Australia: Labor seeks to overcome High Court ruling on refugee processing regime

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The Gillard Labor government is currently preparing proposals to overcome a unanimous ruling by Australia's highest court that invalidated aspects of the government's regime for processing visa applications by detained asylum seekers. Among the options being pursued by the government is the establishment of detention facilities in other countries, such as East Timor, so that the refugees would be held completely outside Australia's legal jurisdiction.

In its November 11 judgment, the High Court ruled that refugee claims must be determined according to Australian law, as per the Migration Act, and that applicants must be afforded "procedural fairness"—the right to a legally fair hearing. The decision also means that rejected asylum seekers can seek review in the courts, but only on very narrow legal grounds. Under the Migration Act, the immigration minister retains an unreviewable discretion not to consider a protection visa application, and can also reject one if he thinks it would be contrary to "the public interest".

While the judges rejected the government's claim that the Migration Act stripped refugees of the basic rights to procedural fairness and judicial review, they left open another government argument that the immigration minister could invoke a non-statutory, executive power to deal with refugee claims. Such a power would operate completely outside the Migration Act, potentially without any judicial scrutiny. The judges also suggested that the Migration Act could always be amended to abolish the requirement for a procedurally fair hearing.

The ruling was hailed by some refugee advocates and sections of the media as a triumph of justice. One of the lawyers involved in the case, David Manne, of the Refugee and Immigration Legal Centre, declared it was "a great decision for the rule of law in this country". *Sydney Morning Herald* commentator David Marr said it was the High Court's way of "sending a blunt message to government"—one that "lays down the law about fair dealing for all refugees".

In reality, the High Court's decision does nothing to end the Australian government's mass detention of refugees. Instead, the most immediate result is likely to be a growing detainee population, as hundreds of asylum seekers wait for months, and probably years, to have their cases heard in courts. Labor's detention centres, already at breaking point, will come under further strain. Overcrowding will worsen and the conditions that have already produced suicides, protests and hunger strikes over the past two months will further deteriorate.

The High Court challenge was mounted by two Sri Lankans, identified only as M61 and M69. Each provided evidence that they faced persecution in their home country. Both arrived in Australia by boat and were taken to the detention facility on Christmas Island, an isolated Australian territory in the Indian Ocean, 2,500 kilometres northwest of the Australian mainland.

In 2001, the Howard Liberal government, with the Labor Party's support, declared Christmas Island and various other island territories to be "excised offshore places". Asylum seekers taken to those places would be classified as "offshore entry persons" and would no longer be permitted to apply for any kind of visa. In order to pay lip service to the International Convention on Refugees, which requires *some* form of assessment of refugee claims, a Refugee Status Assessment (RSA) process was established outside normal government channels. The RSA is carried out by private contractors, including, in the case of M61 and M69, a company called Wizard People.

If Wizard People decides that a person qualifies as a refugee, this information is passed on to the immigration minister, currently Labor's Chris Bowen. The minister then exercises a "non-compellable"—i.e., legally unreviewable—discretion to decide whether to "lift the

bar" and consider granting a visa. The minister may then personally grant a visa "if the Minister thinks it is in the public interest to do so". In the past, courts have interpreted such clauses as giving ministers virtually unfettered decision-making power.

The rationale behind this "shadow" assessment process was explicit: to remove "offshore entry persons" from the controls, rules and procedures of Australian law, including the right to court review of visa determinations. Labor's policy since taking office in 2007 has been to push all refugees arriving by boat into this privatised shadow system. The government has rapidly expanded the use of the Christmas Island detention facility, where a complex of dormitories and tents holds about 2,700 people in conditions described by Amnesty International as overcrowded, difficult and "disturbing". Because the facilities are overflowing, nearly 3,000 other detainees have been transferred to centres scattered across the mainland, but they are still treated as "offshore entry persons".

The seven judges of the High Court concluded that because the government uses the Migration Act to detain asylum seekers during the RSA process, the RSA's procedures are governed by the Act, which currently allows for procedural fairness and judicial review in visa applications. The judges said it was then "not necessary" to consider the government's submission that the minister retained a "non-statutory executive power" that was immune from procedural fairness.

The lawyers for M61 and M69 did not challenge the legality of the detention system itself, even though refugees can be imprisoned for years without trial. In the 2004 case of *Al Kateb*, the High Court ruled that the government could detain an "unlawful" immigrant indefinitely, even if they could not be removed to any other country. Justice Michael McHugh declared that the Australian parliament "is entitled to protect the nation against unwanted entrants by detaining them in custody". Nor did the current case call into question the High Court's refusal to hear the 2001 *Tampa* case, involving 433 refugees who were forcibly removed to Nauru, a remote Pacific island. In that case, two judges cursorily dismissed the application because the refugees were no longer in the Australian jurisdiction.

The few details given by the High Court of the treatment of M61 and M69 demonstrate the politically loaded character of Labor's contracted-out RSA process. Wizard People based its decisions on the government's misleading "country information" about Sri Lanka, without even showing that information to M61 or M69, much less allowing them to challenge or comment on it. This was a blatant violation of one of the most basic rules of procedural fairness—the right to respond to adverse information.

The immigration department's "country information" given to Wizard People insisted that Sri Lanka had become safe for Tamils to return, because the Sri Lankan government-backed militia groups that they feared "were now joining and integrating into the mainstream of politics". The information further falsely claimed that "magistrates and judges were ordering the release of LTTE [Liberation Tigers of Tamil Eelam] suspects". Similar bogus information was used to justify the government's three-month freeze on Sri Lankan Tamil refugee claims earlier this year.

In fact, thousands of "LTTE suspects" remain incarcerated. Wizard People also ignored M61's claim that, because he had been a Tamil shop owner, he was therefore a likely target for state-sponsored anti-Tamil chauvinism. In the High Court, the government continued to insist that Wizard People could decide these asylum claims without treating as binding any legal precedent of any Australian court. Put bluntly, Labor's argument was, in effect, a defence of the government's right, via private contractors, to decide the fate of asylum seekers on whatever basis it saw fit.

Having been partially thwarted by the High Court, and facing the prospect of hundreds of detainees legally challenging their visa rejections, potentially for years to come, the Labor government will seek to concoct an equally punitive processing system, that once again rides roughshod over basic legal and democratic rights. In a Sky News television interview on November 24, immigration minister Bowen said he was still "working through the issues" raised by the High Court decision. His considerations, however, were "well advanced" and he was confident of taking a "fully robust and well considered" proposal to cabinet.