Australian court overturns ruling against removal of Tampa refugees

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In a decision with far-reaching implications for basic democratic rights, the Full Federal Court of Australia has reversed an earlier ruling that the Howard government illegally detained and expelled the refugees aboard the Norwegian container ship, the *Tampa*. By a two-to-one majority the judges declared that the Australian government has vague "executive power" to remove asylum seekers from territorial waters, even if it flouts its own legislation in doing so.

The verdict demonstrates how rapidly ruling circles have seized upon the terror attacks in America to demand the overturning of fundamental legal rights. In the lead-up to the judgment, government ministers and media commentators openly equated refugees with terrorists, declaring that the court had to uphold the government's absolute power to shut the country's borders. Backed to the hilt by the Labor Party, the government has quickly utilised its legal victory to introduce draconian measures to strip asylum seekers of all rights under Australian and international law.

Two judges—Robert French and Bryan Beaumont—held that the government's actions were authorised by section 61 of the Constitution, which invests the government with the so-called prerogative powers formerly exercised by the British monarchy. Chief Justice Michael Black dissented, backing the original judgment of Justice Tony North, who declared that the government had used an "unlawful process" to deny entry to the *Tampa* refugees three weeks ago.

The majority upheld the government's argument that, at least as far as non-citizens are concerned, it has the right to operate above the law, as defined by legislation. This gives governments unprecedented arbitrary power. In the first place, the decision severely undermines the centuries-old legal principle relied upon by North— *habeas corpus*, which prohibits detention without lawful authority. Beaumont went as far as to deny that the Federal Court could issue a writ of *habeas corpus*.

Secondly, the court interpreted the scope of "executive power" so widely that governments can take virtually any action they consider necessary to defend "national sovereignty". This reasoning could allow a government to resort to a range of extra-parliamentary measures.

To find judicial support for the forced expulsion of aliens, the majority reached back to the period in which the "White Australia" policy was developed. They cited the 1891 case of *Musgrove v Toy*, in which the British Privy Council endorsed a decision by the Victorian Supreme Court involving the exclusion of a Chinese man who had arrived in the port of Melbourne aboard the *SS Afghan*.

French and Beaumont rubberstamped the military operation against the 433 refugees rescued by the *Tampa*, in which the government deliberately flouted the law. When it sent 45 SAS soldiers to board the Norwegian freighter and attempt to push it back out to sea, the government was aware that it lacked any lawful power to do so. It tried to rush retrospective legislation—the Border Protection Bill—through parliament to authorise its actions, but was defeated in the Senate.

The government sought to evade the operation of its own draconian Migration Act, which requires government officers to detain and bring to shore all "unlawful" arrivals. Under the 1999 "border protection" amendments to the Act, military officers who board refugee vessels—even on the high seas—are also obliged to bring the people on board ashore, to be placed in detention.

Questioned in the Federal Court, immigration department head Bill Farmer admitted that steps were taken to ensure that the people on board the *Tampa* could not contact lawyers to challenge the legality of the government's conduct or seek their release from the ship. The government was determined to prevent the asylum seekers from applying for protection visas under the 1951 international Refugee Convention.

Even after North's initial ruling, the government continued on its course. The refugees were herded aboard the *HMAS Manoora*, a military troop carrier, and shipped thousands of kilometres away to the remote Pacific island of Nauru. En route, the government crammed 237 more unwanted refugees—seized off Ashmore Reef, another Australian island—onto the *Manoora*. Since their arrival at Nauru, a desolate former Australian colony, the government has tried to force them into a detention camp of makeshift shelters and tents in the middle of the island's former phosphate mine.

As the Full Court deliberated, government leaders and media commentators applied intense pressure to the judges, arguing that the terrible events in the United States made it necessary for the government to wield wider powers. The Commonwealth Solicitor-General, David Bennett QC, told the court that Justice North's decision could restrict the government's ability to avoid such disasters as the attack on the World Trade Centre. In the media, Defence Minister Peter Reith insisted that if North's ruling stood, it would open the floodgates for terrorists to enter the country on refugee boats. Without offering a skerrick of evidence, a junior minister, Peter Slipper, claimed there was "an undeniable linkage between illegals and terrorists".

After the decision was handed down, the government tried to bully the lawyers who had acted pro bono (free of charge) in arguing the refugees' case. It threatened to pursue them for crippling legal costs—estimated to exceed $100,000—if they appealed to the High Court, breaching a long-standing convention of not seeking costs in

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cases of public importance. It also warned that the lawyers could be charged personally with the expense of keeping the refugees aboard the *Manoora* while the High Court deliberated.

