

Court rules that Australian government illegally detained Tampa refugees

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A Federal Court judge ruled on Tuesday that the Australian government last month illegally detained and denied entry to the refugees aboard the Norwegian cargo ship, the *Tampa*. Justice Tony North found the government had determined “at the highest level” to “use an unlawful process to detain and expel the rescuees”.

Both the ruling and the Howard government’s response to it have underscored just how far the government is prepared to go in flouting the most fundamental democratic rights, including freedom from arbitrary detention and access to the courts to challenge executive power.

North ruled that the cabinet had breached one of the most basic legal principles, dating back hundreds of years, that no person, whether a citizen or non-citizen, can be held in detention without lawful authority. In granting a writ of *habeas corpus* for the immediate release of the refugees, he declared: “An ancient power of the Court is to protect people against detention without lawful authority.”

He ordered the government to bring the 433 asylum seekers, currently crammed aboard a military troop carrier, to the Australian mainland by 5pm on September 14, where they will have the right under the 1951 Refugee Convention to apply for asylum.

The Howard government, however, immediately thwarted the decision by announcing an appeal to the Full Federal Court. Until the appeal is finally decided—a process that could take weeks if the case goes all the way to the High Court—the government intends to keep the refugees on the *HMAS Manoora*, which it has ordered to sail to the tiny Pacific island of Nauru.

It appears that the government is deliberately keeping the *Manoora*’s passengers isolated from the outside world so that they have no means of knowing that the Federal Court has upheld their rights.

On arrival in Nauru, the refugees will be asked to leave the ship and enter makeshift detention centres. Attorney-General Daryl Williams has stated that if the refugees disembark in Nauru, they will no longer be covered by the court order. In effect, the government will stop at nothing to negate the effect of the court ruling and deny the refugees their basic rights.

The government has vowed to reintroduce the unprecedented Border Protection Bill that was defeated in the Senate at the height of the *Tampa* crisis. The legislation would give the government and the military “absolute discretion” to seize, detain and turn

around refugee boats, using “any reasonable means,” including force.

Not only that, the legislation would bar anyone from challenging these actions in a court of law. This is a blatant bid to free the government and the military from all legal restraint, in breach of the Constitution, which provides for High Court review of government actions.

The Labor Party has promised to assist the government by helping to pass specific legislation authorising the detention of the *Tampa* refugees, thus overriding North’s ruling—an offer already accepted in principle by Deputy Prime Minister John Anderson. Such legislation would also be without precedent—retrospectively stripping hundreds of people of their basic right to liberty.

As legal commentators have noted, Justice North’s ruling was entirely orthodox and based on traditional judicial precedents. In fact, he upheld the government’s argument on several points, including its refusal to allow the applicants—civil liberties groups and a Melbourne lawyer—to contact the refugees to assist them in applying for protection visas.

But he rejected the government’s central assertion—that it should be allowed to operate above the law. In North’s words, the government “contended that the Court should not stand in the way of the exercise by the Executive of its attempt to protect the borders of Australia”.

He cited a previous High Court judgment declaring that to allow a government to detain people without trial or clear statutory power would undermine “the very fabric of freedom under the law” and represent “tyranny”.

North made it clear that by sending 45 SAS troops to board the *Tampa* and stand guard over the people it had rescued, the government intended to block their rights to apply for refugee status. He quoted in full the letter that they had given to the Norwegian ambassador formally asking for asylum in Australia.

The judge rejected the government’s ludicrous claim that the refugees were not actually detained because they were free to go anywhere in the world, except Australia. The government and the SAS troops, he said, had “directed where the *MV Tampa* was allowed to go and not to go. They procured the closing of the [Christmas Island] harbour so that the rescuees would be isolated.... The respondents took to themselves the complete control over the bodies and destinies of the rescuees.”

The Howard government has also effectively defied North’s

ruling by attempting to expel an Indonesian fishing boat, the *Ratna-Mujia*, with 130 refugees aboard, which ran aground last Monday on Ashmore Reef, another Australian island in the Indian Ocean.

A spokeswoman for Customs Minister Chris Ellison said the navy was helping to make the vessel “seaworthy” so that it could return to Indonesia, despite the fact that the Indonesian government has vowed to turn it away as well. Ellison’s spokeswoman refused to say whether the asylum seekers—126 Afghans and four Iranians—had even been allowed to leave their stricken boat and shelter on the sand-covered reef.

