Australia's highest court sanctions indefinite detention

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In a series of landmark decisions handed down on August 6, 2004, the High Court of Australia declared that the federal government can detain rejected asylum seekers indefinitely—perhaps for life—regardless of their inability to be deported to any other country and irrespective of the intolerable conditions inside the government's immigration detention centres.

In the cases of *Al-Kateb* and *Al Khafaji*, by a four-to-three majority, the court ruled that the government could use the "aliens" power of the Australian constitution to impose detention for as long as the government deemed it necessary. The judges held that, even if deportation were not possible, indefinite detention did not unconstitutionally impose punishment without trial.

In the third case of *Behrooz*, by six-to-one, the court declared that the conditions of incarceration in the country's remote camps—no matter how harsh and inhumane—did not provide a defence to a charge of escaping from immigration detention.

The immediate impact of the decisions was to throw at least a dozen refugees into a legal and political back hole. After years of imprisonment, they had been released by the Federal Court, which ruled that it was unlawful to hold them for deportation when there was no prospect of any other country accepting them in the foreseeable future.

Whilst the cases concerned the imprisonment of asylum-seekers, they have a much broader significance for the relationship between state power and democratic rights and freedoms. They represent a decisive break from established Australian constitutional law concerning the ambit of executive power. They radically broaden the scope for the government to impose detention without trial.

Members of the minority warned that the logic of the decision could be extended to any federal power, not just immigration. Justice Michael Kirby said the majority view had "grave implications for the liberty of the individual in this country which this court should not endorse".

Justice William Gummow noted that the government could now, if it wished, lock up bankrupts, for example, supposedly to protect society. Attorney-General Philip Ruddock has already foreshadowed invoking the rulings to detain "foreign terrorists" without trial.

The judgments signal the emergence of a reactionary bloc of judges, mirroring developments in the legal process in the United States. The majority drew heavily from recent anti-democratic decisions of US Supreme Court Justices Rehnquist, Scalia and Thomas to support the judicial sanctioning of greater executive powers of imprisonment.

Ahmed Ali Al-Kateb, a stateless Palestinian, arrived in Australia without valid papers in December 2000. He sought asylum because he suffered persecution in Kuwait, where he had lived most of his life. Long term residency or birth in Kuwait did not create a right of citizenship or permanent residence there. His application was rejected and, having exhausted his rights of appeal, he applied to be removed from Australia in August 2002. However, neither Kuwait nor Israel would allow him to enter (he sought to be removed to Gaza, but Israel refused this request). As a result, he had been incarcerated for four years by the time the High Court heard his case.

Al-Kateb challenged the legality of his continued detention, seeking a writ of habeas corpus. He argued that, as he could not be removed to another country, his incarceration had become punitive and was therefore beyond the scope and purpose of the Migration Act, which requires all refugee applicants to be detained until they are either granted a visa or deported. In addition, he argued that his detention was unconstitutional, because only courts can order punitive imprisonment.

Similar arguments were mounted by Abbas Mohammad Hasan Al Khafaji, an Iraqi who was recognised as a refugee fleeing persecution in Iraq, but refused a protection visa on the ground that he had a right to reside in Syria, where he once lived. Under the Howard government's changes to refugee law, asylum seekers must seek the right of "effective protection" in other countries. However, that supposed right proved to be worthless to Al Khafaji, because Syria refused to admit him, leaving him in a legal limbo.

Mahran Behrooz, an Iranian refugee, had been detained at the Woomera Detention Centre in the South Australian desert for nearly two years when he escaped, along with two others. After he was captured, he was charged with escaping from immigration detention, a criminal offence carrying a maximum sentence of five years. Behrooz justified his actions on the basis that the conditions of his incarceration were so gross, harsh and inhumane that they were an illegal form of imprisonment, under the constitution and international law. In his trial, the government blocked the admission of evidence regarding conditions at Woomera, insisting it was irrelevant.

Nevertheless, the evidence placed on the record included a report by Professor Richard Harding, Inspector of Custodial Services in Western Australia, condemning the detention centres as an "absolute disgrace". Harding's report said the centres were "in the middle of no-where" involving "gross overcrowding, broken toilets, unprivate conditions, lack of medical and dental facilities". He described Curtin Detention Centre as "almost intolerable", adding that, "such evidence as exists indicates things are little better at the other centres".

Advice had been given to the immigration minister to close Woomera "to help avert a human tragedy of unknowable proportions". A psychiatric nurse stated in a report "that the detainees felt that they were treated like animals, medication was fed through

wire mesh to detainees and there was a pervasive belief that suicide was the only way out".

