Australia: Detained refugees challenge Labor government's denial of fundamental legal rights

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Australia's caretaker Labor government last month strenuously defended in the High Court the denial of elementary legal and constitutional rights to detained refugees. The country's supreme court was hearing final submissions from two Sri Lankan asylum seekers—identified only as "M61/2010E" and "M69 of 2010". They are contesting the legality of the government's offshore processing regime, which subjects asylum seekers to mandatory detention and bars them from access to federal courts and tribunals.

Under the system, which the Labor government has continued from the previous Howard government, Australia's offshore territories, such as Christmas Island, have been arbitrarily "excised" from the migration zone. Even detainees who are transferred to mainland camps from the overcrowded facilities on Christmas Island are still prohibited from exercising the fundamental legal and democratic right to appeal to the courts and tribunals.

Approximately 4,100 people are currently being detained in this legal limbo, unable to challenge their detention or the denial of protection visas. The Migration Act states that an asylum seeker arriving by boat in an "excised offshore place" is an "offshore entry person" and is barred from applying for a protection visa. The immigration minister, currently Labor's Chris Evans, has a personal discretion to allow a detainee to apply for a visa, if the minister thinks it is "in the public interest".

In effect, "offshore entry people" are detained, potentially indefinitely, while they are subjected to "refugee status assessments" by immigration officials, whose rulings are reviewed only by other officials (euphemistically called "independent merits reviewers").

According to the Labor government—represented in the High Court by Commonwealth Solicitor-General Stephen Gageler SC—the federal government has an executive power to impose these detentions—a far-reaching power that cannot be monitored by any court.

This argument flies directly in the face of the ancient principle of habeas corpus—no imprisonment without trial—as well as the Australian Constitution. While the constitution has no bill of rights, it does enshrine a separation of executive, legislative and judicial power, and also specifically permits anyone to challenge, in the High Court, any federal government decision against them.

Lawyers for M69 challenged the constitutionality of a key provision of the Migration Act. According to section 46A of the Act, the immigration minister has no duty to even "consider" whether to allow an "offshore" asylum seeker to apply for a visa.

M69's lawyers argued that this provision "attempts to stultify the constitutional jurisdiction" of the High Court to hear legal challenges to government decisions, which is guaranteed by section 75(v) of the Constitution. They submitted that the High Court had been rendered impotent to prevent the minister acting in excess of his powers under that section of the Migration Act, or to require the minister to exercise those powers.

As the lawyers pointed out, the implications go beyond asylum seekers, and raise the fundamental principle of judicial restraint of governmental power. There was no reason in principle, they submitted, why "every Commonwealth Act" could not contain provisions to the same effect, and "nothing would be left for section 75(v) [of the Constitution] to do in relation to Commonwealth legislation".

M69's lawyers also argued that, even if the refugee processing was "non-statutory"—outside the realm of the Migration Act—the minister was still "acting for the purpose of informing" his discretion under the Act. Moreover, any exercise of executive power, which comes under section 61 of the Constitution, that affects the interests of an individual, must be subject to the common law doctrine of "procedural fairness"—that is, the applicant must be given a fair and unbiased hearing.

At one point during the argument, Justice William Gummow intervened. He pointed out that if the refugee decision-making process were not reviewable by the High Court, either under the Migration Act or section 61 of the Constitution, "there would be a black hole". Gummow added that this was "not just a folly" because "people are incarcerated under this system and transported around the country".

M61's lawyers argued that, because the minister's decision to "lift the bar" and permit a detainee to apply for a visa was predicated on a refugee status assessment (RSA), that process also "must be carried out lawfully" and is "susceptible to review" by a court.

Further, because the entire RSA process is "simply the Minister

directing functionaries on his behalf," asylum seekers should have the right to apply to a federal court to compel the minister to undertake this process according to law.

In addition, argued M61's lawyers, for the ongoing detention of asylum seekers to be lawful, it had to be "intimately connected" with and authorised by the Migration Act, and not simply an exercise of executive power. That would mean that asylum seekers could challenge their detention in federal courts.

