Contemporary Comments

R v Benbrika and ors (Ruling No 20): The ‘War on Terror’, Human Rights and the Pre-emptive Punishment of Terror Suspects in High-Security

Abstract

This comment focuses on the treatment and conditions experienced by unconvicted terror suspects in Australian prisons paying particular attention to the case of the Pendennis defendants in Victoria’s Barwon Prison. Central to this comment is Victorian Supreme Court Justice Bongiorno’s recent landmark ruling that identified a link between the treatment and conditions of the defendants and their ability to receive a fair trial. While highlighting the human rights implications that stem from the treatment of the accused in high-security this comment focuses on continuities between the treatment of prisoners and detainees in domestic prisons and the pre-emptive punishment, abuse and torture of unconvicted terror suspects in off-shore US run military prisons in the ‘war on terror’. It argues that the Bongiorno ruling is significant insofar as it demonstrates the vital role that civil courts and judicial oversight can play in imposing limits on the arbitrary exercise of state power within criminal justice institutions.

Dehumanising practices such as indefinite detention without charge, trial or conviction in punitive conditions have been widely exposed and widely condemned in the context of off shore United States detention facilities such as Guantanamo Bay in Cuba and the recently closed Abu Ghraib prison in Iraq. Practices revealed in documents, photographs, videos, and detainee accounts include shackling, blindfolding, sexual humiliation, beatings, forcing prisoners into stress positions for extended periods of time, force feeding, ‘waterboarding’, sensory deprivation and overload, solitary confinement, exposure to temperature extremes and the use of acute privation in order to maximise control and compliance (Davis 2005; MacMaster 2005; Rajiva 2005; Johnson 2007: 33-45). The majority of these practices were and remain officially sanctioned (Hersh 2004). The exposure of torture and abuse in United States military prisons has mobilised international outrage and disgust, although such practices continue to be officially justified and normalised as exceptional measures taken in the extraordinary circumstances of the ‘war on terror’. The practices in these prisons are widely and popularly understood as confined to United States military prisons in the ‘war on terror’ which are perceived as separate and distinct from domestic prisons in democratic civil contexts. The idea that the treatment of detainees in the ‘war on terror’ is shocking and outside the accepted norm has led critical scholars to reflect on the relative silence surrounding the harsh and brutal treatment of prisoners and detainees in western domestic criminal justice systems. There is however an emerging body of scholarship which seeks to draw out the continuities between the ‘exceptional’ torture and abuse exposed in the ‘war on terror’ and ‘normal’ conditions and treatment of prisoners and detainees in domestic prisons in the United States and other western countries, such as Australia (Greene 2004; Davis 2005; Gordon 2006; Carlton 2006).

This comment focuses on the conditions faced by unconvicted prisoners accused of terrorist offences held on remand in Australian prisons. It considers in particular the
circumstances and conditions of imprisonment and nature of the treatment of 12 men accused of terrorist offences in Victoria (the Pendennis defendants) and the recent Supreme Court ruling on the consequences of that treatment and those conditions on the ability of the accused to receive a fair trial. Each of the men, Abdul Nacer Benbrika, Aimen Joud, Shane Kent, Fadl Sayadi, Hany Taha, Abdullah Merhi, Bassam Raad, Ahmed Raad, Shoue Hammoud, Ezzit Raad, Majed Raad, and Amer Haddara, had been held in Victoria’s Barwon Prison’s Acacia High-Security Unit for at least two years while awaiting and attending trial. The Pendennis defendants are charged with being members of an unnamed terrorist organisation and 10 have been charged with possessing an item connected to preparations of a terrorist act. Given the complexity of the legislation under which the charges were laid, the novelty of the charges, and the quantity of evidence the defendants are likely to have spent close to three years in custody before the case against them is finalised (R v Benbrika and ors p 8 para. 27). The Supreme Court ruling underlines the human rights implications stemming from the long-term incarceration of unconvicted prisoners in conditions of extreme hardship and the corrosive impact of these on due process particularly the ability to receive a fair trial. The ruling is unprecedented in Australian legal history. Previous Australian High Court cases have recognised the right not to be tried unfairly (Dietrich v The Queen; Barton v The Queen; Jago v District Court of NSW; Glennon v The Queen; Carrol v The Queen). This is the first time, however, that the conditions of incarceration and treatment of prisoners have been linked to that right. In this case the Victorian Supreme Court Justice Bernard Bongiorno threatened to stay proceedings indefinitely or release the 12 accused on bail unless the conditions of their incarceration and their treatment were significantly changed.

