Australia:

New attacks on the democratic rights of refugees

Mike Head
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Over the past four years Australian governments have expelled a growing number of refugees. Since 1994 they have rejected about 10,000 refugee applications, including many from war-torn countries such as Sri Lanka and Somalia. Of these asylum seekers, some 979 appealed to the Federal Court, but only 21 were successful in challenging their deportation.

However, this record is not harsh enough for the Howard government. Immigration Minister Philip Ruddock this week issued extraordinary attacks on Federal Court judges and lawyers, accusing them of undermining the government's strict refugee policy. Personally backed by Prime Minister Howard, Ruddock also reintroduced legislation to further restrict the right of asylum seekers to appeal to the courts. The new rules will allow appeals from the Refugee Review Tribunal to the Federal Court only in 'exceptional circumstances'.

Ruddock claimed that half a dozen 'creative' Federal Court judges were indulging in legal 'frolics'. He declared that they were using issues of error of law to wrongly consider cases on their merits. Speaking in parliament last Friday, Ruddock asserted that one or two judges had 'a particular view of the world that is different to everyone else's'.

Such personal attacks on judges and their traditional independence from the government of the day are rare. Understandably, Ruddock's remarks provoked concern in the legal profession and among human rights organisations. His comments indicate a pre-meditated drive to prevent any legal challenge to the government's treatment of refugees and other unwanted arrivals.

Ruddock also denounced 'unethical' migration lawyers and agents who advertise class actions against deportations and rejections of refugee status. He complained that class actions had 'blown out' from four cases involving 170 people in 1994 to eight actions involving 4,830 people currently before the courts. The Minister accused lawyers of 'exploiting people who ... are here unlawfully and want to stay in Australia'. He said he had referred advertisements by legal firms and migration agents to an industry watchdog, the Migration Institute of Australia.

On this reasoning, lawyers would be barred from making people aware of their legal rights and assisting them to defend themselves in any field, whether it be refugee and immigration applications, criminal prosecutions or consumer, tenant and environmental challenges to corporate power. This has grave implications for democratic rights.

Moreover, the government last week succeeded in introducing a measure designed to financially cripple those refugees who seek to exercise their legal rights. With ex-Labor Senator Mal Colston voting with the government, the Senate failed to strike down new rules limiting the right of refugees to work in Australia while their cases are before the courts. Under the previous provisions, refugee applicants had no automatic right to work, to claim social security benefits or seek a Medicare card to obtain subsidised medical treatment. The new measures restrict access even further.

Hundreds of refugees-those who arrive illegally on small boats or without visas-are already deprived of the right to work or receive social welfare. They are locked up in detention centres in the most inhumane conditions in Sydney's Villawood institution or at the remote Port Hedland facility. Now all those who remain in the community will be subjected to similar degradation, unable to provide for themselves and their families. In effect they will be punished for fighting for their rights rather than accepting deportation.

Ironically, the extended ban on seeking employment undermines another claim made by Ruddock. He argued that the lawyers and the courts were protecting 'wealthy' asylum seekers at the expense of those still waiting in other countries for their applications to be determined. The ban on employment shows that the government is specifically targeting those who have no other means of subsistence. It is also determined not to allow any refugee victories that might encourage pauperised people anywhere, particularly in nearby countries such as Indonesia, from seeking entry.

As for genuinely wealthy applicants, they can literally buy their way into the country at any time by paying anything between $350,000 and $1 million. Such sums of capital qualify them as business immigrants under schemes established by the previous Labor government and extended under Howard.

The Labor Party's shadow cabinet has opposed the government's restrictions on legal appeals, saying Labor would uphold the civil liberties of potential refugees. 'We are absolutely and utterly against the inclusion of anything that precludes people from appealing to the courts,' opposition immigration spokesman Con Sciacca said. This is blatant hypocrisy. The previous Labor government made repeated attempts to block legal appeals.

In 1994 the Keating Labor government denied the Federal Court the jurisdiction to review Refugee Review Tribunal decisions on the grounds of denial of natural justice or unreasonableness. This meant that refugees could no longer object on the basis that the government-appointed Tribunal did not give their cases a fair, unbiased or adequate hearing.

The Labor government also declared that any non-citizen in Australia without a current visa was an 'unlawful non-citizen,' who must be detained indefinitely pending deportation. This reversed the centuries-old principle of *habeas corpus* that no one can be imprisoned without being convicted by a court of an offence.

Two harrowing cases

Two recent cases have highlighted how draconian the refugee law has become. On November 16 the High Court-the highest court in the land-

dismissed a last-ditch appeal by a Somali refugee, who can be identified only as SE. The court accepted that the man could face death if sent back to Somalia, yet upheld the rejection of his asylum application.

Only intervention by the UN Committee Against Torture and Amnesty International, accompanied by threats of trade union bans, finally succeeded in having SE taken off his deportation flight in Perth, on the other side of the country. He was, however, sent to Port Hedland, where he remains incarcerated awaiting a report by the UN committee.

Like many refugees, SE's case is horrific. A member of a minority Islamic community known as Shikal, he fled Somalia in June 1997 after most of his family were killed or disappeared over the previous six years. In 1991 militia belonging to the dominant Hawiye clan shot his father. Later one of SE's brothers was killed when a bomb was detonated in his home. In 1994 SE's sister committed suicide after being raped three times by the militia. Another brother and sister are missing in Somalia, feared dead.

