

Australian government defies another High Court ruling on immigration detainees

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10 November 2024

As it has done repeatedly over the past year, the Albanese Labor government last week moved to flout a ruling by the country's supreme court that its punitive measures against immigration detainees are unconstitutional.

The High Court ruled on November 6 that forcing people released from immigration detention to wear electronic monitoring ankle bracelets and live under curfews was unconstitutional, because this amounted to criminal punishment by ministerial edict without judicial process.

In response to this ruling in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*, the Labor government immediately issued new regulations under the Migration Act to allow the immigration minister to quickly reimpose the same police-state restrictions.

The government did not stop there. It also introduced a new bill to parliament to expand the government's powers, allowing it to transport detainees to third countries, reverse protection findings made for refugees, and impose punitive visa conditions on those who remain in Australia.

These developments mark a further escalation in a bipartisan witch hunt, backed by the Liberal-National Coalition, directed against the basic democratic rights of immigrants, refugees and international students. They are being made scapegoats for the intensifying cost-of-living and housing crisis.

Numbers of legal and constitutional experts, as well as the lawyers who represented YBFZ, a 36-year-old stateless refugee, originally from Eritrea, have objected that the new regulations are just as unconstitutional as the ones struck down by the High Court.

The new regulations, rubber stamped by Governor-General Sam Mostyn last Thursday morning, still give the immigration minister, currently Tony Burke, extraordinary arbitrary power.

Burke can impose a range of restrictions, including curfews and ankle monitoring, on released immigration detainees if he is merely "satisfied on the balance of probabilities" that a person "poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence."

This not only amounts to punishment without trial. It is a new form of indefinite detention, potentially for life, based on unproven government accusations of the future risk of a crime.

The High Court majority, by 5 to 2, declared curfews and

ankle bracelets to be punitive. On curfews, the main judgment stated: "For one-third of every day, the person is confined to a specified place... The person is confined because if they leave the notified address, they will commit a criminal offence and be subject to a mandatory minimum sentence of one year in prison."

On wearing bulky and intrusive ankle bracelets, the judges commented: "The fitting of the monitoring device necessarily involves what would otherwise be the commission of the tort of trespass to the person (in the forms of assault and battery)."

The 1901 Australian Constitution has no bill of rights, reflecting its colonial-era character. But it does contain a separation of powers. Courts have for decades stated that criminal punishment can be imposed only by a judicial order, except during wartime. There are a few peacetime exceptions, including detention of non-citizens for deportation purposes.

Among those warning about the unlawfulness of the new regulations were constitutional law experts Anne Twomey and Greg Craven. Craven told the *Australian*: "It's incredibly vulnerable. It's vulnerable the same way the old legislation was."

Nevertheless, Prime Minister Anthony Albanese contemptuously dismissed these concerns when questioned at a press conference last Friday. "Lawyers have a lot of opinions and they had opinions about our legislation before the High Court made the decision that they did," he said.

Albanese once again sought to outdo the Coalition on taking harsh measures against refugees and immigrants. He said "the real question" was "will the Coalition support our legislation?"

For his part, Coalition leader Peter Dutton declared that the government's response was "not enough." Echoing US President-elect Donald Trump, he signalled that the Coalition would seek to further target immigrants at the next federal election which must be called by May.

Alongside the new regulations, the government tabled another Migration Amendment Bill—its fourth in a year—to try to boost its powers. This bill would permit the government to make "third country reception arrangements" by paying foreign governments to detain deported people.

The Albanese government already does this on the remote Pacific island of Nauru, where it reopened the detention camp

last year.

The bill would immunise the government from any liability for harm, injury or death caused by such overseas detention, which has led to numerous deaths, some by suicide, over the past two decades.

The bill would also allow such “third country” arrangements even if the government of that third country might then deport a refugee to their country of origin, where they could face persecution or harm. That violates the international refugee convention.

Moreover, the proposed new powers would permit the government to effectively overturn “protection findings” made by tribunals in relation to refugees.

Refugee Legal executive director David Manne, who acted for the refugee YBFZ, told the media that the new bill was “an offshore warehousing regime” and an “act of consciously calculated cruelty.”

The bill would not only expand Australia’s notorious offshore detention regime, it would provide a pretext to swiftly re-detain the 224 people who have been released as a result of a High Court ruling, known as NZYQ, last November.

Of these ex-detainees, 150 have been subject to electronic monitoring and 130 are under a curfew. Now they, and others who have only just begun to rebuild their lives after years in detention, could be shipped to Nauru or elsewhere, to be locked up once again.

The NZYQ decision partially overturned a shameful two-decade-old line of cases in which the High Court upheld the indefinite detention of refugees and immigrants who were unable to be deported to other countries.

This mandatory detention system was imposed by another Labor government—the Keating government—in 1992. In NZYQ, the court said detention was lawful, but only if there was a prospect of deportation in the foreseeable future.

Now, again, the Albanese government has resorted to patently unconstitutional measures. Late last year, Labor joined the Coalition in ramming through both houses of parliament, in just 12 hours, the laws to impose ankle bracelets, curfews and other draconian restrictions on detainees released by the NZYQ ruling. Another bill was likewise passed to re-imprison them via “preventative detention” provisions.

A third tranche of laws pre-empting another High Court challenge was introduced, but ultimately not needed because the court ruled against an Iranian man who refused to cooperate with his deportation.

Despite widespread opposition throughout working-class immigrant communities, the Albanese government had attempted to rush through parliament a far-reaching immigration deportation bill. It included the power to repeatedly imprison people for up to five years for refusing to sign documents facilitating their deportation and that of their children.

That would clear the way for the government to detain and

forcibly deport up to 10,000 people currently living in the community on temporary visas. The bill would also give the government the power to impose blanket travel bans, barring entry visas to people from designated “removal concern countries” such as Iran, China, Russia and South Sudan.

These moves have been accompanied by a foul inquisition by the Labor government, the Coalition and the corporate media against formerly detained refugees and immigrants, effectively depicting them all as murderers and rapists.

Vulnerable members of society, brutalised by years in detention, often after fleeing wars or persecution, have been vilified and victimised in order to justify authoritarian measures that can set precedents for wider use in the working class as social conditions continue to deteriorate.

More broadly, “foreigners,” including international students, are being blamed increasingly for the worsening conditions produced by capitalism’s global economic crisis and the channelling of billions of dollars into military spending amid the US-backed Gaza genocide and the plunge into wider war against Russia and China.

Capitalist governments internationally are in a vicious drive to divide working people, domestically and globally as this social devastation and barbarism deepen.

Since the Keating government, successive Australian governments, both Labor and Liberal-National, have provided models for other Western governments to shut their doors, block boats, detain asylum seekers and either return them or transport them to grim locations.

In the US, while Trump has vowed to launch the biggest mass deportations ever seen, the Biden administration has already paved the way by intensifying its measures to prevent refugees entering the country. The UK Labour government of Keir Starmer has escalated a similar attack. In June, on World Refugee Day, German state and federal governments discussed measures to increase deportations.



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