

Australian High Court overrules refugee “Malaysia solution”

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The Labor government of Prime Minister Julia Gillard has been plunged into further crisis by a High Court ruling that its “Malaysia solution” for refugees is unlawful and may not proceed.

The government had planned to deport 800 asylum seekers who arrive in Australia by boat to Malaysia, in return for accepting 4,000 refugees processed by the UN in Malaysia. The “people swap” flouted fundamental precepts of international law concerning the processing and treatment of refugees. Now the High Court, in a 6-1 majority decision issued Wednesday, has ruled that the scheme is in violation of the limited protections that remain under domestic law, in the Migration Act.

The High Court found that the government was wrong to declare Malaysia a safe country to send asylum seekers. The Migration Act only allows for asylum seekers to be taken to a third country when the immigration minister specifies in writing that the country “provides protection for persons seeking asylum” and “meets relevant human rights standards in providing that protection.” The court ruled that Malaysia does not satisfy these elementary conditions, because the country is not a signatory to the UN convention on refugees and has no domestic legal protections for asylum seekers.

Chief Justice Robert French said the Immigration Minister Chris Bowen had “misconstrued” the Migration Act when he declared Malaysia safe because it was “keen to improve its treatment of refugees and asylum-seekers.” The government, French continued, was required to assess the safety of a third country on the basis of actual legal protections, rather than “a hope or belief or expectation that the specified country will meet at some time in the future, even if that time be imminent.” The High Court noted that the Department of Foreign Affairs and Trade had advised the government that refugees and asylum seekers in Malaysia are subject to caning and imprisonment. The court also ruled that unaccompanied asylum seeker minors could not be deported unless the immigration minister, who is the legal guardian of such minors in Australia, provides written authorisation.

The government lashed out at the decision. In an extraordinary series of statements, Gillard declared that the High Court decision represented a “missed opportunity” to “send a message” to asylum seekers. She claimed that the ruling “basically turns on its head the understanding of the law in this country prior to yesterday’s decision.” Gillard added a direct criticism of Chief Justice French, declaring that he had previously “considered comparable legal questions when he was a judge of the Federal Court and made different decisions to the one that the High Court made yesterday.”

The prime minister’s attack on the judiciary underscores what was revealed in the High Court ruling itself—the Labor government’s utter contempt for legal principles, much less fundamental democratic rights, when it comes to refugees and asylum seekers.

Gillard’s ability to remain as prime minister is now in serious doubt. The media reaction to the High Court decision was universally scathing. The *Australian’s* editorials today (“PM’s blame game should end with a look in mirror”) and yesterday (“Malaysian non-solution highlights incompetence”) were typical. The newspaper described the High Court judgement as a “body blow” for Gillard, adding, “for a government that has struggled to establish authority since its inauspicious genesis, this saga underlines a perception of grave incompetence.”

Other sections of the Murdoch press effectively called for the Labor government to be brought down. The *Herald Sun* tabloid in Melbourne published an editorial yesterday that declared: “Prime Minister Julia Gillard’s asylum seeker policy, to put it bluntly, is dead in the water. So, too, is her authority as leader of a discredited minority government... If a by-election does not put an end to this stagnation and this Gillard government runs full term, it will be to the detriment of the great majority, who want a return to decisive and effective leadership.”

Immediately after she replaced Kevin Rudd as prime minister through an anti-democratic backroom coup inside the Labor Party, Gillard emphasised she would shift the government’s

asylum seeker policy by reviving so-called offshore processing. After initially nominating East Timor as the country to which refugees would be deported, she struck a deal with the Malaysian government, proposing a “solution” that was even more barbarous and contemptuous of international law than the “Pacific Solution” and other policies implemented by the former conservative Howard government.

The Gillard government has consciously used the scapegoating and vilification of refugees, in line with Labor’s foul White Australia traditions, to divert attention from mounting social tensions and its own deeply unpopular domestic and foreign policy program.

The media’s sharp condemnation of the Gillard government for the High Court decision is not solely due to the collapse of its refugee policy. Criticisms of the government’s “incompetence” and inability to implement key policies are above all driven by big business frustration with Gillard. The prime minister has led a ruthlessly pro-business government. As far as sections of the ruling elite are concerned, however, Labor has not done enough to meet their demands for an austerity program—slashing public spending on welfare, social infrastructure, and public sector jobs and wages—and further attacks on workers’ wages and conditions.

The *Australian Financial Review* yesterday declared: “The problem of ‘irregular boat arrivals’ is, on any objective view, a very minor issue for Australia.” It complained that the question of refugees “has been blown into a big political problem that occupies far too much of the time and energy of ministers and policymakers”, concluding, “It is in the vital national interest that the government gets the issue off the agenda so it can deal with the much bigger issues that really do matter for the nation’s future.”

The government’s response to the High Court ruling has been to foreshadow even more draconian refugee policies. Gillard has refused to rule out deporting asylum seekers to Nauru, as the opposition Liberal-National coalition has long demanded. The government has requested “urgent” legal advice on the implications of the High Court decision for offshore processing in countries other than Malaysia. The ruling, however, explicitly endorsed the previous use of Nauru, claiming that “the arrangements made with Nauru were very different from those that are now in issue”, because Australia remained nominally responsible for the asylum seekers’ well being in the Nauru camp.

This part of the judgment underscored the narrow character of the finding. The reactionary “border protection” regime remains in place, while the asylum seekers detained on Christmas Island who were to be sent to Malaysia remain in

legal limbo. Even if their applications for asylum are now processed in Australia, they are subject to mandatory detention in one of the country’s detention centres. Moreover, there remains the possibility that the Labor and Liberal parties will unite to amend the Migration Act to evade the High Court ruling.

According to some media reports, the government is also considering reintroducing the former Howard government’s “temporary protection visas”, which subject officially-accepted refugees to regular status reviews that can end in their deportation. The reintroduction of this measure and reopening of the Nauru detention camp would mark the end of any pretence by the Labor government that its policies are any less brutal than the former Howard government’s.

According to the *Daily Telegraph*, “some senior government figures say Ms Gillard has ‘lost her authority’ and have urged her to weigh up whether it’s in Labor’s best interests for her to stay on as PM”. Different reports have suggested that Kevin Rudd, Defence Minister Stephen Smith, and former Labor leader Simon Crean have been canvassed to replace Gillard, while others maintain that Gillard retains the key backing of the right-wing faction that installed her in last year’s coup.

The prime minister has rejected suggestions she is under threat. “I’m not going anywhere,” she declared today. “I’m the best person to do this job. And I’ll continue to do it.”

The Greens, Labor’s de facto coalition partner, have pledged continued support for Gillard. They welcomed the High Court decision and urged the government to abandon offshore processing. The Greens stance on asylum seekers is hypocritical to the core—while claiming to oppose Gillard’s policies, they prop up the minority government in parliament and have issued a blanket commitment to vote for its budgets, including those provisions that fund the detention centres, naval patrol boats, and other repressive measures. Moreover, they accept the fundamental premise of Australia’s “border protection” regime—that the state ought to control and limit the entry of refugees and immigrants—and oppose the basic democratic principle that working people ought to be able to live and work with full rights wherever they choose.



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