These arguments reflect the basic legal conception that government power, including executive power, is limited by law, and reviewable by the courts. Nevertheless, these propositions were strongly rejected by the Gillard government's Solicitor-General.

Gageler was unable to explain how the ongoing detention of "offshore entry people" was lawful. He submitted that the RSA process was not "in any sense" done "under the Act". Yet, asylum seekers were clearly being deprived of their liberty, under the process that could lead to the minister deciding, under the Migration Act, to allow them to apply for a visa.

As Justice Kenneth Hayne illustrated, the underlying "assumption" was that "the detention is lawful". The government's "dilemma" was that "if the detention is lawful, it is lawful because the Act is engaged and is engaged properly". Yet, the government's position was that detention was "not being undertaken under the Act," but was an exercise in executive power.

While Gageler conceded that the RSA process was connected to the statutory scheme for visa applications created by the Migration Act, he maintained that the RSA process was an example of an executive "inquiry" allowed by section 61 of the Constitution.

Gageler insisted that the RSA process was "advisory", allowing the minister to be "informed" as to whether Australia's obligations under the international Refugee Convention are "engaged in respect of a particular offshore entry person." Such a finding would not enable the person to obtain a visa, however, even if they were so entitled under international law. Instead, the RSA process only "invited" the minister "to consider, if he so chooses" to "lift the bar" and permit a visa application.

Gageler concluded that until the minister made that decision, there was "no legal consequence that attaches to the gathering of the information". Gageler placed no limits on the scope or duration of such an "inquiry".

The implications of this argument are sweeping. First, such a regime erects almost insuperable barriers to "offshore entry people" obtaining protection visas. Second, the logic of Gageler's argument would justify ongoing, unreviewable executive detention, awaiting a ministerial decision that might never occur. The same rationale could be used to justify executive detention in other contexts.

Submissions made by M61's lawyer also revealed the Gillard government's callous attitude to the plight of Sri Lankan asylum seekers, and its criminal indifference to the Refugee Convention, which formally protects the rights of people to flee persecution. M61 stated that he faced "a risk of harm" in Sri Lanka from government-backed paramilitary groups, on account of being a Tamil "perceived to be wealthy". He had been refused a protection visa, a decision upheld by an "independent merits reviewer".

The merits reviewer claimed that M61 had "embellished and exaggerated his difficulties" and had "embellished and exaggerated the situation in Sri Lanka". In the final months of the Sri Lankan civil war, between January and May 2009, the UN estimated that 7,000 Tamil civilians had been killed by the military. A report by the International Crisis Group this year put the death toll at between 30,000 and 75,000. Despite this, the merits reviewer rejected M61's claim, without providing any substantive explanation.

Similarly, M69 stated that it was impossible to return to Sri Lanka as a young Tamil male because if "I go back now they will suspect that I have been involved with the LTTE"—the separatist Liberation Tigers of Tamil Eelam. M69 said that his work with suspected LTTE supporters in a hospital "places me under suspicion of LTTE support also" and "the Army has all my details". An immigration official dismissed M69's refugee claim as one based on "ethnicity", rather than fears of political persecution.

While Labor took office in 2007 pledging to modify the detention regime established by the Howard government, it has maintained all of the regime's essential features. The convoluted, authoritarian logic of Gageler's submissions is the result of Labor's determination to bolster its credentials as being "tough" on refugees. The High Court has reserved its decision.

Throughout the recent federal election campaign, Prime Minister Julia Gillard and opposition leader Tony Abbott vied with one another to announce the harshest regime for asylum seekers. One of Abbott's key election slogans was to "Stop the Boats". Gillard drew from the reactionary well of White Australia and Labor Party racism and nationalism, declaring her support for "a sustainable Australia, not a big Australia". The victimisation of asylum seekers is aimed squarely at diverting widespread social anger and frustration at the crisis in social infrastructure, job insecurity and the lack of affordable housing away from those responsible—state and federal governments, both Labor and Liberal alike.