

Australian journalist still faces prosecution despite illegal police raid

By Mike Head
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An extraordinary ruling by Australia's High Court has highlighted the ongoing threat to free speech posed by last June's police raids on journalists accused of revealing government documents about the military and intelligence agencies.

On April 15, the seven judges on the country's supreme court unanimously declared "invalid" the search warrant used in an Australian Federal Police (AFP) operation that ransacked the Canberra home of a News Corp journalist. But by a four-to-three majority, they permitted the AFP to retain the material seized in that illegal eight-hour search, so that it could still be used to lay criminal charges.

This perverse outcome points to the continuing drive by the Australian government and its US and UK partners to pursue and potentially jail journalists and publishers who expose war crimes and mass surveillance, just as they have done with WikiLeaks founder Julian Assange.

With the full backing of the Australian government, the British government is keeping Assange, an Australian citizen, incarcerated in one of the UK's worst prisons, despite his acute vulnerability to the spread of the COVID-19 pandemic through the prison system.

As a result of the High Court ruling, other journalists could still face similar persecution.

In effect, the judges struck down as unlawful the warrant obtained by the AFP to raid the home of Annika Smethurst, a senior political reporter, yet rewarded the unlawful conduct by allowing the police to keep the material seized from her.

By a majority, the court did not even force the AFP to hand back data it obtained from Smethurst's phone, which she had been forced to unlock and hand over during the raid.

The court's entire ruling was a narrow technical one. It found that the search warrant failed to specify with "sufficient precision" the crime under investigation and misstated the related provisions of the Crimes Act. But it gave the AFP a green light to use the material to possibly charge her with other official secrecy offences.

Brushing aside some previous court decisions to the contrary, Chief Justice Susan Kiefel and Justices Virginia Bell and Patrick Keane declared: "[N]either the common law nor statute law presumes that information unlawfully obtained may not be used in the investigation or prosecution of an offence."

Smethurst and News Corp had sought injunctions requiring the destruction or return of the information taken from her phone, or preventing the AFP from giving the material to the prosecuting authority. But the three judges, who were supported by a fourth, Justice Geoffrey Nettle, insisted it would be contrary to the "public interest" to "prevent the disclosure of criminality."

All the judges also declined to consider whether the warrant, and the Crimes Act secrecy provisions themselves, infringed on the implied freedom of political communication in the 1901 Australian Constitution.

Smethurst and News Corp Australia had argued that the section of the Crimes Act that underpinned the raid "transfers to the largely unconstrained discretion of the executive the ability to decide" what is classified as a government secret.

By refusing to rule on this constitutional argument, the judges left unchallenged a Federal Court ruling in February that the supposed freedom of communication did not protect two Australian Broadcasting Corporation (ABC) journalists whose data was seized

in an AFP raid on the ABC's Sydney headquarters a day after the raid on Smethurst's home.

The Liberal-National Coalition government has refused to rule out prosecuting Smethurst for laying bare its plans, later confirmed, to remove formal legal restriction on using the Australian Signals Directorate (ASD), the electronic surveillance agency, to spy on people inside Australia.

In an attempt to defuse the widespread hostility toward the government's police raids, Attorney-General Christian Porter later ordered the Director of Public Prosecutions not to prosecute journalists for specified secrecy offences without his approval. But that only concentrates these police-state powers in the hands of the government itself.

Hours after last Wednesday's High Court ruling, AFP Commissioner Reece Kershaw said his force was still investigating laying charges against Smethurst, as well as the ABC journalists.

Like Smethurst's story, the ABC's publication "The Afghan Files," written by Dan Oakes and Sam Clark, exposed aspects of Australian military-intelligence operations closely connected to those of the US. The reports revealed a protracted official cover-up of war crimes committed by the Special Forces in the US-led invasion and occupation of Afghanistan.

Another chilling aspect of the High Court's judgment is that the judges had no objection to the way the six-page warrant had been issued by a magistrate at a secret and uncontested hearing, nor to the vast scope of the warrant.

Like the one used against the ABC, the warrant was sweeping. It included "any notes, diaries, correspondence, emails and other forms of electronic messaging, minutes, reports, briefing documents, assessments, graphics, sketches or photographs, story pitch, planning logs, broadcast and online schedules, story boards, website content and USBs."

The warrant extended to "both originals and copies of these things and to anything stored on a computer storage device or other storage device, together with any manual, instruction or password that assists to gain access to, interpret or decode any of those things."

Ruling in February in the case involving the ABC, the Federal Court flatly rejected the constitutional argument. In essence, it ruled that "national security" overrode media freedom and the right of the public to

know the truth about the secret crimes being committed by the government and the military-intelligence apparatus.

By authorising the police raids against journalists, the Australian government followed the lead of the Trump administration in charging Assange with 17 counts under the US Espionage Act, for which he faces up to 175 years' imprisonment.

Assange, an investigative journalist and publisher published thousands of documents that exposed war crimes, assassinations, coup plots and mass surveillance committed by the US and its allies, including Australia, around the globe.

The ongoing threats to journalists, like the vendetta against Assange, are part of an attempt to cover up, not just the past crimes of the US and its allies, but the even greater ones being prepared as Washington bullies US geo-strategic rivals and escalates its economic and military confrontation with China.

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