In a decision handed down in March 2008 Victorian Supreme Court Justice Bernard Bongiorno ruled that he was:

Satisfied that the evidence before the Court establishes that the accused in this case are currently being subjected to an unfair trial because of the whole of the circumstances in which they are being incarcerated at HMP Barwon and the circumstances in which they are being transported to and from court (R v Benbrika and ors p25 [91]).

In light of this he ruled that:

Removal of the source of unfairness in this trial requires either that the accused’s conditions of incarceration be drastically altered or that they be released on bail (R v Benbrika and ors p25 [92]).

Contrary to the presumption of innocence there is a presumption against granting bail to those charged with terrorism offences in Australian legislation (Crimes Act s15AA). A person accused of a terrorism offence must demonstrate ‘exceptional circumstances’ to be able to qualify for bail (Crimes Act s5AA(1)(2)(a)). This presumption operates by way of statutory fiat and draws no distinction between offences involving serious violence and those that do not. The defendants, in line with standard Corrections Victoria policy, were all allocated an A1 security rating by prison authorities on the basis of the charges, although none of the men were accused of committing violent crimes. The men were subsequently classified to Victoria’s highest-security prison with little justification. The Victorian Department of Justice decision to place the defendants in high-security was partly based on newspaper clippings (The Australian 22/3/07). This is typical of the processes surrounding classification, which are frequently inconsistent and lack accountability and transparency.

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1 The only exception is the ‘association’ offence under s102.8 of the Criminal Code.
In a previous application for bail made on behalf of the accused in 2007 Justice Bongiorno remarked that the:

> Conditions in Acacia Unit in Barwon prison are such as to pose a risk to the psychiatric health of even the most psychologically robust individual. Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing (Raad v DPP p3 [6]).

In relation to the security rating in the 2008 ruling Justice Bongiorno noted that:

> Neither Corrections Victoria nor the Crown has ever placed any evidence before this Court in any form to justify either the accused’s classification or their treatment which is, in terms of the fairness of this trial, intolerable (R v Benbrika and ors p27 [97]).

The transportation conditions to and from court under the A1 security rating involved frequent strip-searches at each point of transfer between van, court cells and the courtroom. Travel conditions for the men comprised a major focus of concern in the ruling:

> The vans in which the accused travel are divided into small box-like steel compartments with padded steel seats. Each compartment holds one or two prisoners ... The compartments are lit only by artificial light. They are air-conditioned by a unit controlled by one of the prison officers who travels in the driver’s compartment. The accused are under video surveillance at all times ... The door of each compartment opens only to the outside of the van and is kept securely locked from the outside when any prisoner is within (R v Benbrika and ors p10 [35]).

The conditions received much adverse publicity during bail hearings in March 2007 when the air-conditioning unit in the van malfunctioned on a trip from court to Barwon Prison. The men travelled in 50 degree temperatures because security protocol would not allow a transfer to another van. One of the men, Shane Kent, collapsed and another, Ezzit Raad suffered asthma (Herald-Sun 26/3/07). The others who believed they were dying banged on the doors and screamed for assistance. After the commencement of trial prisoners regularly reported experiencing disorientation, travel sickness, fatigue and confusion subsequent to their time in the van which impacted on their ability concentrate in court and thus to take part in their own defence.

Justice Bongiorno outlined six conditions necessary to remove the unfairness that he declared was affecting the trial. These conditions included moving the men to a facility closer to the venue of the trial, that ordinary handcuffs (not connected to a waist belt) rather than shackles be used, that strip searching not occur when the men had been under constant supervision in secure areas, that the minimum out of cell hours on non court days be not less than 10, and that:

> They otherwise be subjected to conditions of incarceration not more onerous than those normally imposed on ordinary remand prisoners, including conditions as to professional and personal visitors (R v Benbrika and ors p28 [100]).

