogations, Thomas denied being involved in any terrorist plot. He maintained that he had never heard of Al Qaeda before the September 11 attacks, and responded to those atrocities with shock and disbelief. Horrified by the suggestion of assisting a terrorist attack in Australia, he decided to accept cash from an Al Qaeda-linked individual to get back home. Pakistani police finally released him without charge.

After being allowed to return to Australia in mid-2003, Thomas lived in Melbourne with his family for nearly 18 months without any evidence of involvement in terrorism. During that entire time he was under close surveillance by police and the Australian Security Intelligence Organisation (ASIO). Without any warning or new evidence, he was suddenly arrested in late 2004, just as the Howard government was preparing a new round of “anti-terrorist” legislation, including provisions for closed trials, secret witnesses and media restrictions.

From the outset, his prosecution was politically motivated, and accompanied by a concerted media witchhunt, to whip up fears of “terrorist cells” and justify the barrage of draconian terrorism laws that the Howard government and its state Labor counterparts have

introduced since 2002. In an effort to poison public opinion, Thomas was dubbed “Jihad Jack”.

He was ultimately placed on trial early this year amid an ongoing scare campaign, triggered by Prime Minister John Howard’s “security alert” last November, which was used to smother widespread opposition to the 2005 federal and state anti-terrorism bills. These introduced two new forms of detention without trial, as well as far-reaching sedition offences.

Under these conditions, the trial judge allowed his trial to proceed almost entirely on the basis of his AFP interview, setting a reactionary precedent for the use of statements extracted by torture.

The jury, however, cleared Thomas of the two charges 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 in Pakistan in 2001, and the second was that he had agreed to become an Al Qaeda “sleeper,” awaiting instructions upon his return to Australia. By implication, the jury accepted Thomas’s insistence that his actions were innocent.

He was found guilty on two lesser charges—accepting money from Al Qaeda, and altering his Australian passport when he tried to leave Pakistan—becoming the first person to be convicted by a jury under any of the terrorism laws.

Even this minor victory for the Howard government was shattered in August when the Court of Appeal judges—court president Chris Maxwell and justices Frank Vincent and Peter Buchanan—unanimously reversed Thomas’s convictions and five-year jail sentence. They ruled that Thomas’s AFP statement should never have been allowed as evidence, and gave previously suppressed details of the coercion, violence and “emotional manipulation” inflicted on him.

Key sections of the media responded viciously. In particular, Rupert Murdoch’s outlets accused the judges, and commentators who welcomed their ruling, of handing a victory to “terrorists” and the “enemy”. An editorial in the *Australian* on August 17 charged the judges with using the law “as a weapon in the service of their ideological objections to the national defence effort”.

Within days, Attorney-General Philip Ruddock personally sought and obtained a 12-month “control order”—a form of house arrest—against Thomas. It was an obvious bid to reverse the damaging setback the government had suffered in the case. The control order, which is currently under challenge in the High Court on constitutional grounds, was the first use of the controversial

powers introduced in 2005.

It was in this political climate that the three judges, after initially stating their intention to acquit Thomas, decided to accept a last-minute application from the government's lawyers to place him on trial again. This time, the prosecution will be based on two media interviews that Thomas gave before his trial in an attempt to explain his circumstances to the public. One was with the Australian Broadcasting Corporation (ABC) "Four Corners" program and the other with the *Age* newspaper.

Thomas gave the interviews on the understanding that they would not be published until after his case was finalised. But the Commonwealth Director of Prosecutions (DPP) seized upon them, arguing that in them Thomas made roughly the same statements as he had in the illegal AFP interview. The DPP will also seek to rely on a 13-page handwritten statement by Thomas while he was in Pakistan. Yet, this statement—which was handed to the ABC interviewer and was referred to during the interview—was ruled inadmissible at the original trial.

In other words, having first relied on evidence obtained by torture, the federal government is now trying to utilise interviews broadcast in the most dubious manner by the same media outlets that have been instrumental in Thomas's demonisation as a terrorist.

