

Australian High Court rejects Labor government's demand for immunity for illegal detentions

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Australia's supreme court last week unanimously dismissed an unprecedented bid by Prime Minister Anthony Albanese's Labor government to protect itself from liability for the unlawful indefinite incarceration of hundreds of people, including asylum seekers, in immigration prisons.

The immediate issue in the High Court case, *Abdel-Hady v Commonwealth of Australia*, was the government's attempt to protect itself from being sued for false imprisonment over the wrongful detention of at least 342 non-citizens. The government had been finally forced to release them in late 2023 after the High Court ruled their endless detention—sometimes for many years—to be an unconstitutional punishment.

As a result of the *Abdel-Hady* ruling the federal government could be forced to pay damages, potentially totalling millions of dollars, for the unconstitutional deprivation of liberty and the accompanying impact on the detainees' lives and physical and mental health. The detainees, some of whom had been incarcerated for years, included traumatised rejected asylum seekers as well as previously convicted criminal offenders who had all completed any prison sentences imposed on them.

But the logic of the argument advanced by the government, which the judges described as a “new novel defence,” went far further. It essentially sought to erect a shield of immunity to prevent governments being sued for any illegal action.

In its submissions to the court, the government strenuously insisted that when the non-citizens were kept detained, it was relying on a 2004 High Court ruling known as *Al-Kateb*, which allowed the indefinite detention of those who could not be deported to another country.

After nearly two decades of brutal indefinite

imprisonment, this ruling was belatedly partly overturned by the 2023 High Court decision, known as *NZYQ*, which ruled that continued indefinite detention is unlawful once it becomes impossible to deport a non-citizen.

In essence, the Labor government's lawyers argued that if it acted on the basis of a law that had previously been found to be valid, that would be a legal defence to being sued for damages. Such an extraordinary defence would essentially transform the government's obligation to obey the law into an immunity where the government asserted, wrongly, it was acting within its power.

In a joint judgment, Chief Justice Stephen Gageler and Justices Jacqueline Gleeson and Robert Beech-Jones said they could not accept an immunity where detention was found to have transgressed legal limits. That would overturn the responsibility of the executive government to “ascertain and comply with the law.” That “would amount to an inversion, if not a perversion, of constitutional principle.”

Justice Jayne Jagot pointed to the unprecedented character of the government's case. “[F]or a defendant to have acted in good faith in unlawfully detaining another person has never provided a defence of justification for the commission of false imprisonment in the common law of Australia.”

Several judges said the government's logic extended well beyond liability for false imprisonment. Justice Michelle Gordon said there was “a further, and fundamental, issue with the Commonwealth's proposed defence—its implications for the rule of law.” That “sought to turn a duty to obey the law into an immunity from liability for breaching the law.”

She said false imprisonment, by interfering with a person's liberty, constituted “prima facie a grave infringement of the most elementary and important of all

common law rights.” For centuries, the right to sue for false imprisonment had played a fundamental role, alongside the writ of habeas corpus, “in protecting the basic liberties of individuals against excesses of state power.”

Justice Gordon concluded: “In reality, the proposed defence is akin to a ‘foot in the door’ to a far more wide-ranging defence, which would significantly undermine the ability of a person to obtain redress where the Executive exceeds its authority. That door should remain closed.”

The Albanese government’s assault on this basic legal and democratic right also contrasted with previous precedents, such as that set in 2017, when the Liberal-National Coalition government paid out \$70 million plus costs to 1,905 asylum seekers and detainees who had suffered physical and mental injuries in the offshore detention camp on Papua New Guinea’s Manus Island.

The Labor government has said it is studying the Abdel-Hady decision but clearly remains defiant. It is reportedly exploring means, with support readily offered by the Coalition, to try to effectively extinguish the ruling via legislation or impose a capped compensation scheme.

The Albanese government has a record of repeatedly seeking to nullify the NZYQ and other High Court rulings that struck down its moves to replace unlawful indefinite detention with other punitive measures.

Most recently, in March the High Court declared unconstitutional the government’s bid to keep ex-detainees shackled in ankle bracelet monitors and subject to curfews, after the court had already ruled the entire regime unlawful in 2024.

For the second time, the judges ruled that the shackling and curfew regime—even if slightly modified by ministerial regulations issued by Home Affairs Minister Tony Burke to try to evade the 2024 verdict—violated the separation of powers in the 1901 Australian Constitution, which reserves to the courts the power to inflict criminal punishment.

Burke immediately declared that the government would dodge the ruling by accelerating its dumping of the refugees and other non-citizens on the tiny remote Pacific island of Nauru, whose government last year agreed to place the ex-detainees on 30-year visas in return for an Australian government upfront payment exceeding \$400 million, plus \$70 million a year.

In 2023, the Labor government reopened the refugee detention facilities in Nauru, originally established by the Howard Coalition government in 2001 as part of a “Pacific Solution”—a world first in imprisoning asylum

seekers on remote islands.

Labor’s other measures included “preventative detention” laws that aim to keep people imprisoned even after they had served sentences for crimes for which they had been convicted.

Albanese’s government is setting precedents that match those being pursued by other capitalist governments internationally, spearheaded by the Trump administration’s fascistic Immigration and Customs Enforcement (ICE) raids, imprisonments and deportations.

Despite popular opposition, Labor and the Coalition further joined hands last year to pass three anti-immigrant bills. One was a potential mass deportation bill. Immigration officials admitted that more than 80,000 people on bridging or temporary visas could be expelled from the country under its provisions.

The second bill ordered migrants being expelled from the country to “cooperate” with their prompt removal, or they could be imprisoned repeatedly for up to five years. The third bill gave the government powers to confiscate mobile phones from detainees, to prevent them from communicating with the outside world.

These moves have been accompanied by bipartisan and media scaremongering, branding detainees like Abdel-Hady as “serious criminals,” murderers and rapists. In reality, many are refugees, and all have completed their prison sentences. If they were citizens, they would not have been incarcerated.

Increasingly, amid a spiralling cost-of-living and housing crisis, Labor has also scapegoated refugees, together with other immigrants and international students, seeking to outflank the Coalition and the far-right anti-immigrant One Nation by slashing intake numbers.

Internationally, the corporate media and political establishments are seeking to whip up anti-immigrant sentiment, nationalism and patriotism to divide the working class globally. They are seeking to divert the growing discontent with deteriorating living and working conditions away from the real source—the staggering accumulation of wealth by the billionaires and the underlying capitalist profit system itself.



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