Australian High Court upholds denial of appeal rights to refugees

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In a ruling with far-reaching implications for the treatment of refugees and the legal system itself, the High Court of Australia on Wednesday upheld legislation introduced by the former federal Labor government in 1994 to drastically curtail the right of asylum seekers to appeal to the courts.

While all the judges claimed to be deciding the case on the basis of the law, the court was nevertheless split 4-3. Justices Gleeson, McHugh, Callinan and Kirby found for the government on the key constitutional question at stake, opposed by Justices Gaudron, Gummow and Hayne.

In an immediate sense, the decision will mean the deportation of Seniet Abebe, an Ethiopian woman who has languished in Sydney's Villawood Detention Centre for more than two years since she arrived in Australia on 6 March 1997. The Immigration Department rejected her application for a protection visa three months later but she appealed to the Refugee Review Tribunal, a government-appointed appeal body.

The High Court affirmed a decision by that Tribunal not to consider her evidence that she had been raped repeatedly by Ethiopian soldiers while in detention and was therefore in danger of persecution if sent back to Ethiopia. The Tribunal apparently refused to believe that she had ever been detained for political or racial purposes and said it did not need to consider her accounts of being raped. She appealed to the Federal Court on the grounds that she was denied natural justice and the decision was so unreasonable that no reasonable person could have made it. The Federal Court ruled that it could no longer hear appeals on those grounds.

Ms Abebe becomes one of more than 10,000 asylum seekers refused entry by the government, the Tribunal and the courts since 1994, applying the narrow criteria of the 1951 Geneva Convention on Refugees that requires proof of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".

By legitimising the 1994 measures, the decision of the High Court--the supreme court of Australia--has a wider import. It gives the go-ahead for governments to selectively abolish appeal rights for certain categories of people. In its 1994 amendments to the Migration Act, the then Keating Labor government severely truncated the jurisdiction of the Federal Court, the second highest court in the federal legal system, in cases involving refugees.

Under these amendments, the Federal Court can no longer hear appeals from the Refugee Review Tribunal on the grounds of denial of natural justice (or procedural fairness), or that the decision was so unreasonable that no reasonable person could have made it. As amended, the Act also abolished appeals for improper exercise of power, involving bad faith, fraud, actual bias, errors of law, taking an irrelevant consideration into account and failing to take a relevant consideration into account.

The High Court majority declared that these sweeping provisions did not infringe the Australian Constitution, which purportedly establishes a separation of powers between the judiciary, the government and the parliament. They ruled that the parliament could validly strip the Federal Court of selected parts of its jurisdiction, even if it meant the court effectively endorsing an unlawful decision by the refugee tribunal.

In handing down their judgments, the judges seemed more concerned about the implications for the High Court than for refugees. "The effect on the business of

this court is certain to be serious," said Chief Justice Gleeson and Justice McHugh in a joint judgment. Justice Kirby said it would be "extremely inconvenient ... expensive and time-consuming". Their fear is that asylum seekers who can no longer appeal to the lesser court will deluge the High Court.

This issue arises because under the Constitution, the government cannot block appeals to the High Court itself. By curtailing appeals to the Federal Court, the Labor government hoped to use the enormous costs and time delays involved in going to the High Court to effectively end legal appeals. Nevertheless, a handful of refugees' cases have found their way to the High Court, and this may increase, despite vicious cuts to legal aid by the present Howard government.

The ruling against Ms Abebe was handed down amid an aggressive campaign by the Howard government to have the Senate pass new laws further limiting appeals to the Federal Court. Its legislation seeks to allow appeals only in "exceptional circumstances". In recent months Immigration Minister Philip Ruddock has issued unprecedented attacks on Federal Court judges and lawyers, accusing them of undermining the government's refugee policy by enabling asylum seekers to challenge deportations.

Recent days have seen an increasingly hysterical campaign by the mass media and politicians against the arrival of Asian refugees in small boats. When some 60 Asian people landed on the northern New South Wales coast last week, the Sunday newspapers carried inflammatory banner headlines, such as "Invaded". Labor politicians sought to outdo their ruling Liberal-National counterparts in demanding tougher action to detect and remove "boat people". Queensland state premier Peter Beattie called for laws to immediately deport such arrivals, stripping them of all rights to even apply for refugee status, let alone to appeal against rejection.

This official and media witchhunting is designed to obscure the fact that these refugees are largely trying to escape from the catastrophic consequences of the economic meltdown produced in Asia by the policies of the international financial markets. Having long supported brutal regimes such as the Suharto dictatorship in Indonesia--in order to maintain "stability" in the region at great human cost--those who occupy the corridors of power in Australia are now determined not to allow any of the victims of capitalism's Asian disaster into the country.