Australian High Court partly overturns indefinite detentions

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In an as-yet unexplained partial about-face, Australia's supreme court this week declared unconstitutional the indefinite detention, without trial, of some stateless refugees and other non-citizens.

Without providing any reasons, Chief Justice Stephen Gaegler announced on Wednesday that "at least a majority" of the High Court bench had agreed that a Rohingya asylum seeker from Myanmar, identified in a dehumanising fashion only as NZYQ, had been unlawfully detained since May.

The ruling, strenuously opposed by the Albanese Labor government in the court hearing, could ultimately force the government to release up to 92 detainees, mostly asylum seekers. They have been incarcerated without any due process, essentially by executive decree, on an average of 708 days, many for more than five years.

This is a cruel and barbaric imprisonment regime, based on the denial of fundamental democratic and legal rights, that the highest judges in the land have permitted successive governments, both Labor and Liberal-National, to maintain for decades.

The entire saga is damning. It sheds further light on how far the political and judicial establishment has gone in blatantly violating even the most limited protections of legal rights contained in the country's reactionary 1901 Constitution.

After infamously sanctioning the arbitrary detention of non-citizens—referred to as "aliens" in the Constitution—in previous cases in 1992 and 2004, the judges appear to have partly overturned it.

The ruling only applies to those detainees that the government cannot possibly deport because no other country will take them. As yet, it is not clear how many others of the current total of 340 indefinite detainees could be released. That still depends on government assertions about the likelihood of other countries accepting deportations in the foreseeable future.

Following the ruling, the government released the Rohingya refugee, but on unspecified "strict" visa conditions. It announced the release of some others, while also emphasising, in the words of Acting Prime Minister Richard Marles, that they will be subjected to the "strictest" conditions.

What that means exactly is not yet known. The opposition Liberal-National Coalition is demanding that those released be subjected to continuing detention orders or some form of de facto house arrest, such as a control order or supervision order.

The government has said it will wait for the court's publication of its reasons, which could take months, and seek legal advice before deciding to release others.

Politically, why the government is moving to release some detainees is most likely related to the obvious tarnishing impact of the indefinite detention regime on Australian imperialism's ability to join US-led aggression against Russia and China on the pretext of protecting "human rights."

A document tendered in the court by the government, represented by the solicitor-general, showed that the majority (78) of the 92 detainees being considered for release are officially owed refugee protection, even under Australia's restrictive laws. Most are from US-devastated or war-torn countries such as Afghanistan, Iran, Iraq and Sudan.

At least six have been in detention for over a decade. Four are in their 11th year of detention, and one each in their 12th and 13th year. Another 10 are in their eighth year of detention, and two in their ninth year.

Human Rights for All director Alison Battisson said the government was wrong to claim it needed to wait for the reasons for the court's decision. She said she had written individualised letters to the home affairs and immigration ministers for 20 of her clients explaining why each was now entitled to release. They were "people fleeing

persecution in their countries of origin" who faced recognised harms, including death, sexual violence or inability to subsist if they were returned.

The Labor government fought all the way to the High Court to retain the arbitrary detention power. Through the solicitor-general, it warned the judges that the cohort of 92 featured convicted murderers, sex offenders and people smugglers.

Despite such witch-hunting claims, sensationalised by the corporate media, most detainees have been imprisoned simply because the immigration minister or department has classified them as threats to "national security" or "otherwise not of good character," even if they have been found not guilty of offences or already completed terms of imprisonment.

NZYQ, the refugee from Myanmar, arrived by boat in 2012 and finally received a bridging visa in 2014. The next year he was arrested and charged with a child sexual offence. He pleaded guilty and went to jail. Authorities released him on parole in May 2018 but then immediately detained him because the government had cancelled his visa.

Lawyers for NZYQ revealed that the government had attempted to deport him to six countries. A lawyer representing the government said Home Affairs Minister Clare O'Neil had been "directly" involved and authorised a "no stone unturned" approach to find a country to take NZYQ. However, Solicitor-General Stephen Donaghue conceded it was "impossible to predict with confidence" whether the man would ever be deported.

This week's ruling appears to question previous High Court rulings permitting governments to indefinitely imprison non-citizens without visas, so long as a government stated an intent to remove them from the country as soon as "reasonably practicable."

Australia's constitution has no bill of rights protecting any basic civil liberties, but it contains a separation of powers between the executive and the judiciary. Because of that, "punitive" detention is illegal—except in wartime—unless ordered by a court.

Yet the High Court's 1992 *Chu Kheng Lim* decision rubberstamped the mandatory imprisonment of all asylum seekers introduced by the Keating Labor government, on the basis that it was "reasonably necessary" for visa processing or deportation.

In three decisions, *Al-Kateb*, *Al Khafaji* and *Behrooz*, handed down in 2004, a High Court majority went further, declaring that a government could detain rejected asylum seekers indefinitely—perhaps for life—and irrespective of the intolerable conditions inside the government's immigration detention centres.

The WSWS denounced those rulings and warned that their reactionary logic broadened the scope for governments to impose detention without trial, even to citizens, on the grounds of protecting society from harm.

Even now the NZYQ ruling is limited, although its extent will not be fully clear until the court hands down its reasons. Most likely, the outcome does not affect the continued indefinite detention of asylum seekers on remote Pacific islands—a power that the High Court upheld in 2016.

Only last week, moreover, the High Court declared that the constitutional doctrine of not giving a minister the power to punish anyone had an exception—that the punishment served a "legitimate non-punitive purpose." In one case of the government stripping citizenship from a man by executive order, the court backed the government, saying the "legitimate purpose" was "the protection of the integrity of the naturalisation process."

By means of such pseudo-legal justifications, the judges and successive governments have eviscerated *habeas corpus*, the principle of no imprisonment without trial, which dates back to the Magna Carta of 1215 and became a critical doctrine in the 17th and 18th century struggles against arbitrary incarceration by the absolute monarchies.

Many of these measures have targeted non-citizens but set wider precedents. The logic involved, combined with the efforts to legitimise citizen-stripping powers, poses a broader threat to fundamental democratic rights, particularly as opposition grows to the ruling-class agenda of war and austerity, fuelled by the cost-of-living crisis, the multi-billion-dollar AUKUS military pact and full support for the Israeli genocide in Gaza.