The Victorian Council of Civil Liberties, which took the case to the Federal Court, denounced the government's threats as a "clear attempt to intimidate" not just the lawyers but all citizens from taking legal action. It was a "significant and unhealthy development" in Australian public life that would shut down the Council of Civil Liberties if it succeeded, a spokesman said.

Despite the pressure, one of the lawyers involved in the case, Eric Vadarlis, announced his intention to appeal the decision to the High Court, although he acknowledged that his appeal might have to be withdrawn if the government succeeded in passing legislation to validate its actions against the *Tampa* refugees.

As soon as the Full Court decision was announced, the government unveiled three new laws. The first, a revamped version of the Border Protection Bill, seeks to retrospectively legalise the seizure of all the refugees aboard the *Manoora*, as well as authorise similar operations in the future. The legislation will give government or military officers authority to board, search, detain and turn around refugee boats, using whatever means considered "reasonable," including force. All conduct under the Bill will be protected from legal challenge. Penalties for crew members of refugee boats will also be increased to a minimum of five years' jail.

The second law is equally unprecedented. The Migration Amendment (Excision from Migration Zone) Bill will remove certain parts of Australia, including the Christmas, Cocos (Keeling), Cartier and Ashmore Islands, from the migration zone. Other areas can be added to these "excision zones" by regulations. Refugees entering these zones will not be permitted to apply for asylum or any Australian visa. Instead, they will be incarcerated in yet-to-be built camps inside the zones and tested for refugee status by an undetermined process, with no right of appeal to Australian courts. The Minister will have an absolute discretion to deny them a protection visa and remove them to another country.

A third Bill will protect the government from all legal challenges in enforcing the capture, imprisonment and expulsion of "excision zone" asylum seekers. It will also prevent those who arrive from Indonesia from ever obtaining permanent residency or citizenship in Australia, thus depriving them of basic legal and democratic rights, as well as access to essential welfare and health facilities.

With tens of thousands of people now fleeing Afghanistan in fear of US attack, it is clear that the numbers risking their lives to get to Australia will only increase. Many will perish as they undertake longer voyages, trying to evade naval warships and reach the mainland. Meanwhile, at least one of Australia's offshore islands will become a literal penal colony, adding to the six (soon to be nine) mandatory detention centres onshore.

Labor Party leader Kim Beazley moved quickly to give full support to the government's legislation, ensuring its swift passage through parliament. Labor MPs promptly voted to back the new laws, dropping earlier objections to features of the Border Protection Bill. In return, Howard abandoned his bid to bar appeals to the High Court—a flagrant breach of the Constitution that was unlikely to survive legal challenge in any case.

Furthermore, Labor withdrew its reservations to three other laws, each of which contain a far-reaching attack on fundamental legal rights. One will abolish nearly all appeals to the courts in immigration and refugee cases, the second will ban class actions to challenge refugee decisions in the High Court and a third will allow officials to deny refugee status to people arriving without identity documents. All six pieces of legislation will be rushed through parliament within days.

Not to be outdone by Howard, Beazley proposed his own plan for preventing legal challenges to government power—fines of up to $10,000 for lawyers pursuing "vexatious claims".

The Council of Civil Liberties condemned both major parties for planning to do the "unthinkable ... prevent the proper litigation of very serious issues going to the heart of the way in which our democracy works". The Law Council of Australia, the legal profession's peak body, declared: "Any person within the territory of Australia, whether an unauthorised arrival or not, must have a right of access to the courts." The organisation also denounced the Labor Party, commenting: "Labor has previously strongly opposed these initiatives. Why is there now bipartisan support for such draconian measures?"

Howard and his ministers have been lauded in the media for their stand, and opinion polls indicate a significant reversal in popular hostility toward the government. With an election due within two months, Beazley and his colleagues are trying to compete with their coalition counterparts in scapegoating refugees. Indeed, the government's laws simply extend the draconian measures adopted by the previous Labor government, which introduced compulsory detention for independently-arriving refugees, cut off most legal appeals to the Federal Court and stripped all new immigrants of welfare benefits for six months.

Having whipped up anti-refugee hysteria, the media owners are attempting to utilise the climate they have generated to undermine legal and democratic rights more generally. Definite demands have been issued for limits on the right to challenge government power in the courts. A recent editorial in the Murdoch-owned Sydney *Daily Telegraph* attacked the lawyers who defended the *Tampa* refugees for showing "suspect" judgment. "The broader issue is the right of a court to act against the wishes of the elected government," it insisted.

Similarly, *Sydney Morning Herald* columnist Padraic McGuinness labelled the Council of Civil Liberties "the Council for Criminal Liberties" and expressed the hope that the terror attacks in America would render legal rulings redundant. "Popular feeling will now ensure that the government will have little difficulty in tightening up on refugee policy so as to diminish the interference of the courts."

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