With only Justice Kirby dissenting, the High Court ruled 6-1 that the harshness of conditions was irrelevant to the validity of the detention, and therefore provided no defence. Justices Gummow, Michael McHugh and Dyson Heydon cited with approval an opinion by Justice Scalia in a case in which the US Supreme Court overturned earlier decisions that a prison inmate was constitutionally entitled to medical treatment.

The High Court rulings were in direct conflict with previous legal precedents, as well as international law, such as the International Covenant on Civil and Political Rights.

1. A general constitutional limit on executive detention

Since the Magna Carta of 1215, the English constitutional system, which Australia inherited, has curtailed the power of the executive to detain people. A desire to guarantee freedom from arbitrary imprisonment lay at the core of the doctrine of separation of powers. In previous cases, the High Court has insisted that with rare exceptions (such as mental health committals) deprivation of liberty can only occur by order of a court following a finding of guilt in criminal proceedings.

Justice Kirby said in his dissenting judgment in *Al-Kateb*: "Indefinite detention at the will of the Executive, and according to its opinion actions and judgments, is alien to Australia's constitutional arrangements."

2. Legislation must be interpreted consistently with basic rights

It is an established rule in English-based common law countries that statutes will not be interpreted as abrogating fundamental rights and freedoms unless clearly stated. Where legislation is ambiguous or silent on the issue, it will be interpreted to make it consistent with these rights.

Together with Kirby and Gummow, Chief Justice Murray Gleeson said the Migration Act did not contemplate the circumstances of stateless people who could not be deported. Yet, the majority—Justices McHugh, Ian Callinan, Kenneth Hayne and Dyson Heydon—ruled that the Act's wording explicitly authorised such detention.

3. The executive cannot judge itself

Since 1951, when the Menzies government attempted to outlaw the Australian Communist Party, the High Court has rejected the proposition that the executive can set the limits of its own power. The legislation proscribing the Communist Party purported to set out the "facts" that validated the ban under the federal government's "defence" and other constitutional powers.

The relevance of the Communist Party case to *Al-Kateb* and *Al Khafaji* was the assertion by the government and the Department of Immigration that the purpose of their detention was deportation—despite the uncontested fact that deportation was not possible in the foreseeable future.

4. Previous rulings on immigration laws

While upholding the legality of detention for the purpose of deportation, two previous High Court authorities had specifically limited such power. In 1949, when the infamous "White Australia" policy still prevailed, *Koon Wing Lau v Calwell* established that detention was constitutional because it did not create a power to keep a deportee in custody for an unlimited period. The court held that the deportee must be set free if not deported within a reasonable time.

In 1992, in *Chu Khong Lim v Minister for Immigration*, the High Court sanctioned the federal Labor government's new system of mandatory detention. However it ruled that if detention went beyond what was reasonably necessary for deportation, it would assume the character of unconstitutional punishment.

Yet in the August 6 rulings, the majority held that no time limit could be placed on detention under the "aliens" power. Justice McHugh declared: "Under the aliens power, the Parliament is entitled to protect the nation against unwanted entrants by detaining them in custody...." This assertion contained no substantive legal reasoning. It was more akin to a political speech in favour of indefinite detention.

Similarly, Justice Callinan suggested that detention could be used for other purposes, in addition to deportation, to enforce the exclusion of non-citizens. "It may be the case that detention for the purpose of preventing aliens from entering the general community, working, or otherwise enjoying the benefits that Australian citizens enjoy is constitutionally acceptable. If it were otherwise, aliens having exhausted their rights to seek and obtain protection as non-citizens would be able to become de facto citizens."

The High Court decisions mark a radical shift in the legal-constitutional framework. Their practical effect assumes a positively Kafkaesque dimension: segregation by incarceration, without trial for any offence, at the will of the state, for an indefinite period, perhaps for life, in harsh, inhuman conditions.

The rulings represent the judiciary's imprimatur for the re-alignment of legal and political power sought by the government, which has already exploited the "war on terror" to introduce unprecedented measures of a police-state character. These include detention without trial for interrogation, jail terms for "associating" with alleged terrorists and wide-ranging and subjective definitions of terrorism that cover many traditional forms of political dissent.

The plight of stateless detainees also throws into sharp relief the fundamental contradiction between national-based legal systems and the global transformation of social and economic life. The cases reveal the increasingly intolerable barrier to human freedom—including the basic democratic right to live and work wherever one chooses—represented by the continued existence of the nation-state system.