Australian High Court ruling highlights denial of refugee rights

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A decision by Australia's High Court on August 8 has underscored how far successive Australian governments have gone to abolish the basic democratic rights of asylum seekers.

Without in any way challenging the official persecution of refugees—the use of the military to turn back boats or transport their occupants to remote island detention camps, and the continued indefinite incarceration of earlier asylum seekers in mainland camps—the court ruled that the procedures that have been used by the federal government's Refugee Review Tribunal (RRT) to reject thousands of asylum applications since 1993 are procedurally unfair and therefore unlawful.

In a test case for more than 7,600 rejected applicants, the court held that the RRT had denied "procedural fairness" (also known as "natural justice") to two people of Chinese descent, Nancy Lie and an applicant identified only as Muin, who fled from communalist riots and killings in Indonesia in 1997.

Since the former Labor government established the RRT in 1993 as the last line of appeal for refugees, tribunal members have decided more than 45,000 cases, overwhelmingly rejecting them. The High Court judgment indicates that these potentially life and death decisions were all made without fair hearings.

By 7 to 0 in Muin's case and 5 to 2 in Lie's case, the court found that the RRT contravened procedural fairness in three ways. Firstly, the tribunal was not given the documents that the immigration department initially used to deny the asylum applications. The documents could have included material favourable to the applicants, as well as flawed documents used against them. Instead, the department merely made some documents available on an electronic database, where links dropped out or changed content on a daily basis.

Secondly, the RRT sent misleading letters to asylum seekers stating that it had received the full documents, falsely implying that the tribunal member deciding their fate would actually read the documents. If the applicants had known the true situation, they could have submitted contrary evidence at their hearings.

Thirdly, the RRT did not inform Muin that it was relying on new information about the allegedly improved conditions in Indonesia. Having no knowledge of this adverse evidence, Muin had no opportunity to refute it.

The High Court decision does not automatically grant protection visas to any of the refugees. The court confined its decision to the facts of the two cases and simply sent them back to the RRT for re-hearings. Nevertheless, Adrian Joel, the solicitor for the 7,600 asylum seekers, said he would ask the court to make the same ruling for all of them, because of the common procedures used.

Joel described the court decision's implications as "staggering". "In a 7-0 judgment, the bench has ruled that the tribunal's handling of refugee claims is fundamentally flawed," he told the *Sydney Morning Herald*.

Clearly, many of the tens of thousands of refugees rejected since 1993 were also denied due process. In most cases, their plight is unknown. The government refuses to disclose, let alone take responsibility for, the fate of asylum seekers it has deported. To do otherwise would further undermine support for its policies.

In some cases, possibly hundreds, the rejected asylum seekers remain incarcerated in the government's detention centres. Most of the 7,600 class action claimants themselves are believed to be living in the community on bridging visas. These deny them all

basic political and social rights, including the right to work and access to Medicare, which subsidises medical treatment.

The RRT and its procedures ride roughshod over refugee rights in ways that are more fundamental than the flaws detected by the High Court. Tribunal members are government appointees on short-term contracts and they include former Liberal and Labor politicians. They can be counted on to reject most appeals. In 1998-99, for example, RRT members overturned the department's decision in only 560 out of 5,505 cases, or eight percent.

The tribunal sits behind closed doors. There is no right to legal representation, although legal and other advisers can be present as observers. Asylum seekers must appear in person and be questioned by a tribunal member. The process is intimidating and restrictive for refugees, who often speak little English and have no knowledge of the law and the procedures being used against them.

The government's response to the High Court judgment displayed its contempt for basic democratic rights. Both Prime Minister John Howard and Attorney General Daryl Williams dismissed the importance of natural justice, a centuries-old protection against arbitrary power. Williams claimed the case was decided on "narrow technical points related to process," while Howard blithely remarked that "tribunals and courts often operate unfairly".

Williams openly attacked the High Court, accusing it of prolonging the mandatory detention of refugees. "Unfortunately, it appears that these judgments will ultimately result in increased formality, increased bureaucracy, increased legality and potentially increased periods of detentions for protection visa applicants as they seek to exploit these decisions in the courts."

The government attempted to stop the case even being brought to court by harassing and intimidating the lawyer, Adrian Joel. Two years ago, government MPs reported him to the Migration Agents Registration Authority (MARA) for allegedly soliciting people to join the class action. This resulted in MARA requesting 78,000 pages of his correspondence with his clients. He obtained a Federal Court order to block the demand, on the grounds of lawyer-client privilege.

With Labor's backing, the government also pushed through legislation on June 26 to remove the requirement for natural justice in all refugee and immigration decisions, including RRT decisions. In other words, what the RRT did to Muin and Lie has been legal since then. The immigration department and the RRT now only have to comply with minimal decision-making procedures set out in the Migration Act.

Immigration Minister Philip Ruddock has thus far refused to state what will happen to the 7,600 other claimants in the August 8 cases, let alone the 45,000 denied a fair hearing since 1993.

Over the past decade, the Liberal-National Party and Labor have had a bipartisan policy of vilifying refugees and increasingly stripping them of democratic rights. Labor established the RRT, along with the system of mandatory detention of refugees, in the early 1990s and progressively reduced refugees' rights to appeal to the courts from RRT decisions. The Howard government has continued this process.

During last year's Tampa refugee crisis, the government took the denial of access to the courts to a new level. Backed by Labor, it passed legislation seeking to ban appeals to the courts in practically all refugee and immigration cases. The laws also barred class actions by refugees. The case involving Lie and Muin only survived because it predated the legislation.

In sum, the government, with Labor's support, has now stripped asylum seekers of every basic right. Refugees can be blocked by military force from seeking asylum; detained indefinitely without trial; denied natural justice; and prevented from appealing to the courts.