Acacia Unit where all the men were held for at least two years was purpose built as a high security facility for sentenced prisoners, not prisoners on remand (R v Benbrika and ors p9 [28]). The designation of an unconvicted prisoner to the ‘highest’ security facility to be held with the system’s ‘worst’ offenders and the security measures surrounding appearances in court impact inevitably on mental and physical health and the ability to comprehend and instruct on legal matters. High-security or supermax units such as Acacia are defined by austere conditions including isolation and idleness, total surveillance, pastel colours, fluorescent lights, a lack of natural light and air, the use of invasive security procedures such as strip-searches and shackles and the withholding of basic prisoner ‘privileges’ such as
visits. The units are also frequently associated with greater levels of secrecy, a disproportionate prioritisation of security over human needs, exertions of unaccountable power and abuse which in turn underpin a spiralling sense of despair and higher incidence of conflict, disorder, violence and individual harm (Rodriguez 2006; Carlton 2007; Fellner & Mariner 1997; Haney & Lynch, 1997). Historically high-security prisons have been associated with the official project of confronting and breaking prisoner non-compliance through structural, physical and psychological methods aimed at exacting control (Carlton 2007). Studies reveal that high-security or supermax conditions can give rise to debilitating psychological harms such as feelings of frustration, anger, sleep deprivation, paranoia, disorientation, hallucinations and psychosis (Haney 2003; Haney & Lynch 1997). In short, critics argue that the conditions in high-security constitute a form of cruel and unusual punishment amounting to torture (Haney 2003).

High-security regimes are officially justified on the basis of violent and dangerous criminal identities held within (Davis 2005; Sim 2004). These risks are perennially reinvented and repackaged in the face of a crisis where there is a need for more units to house a ‘new breed’ of high-risk prisoners. The United States-led ‘war on terror’ represents the most recent of these ‘crises’ underpinning the increased use and expansion of high-security or supermax and associated practices.

While unconvicted prisoners generally spend a maximum of 12 hours out of their cell, terror suspects are only allowed six. Moreover, and in the interests of security the Pendennis defendants were allowed only one non-contact visit with their families per week and one contact visit with their children per month (The Australian 22/3/07). Justice Bongiorno commented in an earlier bail hearing for the accused that the conditions in Acacia where the men were segregated, shackled, regularly strip-searched and confined to their cells for more than 20 hours every day lacked justification and risked undermining the rule of law by treating the men in the same way as the state’s worst convicted contract killers: ‘It is extremely difficult not to see this as some sort of pre-emptive punishment being imposed’ (The Australian 22/3/07).

Shortly after the trial commenced counsel for the accused maintained that the manner of transport and the conditions of incarceration were having a detrimental effect on the psychological and physical wellbeing of the accused interfering with their ability to give proper attention to the proceedings (R v Benbrika and ors p2 [5]). In making his ruling Justice Bongiorno maintained that:

Any adverse affects which the accused are currently suffering on their capacity to take part in their trial must properly be seen as cumulative upon the effects of two years’ incarceration in the most austere conditions in the Victorian prison system (R v Benbrika and ors p9 [31]).

The ruling refers to evidence given by a doctor who visited one of the accused at Acacia and also inspected the prison vehicles involved in transporting the accused prisoners to and from court. It records that the doctor maintained:

She would expect people to become depressed, irritable and anxious as a result of such incarceration ... She said that the circumstances in which the accused found themselves could lead to fatigue which could play a major role in their response to the situation. She said it could have the same effect on an individual as being ‘over .05’ so that reflexes, concentration and ‘... all that sort of thing can be quite markedly inhibited’ (R v Benbrika and ors pp13-14 [50]).

Another doctor who gave evidence maintained that the conditions in Acacia Unit were such that ‘the ordinary person could reasonably be expected to experience a very significant degree of psychological and emotional distress’ (R v Benbrika and ors p15 [57]).
One aspect of the circumstances of the accused and their incarceration that was not dealt with in the case but nevertheless potentially impacts on the ability of the accused to receive a fair trial is the way obvious and extreme security measures, might impact publicly and on the jury with regards to perceptions as to the dangerousness of the men. Counsel for the accused raised these concerns in March 2007 arguing the elaborate security arrangements in court would compromise the ability of the defendants to receive a fair trial and the ‘jury members who saw the men sitting behind security screens, guarded by more than a dozen uniformed police and prison officers, may be prejudiced and conclude they were guilty’ (The Australian 22/3/07).

The Victorian Supreme Court ruling prompted the Victorian Department of Justice to transfer the Pendennis defendants out of high-security to the Metropolitan Remand Centre. The fact that the ruling linked the conditions of incarceration and the treatment of prisoners with the ability of accused to receive a fair trial represents a landmark in legal history and the human rights of unconvicted prisoners. The severe and pre-emptive punishment of those charged with terrorism offences in Australia resonates with the eclipse of due process and violation of human rights in the ‘war on terror’ (McCulloch & Carlton 2006). The ruling however demonstrates the significance of judicial oversight provided through the civil courts in imposing limits on the oppressive and punitive treatment of those accused.

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