Just three days earlier, navy ships confronted another Indonesian boat, the *Aceng*, near Ashmore Reef, eventually forcing its 237 passengers to clamber aboard the *Manoora* while still on the high seas. The already crowded troop ship was passing through the area on its way from Christmas Island.

Under circumstances that are still shrouded in official secrecy, the frigate *HMAS Warramunga* sent boarding parties to the *Aceng* several times, unsuccessfully trying to force it to turn back to Indonesia. Ultimately, according to Defence Minister Peter Reith, the boat’s passengers became “agitated” and were loaded onto the *Manoora*.

In a further breach of the Refugee Convention, the government has announced yet another piece of retrospective legislation—to remove Christmas Island and Ashmore Reef from the Australian migration zone. This will prevent refugees from applying for asylum unless they reach the Australian mainland.

Redrawing the national border for migration purposes will force desperate asylum seekers to try to sail in unseaworthy boats all the way to the mainland, evading and fleeing from warships along the way. Inevitably, people will die as a result.

Having failed to convince Indonesia or any other government in the Asia-Pacific region to accept refugees turned away from Australia, the Howard government has prevailed upon the cash-strapped administration of Nauru, a remote former Australian colony in the midst of the Pacific Ocean, to act as a virtual penal colony.

Reith flew to Nauru on Monday to stitch up an agreement for Nauru to temporarily detain most of the 670 people now on board the *Manoora*—except for 150 that New Zealand will accept—and possibly future boatloads, in return for Australian cash and aid worth tens of millions of dollars.

With an indigenous population of just over 5,000, an area of 21 square kilometres and a GDP of just \$100 million a year, Nauru has few facilities and almost no resources. It has little land fit for habitation, having been mined exhaustively by Australia for phosphate throughout most of the 20th century.

Under the Howard government’s plan, the asylum seekers will be dumped in spartan units in a disused athletes’ village or put into tents on a sports oval, where they will be tested for refugee status by UN officials. Wire fences will be built around their compounds, patrolled by Australian private security guards.

Canberra will pay all associated costs and provide the Nauru authorities with a \$20 million “assistance package”. This includes a refit of electricity generators and supplies of diesel fuel to prevent power blackouts until next May; payment of outstanding hospital bills incurred by Nauruans in Australia; assistance to

restore air and telecommunications links with the outside world; and various educational and sporting scholarships.

The Howard government has already spent an estimated \$20 million on the military operation to block the *Tampa*, and is spending at least \$10 million a week to keep five warships, six patrol boats and three aircraft hunting down refugee vessels to Australia’s north. According to one media estimate, the bill could total \$116 million over three weeks—more than it would cost to admit the refugees to Australia and give each family a house.

By contrast, the government allocates just \$14.3 million a year to the UN High Commissioner for Refugees (UNHCR)—responsible for housing and feeding more than 20 million refugees in the Middle East, Africa and the former Yugoslavia—and has donated only another \$28 million since June 2000 for special programs to address the Afghani and Iraqi refugee crisis.

The court ruling has led to renewed criticism of the government’s actions in some media outlets, reflecting concerns in ruling circles of the damage being done to Australia’s international standing, particularly in its key markets and sphere of influence in the Asian-Pacific region.

“The Federal Court has left John Howard looking like the emperor whose nakedness is covered only by the opinion polls,” wrote Michelle Grattan in the *Sydney Morning Herald*. “Howard’s machismo mission to stop the boat people, now a holy war, is not only grossly expensive and logistically fraught, but has flouted the law as well.”

Wednesday’s editorial in Rupert Murdoch’s *Australian* said Justice North’s judgment “exposes the government’s ad hockery” and described Howard’s actions as “politically motivated, bungled and on-the-run amid high emotions two months before a federal election”.

Nevertheless, the government is intent on aggressively pursuing its course. Facing an election under conditions where its economic and social policies have produced deep popular disaffection and a series of landslide electoral defeats for right-wing state governments, it is blatantly resorting to the scapegoating of refugees, in an effort to incite nationalist and racist sentiment.

Not to be outdone, however, the opposition Labor party has sprung to the government’s aid by backing its appeal to the Full Federal Court and offering to retrospectively legalise its *Tampa* operation.

This marks a bipartisan consensus, aimed not only at riding roughshod over the basic democratic rights of refugees, but also at the repudiation of traditional legal forms of rule. Workers and professional people need to draw a sharp warning from these developments. The illegal and anti-democratic measures taken against the refugees—the most vulnerable layers in society—presage the kind of measures both parties will increasingly resort to as political discontent and social tensions intensify.



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