Leaving his wife and surviving family members in Kenya as illegal immigrants, SE went to Italy where he was granted a one-month visa (Somalia was an Italian colony). He paid an illegal immigrant network an undisclosed amount, thought to be between $5,000 and $10,000, for a fake Kenyan passport and a ticket to Bangkok, where he was placed on a British Airways flight to Australia using fake Italian documents.

On October 2, 1997 he was immediately detained for arriving without a visa and taken to Melbourne's Maribyrnong Detention Centre. On October 8, 1997 SE applied for protection. He was interviewed by an official but given no decision for four months. After his visa was finally refused on March 28, he sought review by the Tribunal.

In May this year, appearing without legal representation and speaking through an interpreter, SE told the Tribunal he would be killed if he returned to Somalia. A Tribunal member asked him: 'Who by? Who is after you in Somalia?' SE answered: 'Yes, the people who already took my possessions and my shops, they are still there. If they saw me hanging around, they would see that I am first seeking for revenge, or I am seeking my rights to get my shops back and my ... so I have to get away from their family and away from them.'

The Tribunal nevertheless concluded that 'there is no real chance that in the reasonably foreseeable future he will face persecution'.

Ruddock refused to intervene and on October 29, immigration officials made their first attempt to deport SE. They failed amid dramatic scenes at Melbourne airport. SE co-operated until he was handed over to a private security guard from a company known as P& Associates, hired to take him back to Somalia. Half-way up the steps from the tarmac, SE sat down and started screaming. The security guard threatened to handcuff SE and carry him on to the plane. However, the captain of the Qantas plane refused to take him on board, possibly saving his life.

SE was taken back to Maribyrnong and placed in isolation. Ruddock again refused to reverse the decision. Officials informed SE that he would be removed the next day. He sought an interim injunction from the High Court for judicial review of the Tribunal decision. After one judge, Michael Kirby, twice granted an injunction, Justice Kenneth Hayne decided on November 16 that SE had no case.

Two days later, Amnesty International issued its first 'urgent action' call in an Australian case for nine years, urging Ruddock and Qantas to stop the deportation. 'He may be at risk, immediately upon his arrival, of being arbitrarily detained, kidnapped, tortured or extra-judicially executed,' Amnesty said. Ruddock sought legal advice and finally halted the deportation flight on the ground that the deportation could be a breach of an international treaty.

On November 25, Justice Hayne handed down his written reasons for dismissing SE's appeal. With the government lashing out at judges, Hayne seemed to be at pains to show that the High Court would not interfere with a Tribunal decision. Incredibly, he said SE's statement to the Tribunal that he would be killed in Somalia did not reveal fear of persecution on account of his membership of a clan. Therefore, the Tribunal's decision was one 'reasonably open to it'.

Hayne also left the way open for the use of private contractors such as P& I Associates to carry out forced deportations. P & I appears to be part of a growing and no doubt lucrative business. In his judgment, Hayne quoted from a brochure advertising P & I as a company that 'specialises in offering a complete management service in the repatriation of inadmissibles, deportees, stowaways, unlawful non-citizens ('inadmissibles') to the individual's country of origin.'

Hayne said the Immigration Department had asked P & I to arrange SE's travel documents for re-entry into Somalia. Yet he claimed there was no evidence that the Department had actually requested escort arrangements. On this basis, the judge declined to rule on whether such arrangements would be legal.

On the same day that Hayne gave his reasons, the Full Court of the Federal Court rejected an appeal involving 450 Sri Lankans. The class action, which brought together Tamils, Sinhalese, Burghers and Muslims, challenged a government decision to cancel humanitarian visas granted to them over the past five years. Last year Ruddock declared that all those who arrived from Sri Lanka after November 1, 1993 were no longer eligible for protection, despite their fears of the ongoing civil war.

Lawyers for the Sri Lankans argued that Ruddock's decision was so unreasonable as to be invalid, that it was 'arbitrary and capricious' to allow some Sri Lankans to stay while others had to leave, and that the decision infringed the Racial Discrimination Act. However, the Full Court said the government's decision was made after balancing considerations, which it was entitled to do under the Migration Act.

Who is a refugee?

Like most governments around the world, the Australian government applies a legal test of refugee status that deliberately excludes the vast majority of refugees. The test is based on the 1951 Geneva Convention on Refugees, which requires a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.

As one legal text explains: 'This means that most Third World refugees remain de facto excluded, as their flight is more often prompted by natural disaster, war, or broadly based political and economic turmoil than by 'persecution,' at least as that term is understood in the Western context.' [James Hathaway, *The Law of Refugee Status*, Toronto, Butterworths, 1991, 10-11] So-called economic refugees, those seeking a better life or trying to escape hunger and economic oppression, are entirely excluded by the definition.

The expulsion of refugees from Australia is part of a global trend. While companies are increasingly free to move investment funds around the globe at will to take advantage of cheap labour, those subjected to their dictates--the working masses--are ever more restricted in their movement across national lines, except, that is, when their labour is required by employers.

Two centuries ago, before the consolidation of the nation-state system, the English common law actually protected those from other realms. In the mid-18th century, Blackstone summarised the state of English and international law as follows: '... great tenderness is shown by our laws ... with regard to the admission of strangers who come spontaneously. For so long as a nation continues at peace with ours, and they themselves behave peaceably, they are under the King's protection.'

It was not until the French Revolution of 1789 that legislation was introduced to control the entry of aliens to England and to provide for their deportation. With the subsequent emergence of the working class, most states followed suit during the 19th century.

Today the so-called alien, especially the refugee, is hounded on every continent. The economic system based on wage labour, private profit and the nation state cannot provide even the most elementary democratic right to live decently wherever one chooses.