In ordering a re-trial, the judges engaged in tenuous and hypothetical arguments to evade the centuries-old rule against "double jeopardy"—being tried more than once on the same charges. They conceded that their decision had no judicial precedent. According to the accepted legal test, laid down by the Australian High Court in the 1984 case of *Fowler*, a new trial could be ordered only if sufficient admissible evidence existed at the original trial to justify a conviction.

If that test were read literally, the three judges admitted, Thomas would have to be acquitted. However, they argued that the case had "one crucial, atypical feature which appears never to have been considered by an appellate court": the DPP applied for a fresh trial, relying on "new evidence" that was "not known and could not have been known to the Crown at the trial".

As a matter of fact, given the close ASIO and police surveillance of Thomas, it is hardly likely that the government's agencies did not know about the media interviews. However, the DPP chose to rely upon the AFP interview throughout the appeal hearing, defending the use of evidence obtained via torture.

To get around the double jeopardy rule, the judges conjectured that if the trial judge had correctly excluded the AFP interview, the DPP "may have" entered a *nolle prosequi* plea. Technically, such a plea, which is Latin for "we shall no longer prosecute," allows for a subsequent resumption of the prosecution.

This hypothetical scenario ignored all the essential facts. Thomas would not even have been on trial if he had not been wrongly detained and tortured in Pakistan. Nor would he have been convicted, except for the trial judge's admission of the illegally obtained police interview. Rather than allowing a *nolle prosequi* plea, the trial judge should have dismissed the case outright. Moreover, even if the judge had granted the plea, the media interviews probably could not have been published because they would have sub judice—prejudicial to any jury trial.

The re-trial ruling seriously undermines the principle of double jeopardy. It paves the way for governments to use *nolle prosequi* pleas to keep terrorism prosecutions open indefinitely—always able to be resumed on the basis of supposed new evidence—regardless of how weak or tainted the evidence is at the original trial.

Lex Lasry QC, the senior counsel for Thomas, contended that the interviews did not disclose any "new or additional" evidence. Thomas had simply re-iterated his opposition to carrying out a terrorist act in Australia and explained that he took the money only to get home. Lasry also argued that in order to conclude that Thomas knew the money was from Al Qaeda, a jury would need more evidence, which was not possible in this case.

The judges not only rejected these arguments but refused to exercise their discretion, under the *Fowler* test, to acquit Thomas because the circumstances "might render it unjust to the accused to make him/her stand trial again". Instead, they ordered a new trial on account of an alleged "powerful public interest". By this they did not mean any popular demand for a re-trial. They cited the fact that parliament had fixed a maximum penalty of 25 years imprisonment for receiving funds from a terrorist group. This, they claimed, indicated the "seriousness with which the engagement in such conduct must be viewed".

The judges rejected Lasry's objections that Thomas had already been incarcerated in harsh conditions for nearly 18 months and that adverse media coverage had prejudiced the prospect of a fair re-trial. They agreed that the case had received a "great deal of media attention" but asserted that this was "hardly surprising" because it was "of considerable interest and legitimate concern to the entire community".

In fact, the media campaign has been highly orchestrated, and directed at trying to overcome growing popular opposition to the Iraq war and mounting unease with everything else associated with the "war on terror". An *Australian* editorial on December 22 hailed the latest ruling and declared that the ABC "deserved applause" for "undertaking a hard-hitting investigation of Jack Thomas and asking tough questions of their subject".

The reversal is a cruel and unjust blow to Thomas. Although he has been granted bail, he is already suffering from post-traumatic stress disorder and depression due to his maltreatment by Pakistani, American and Australian interrogators and jailers, which included nine months of solitary confinement in Victorian prisons.

His re-trial is a warning that the political and media establishment will stop at nothing to try to secure convictions to bolster the "war on terror" and overturn essential protections against official persecution, such as the rules against torture and double jeopardy.



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