

Australian High Court sanctions indefinite offshore refugee detention

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Australia's highest court on Wednesday unanimously rejected a legal challenge to the removal of asylum seekers for indefinite detention in overseas camps, despite that system flouting the international Refugee Convention. The High Court ruling means that refugees will not only continue to be incarcerated in Nauru and Papua New Guinea's Manus Island, but can be sent to similar hell holes in other countries.

In a brief joint judgment, six judges rubberstamped legislation introduced by the previous Labor government, with the backing of the then Liberal-National Coalition opposition, to thwart a 2011 High Court ruling that blocked Labor's earlier plan to dump refugees in Malaysia.

In 2011, the court said the "Malaysian solution" was unlawful because it failed to ensure elementary human rights requirements under the Refugee Convention. Now the judges have given the green light to the forced transfer of asylum seekers to other countries without any such protections.

The ruling confirmed that—as a result of the bipartisan line-up to overturn the 2011 outcome—there is virtually no limit on where refugees can be consigned. With the Coalition's support, the Labor government amended the Migration Act in 2012 to specify that a country can be designated as a "regional processing country" without any "reference to the international obligations or domestic law of that country." Instead, the immigration minister must only consider what is in the "national interest."

The outcome demonstrates the readiness of Australia's entire political and judicial establishment to extinguish basic legal and democratic rights—such as freedom from arbitrary detention—even when they are recognised in international law.

In 2004, a series of landmark High Court cases

sanctioned the indefinite detention of refugees, potentially for life, within Australia. This abrogation of the principle of habeas corpus—no detention without trial—has now, in effect, been extended to cover those languishing on PNG's Manus Island and Nauru, leaving them in a legal black hole.

The detainee who brought the case is an Iranian in his late 20s, identified only as S156, currently locked up on Manus Island. As if to reinforce the impact of its judgment, the court ordered that he pay the Abbott government's costs incurred in fighting his challenge. In the past, costs have often not been awarded in such test cases.

The court found that the Labor government acted constitutionally in amending the Migration Act and that its immigration minister Chris Bowen correctly applied the legislation in nominating PNG as a "processing country" last July. That was despite the judges acknowledging that "there may be some doubt" whether the amended Act "can be said to respond to Australia's obligations under the Refugees Convention."

The judges gave short shrift to the detainee's first submission, that the "aliens" power of the Australian Constitution—which previous courts have said authorises the expulsion of non-citizens—cannot extend to orchestrating indefinite detention in another country. The Iranian man's lawyers were not even permitted to amend their submission to argue that the Constitution did not "authorise the Executive to, in effect, imprison persons in third countries against their will for an indefinite period."

The court refused to consider this argument, on the spurious basis that the relevant sections in the amended Migration Act did not specify any such imprisonment—only the selection of "regional

processing countries.” In fact, the Australian government remains directly responsible for the indefinite detention of the refugees, in camps that it finances, staffs and controls. The court brushed this reality aside, declaring that the extent to which Australia participates in the continued detention was “not evident” on the facts before it.

The judges were equally dismissive in rejecting the detainee’s second argument that before selecting PNG, Bowen was legally obliged to consider “international law obligations; the need to consult with the Office of the United Nations High Commissioner for Refugees prior to designation; PNG’s international obligations and its domestic law; PNG’s capacity to implement its obligations; the framework, if any, for processing refugee claims in PNG; the possibility of indefinite detention; and the conditions in which [asylum seekers] would be detained.”

The court declared that none of these conditions were mandated under the amended legislation. According to the judges, the detainee’s “fundamental difficulty” was that the “only condition” required to be observed was “the national interest” and that was “largely a political question.” This gave Bowen a “general discretion.”

The court brushed aside the legislation’s token requirement for the immigration minister to seek assurances that refugees would not be expelled to face persecution—the core principle of the Refugee Convention. The judges declared that there was “no statutory requirement” for the minister to go beyond obtaining purely formal assurances by PNG.

Mark Robinson, the detainee’s barrister, said the result was “devastating” for his client, who had already been imprisoned on Manus since August. “It means that he has to remain in PNG in terrible conditions.”

These conditions, in which more than 1,300 men are crammed in a squalid, hot and mosquito-infested camp, were highlighted in February when PNG and Australian security personnel killed Reza Berati, a 23-year-old Iranian Kurd, and injured more than 60 other refugees in order to suppress protests over their prolonged imprisonment.

Immigration Minister Scott Morrison and Prime Minister Tony Abbott welcomed the ruling as a boost to their drive to deter and stop all refugees from reaching Australia. “This is a government that is determined to stop the boats,” Abbott said. “Obviously

I’m pleased those policies have passed muster.”

Morrison recently signalled that the offshore dumping of refugees will be soon extended to Cambodia, another impoverished country. This judgment will remove any legal doubts about that plan.

Just a day before the High Court decision, the Labor Party also underscored its intent to retain the PNG and Nauru regime should it return to office. The Labor parliamentary caucus voted overwhelmingly to defeat a motion to shut down the Nauru and Manus camps.

Greens leader Christine Milne reiterated her party’s call for the closure of the offshore facilities, voicing a concern that they were “a black stain on Australia’s character.” Yet the Greens propped up the minority Labor government as it undertook all the measures upheld by the High Court. As well as being committed to shoring up the parliamentary order, the Greens have no fundamental difference with the underlying framework of immigration restrictions and “border protection.”

Labor first imposed mandatory detention of all refugees arriving by boat in 1992, spearheaded by the Keating government’s Immigration Minister Gerry Hand. Since then, every economic downturn has seen the policy made more draconian. One government after another has demonised asylum seekers, making them scapegoats for worsening unemployment and living conditions. The tearing up of their essential legal and democratic rights is setting far-reaching precedents that can and will be used against all working people in the period ahead.



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