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Australia's High Court Backs Indefinite Offshore Detention

Guantanamo Bay-style legal black holes

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The six-to-one verdict handed down by Australia's High Court last week,upholding the Australian government's indefinite detention of asylum seekers on remote Pacific islands, has far-reaching legal and political implications, not just for refugees but for the working class as a whole.

The majority dismissively rejected a challenge to the constitutional validity of Australia's "offshore" detention regime on Nauru. The case was brought by a Bangladeshi woman—identified only as M68—who was transferred from Nauru to Australia to give birth to a child in 2014.

All six majority judges based their judgments on legislation pushed through parliament last June by the current Liberal-National government, with Labor's support, to retrospectively legalise the detention regimes on Nauru and Papua New Guinea's Manus Island.

Before the amendment to the Migration Act, no legislation authorised the detention. Instead, when the previous Labor government reopened the Nauru and Manus camps in 2012 it simply asserted that it had "executive power" under the Australian Constitution to make such arrangements with Nauru and Papua New Guinea or any other designated "regional processing country."

None of the judges raised any objection to the retrospective amendment, backdated to 2012, even though it was clearly aimed at shutting down M68's legal challenge, which was already underway.

Moreover, the sweeping amendment aimed to strip all offshore detainees of any right to challenge their imprisonment. The new section 198AHA of the Act gave the government open-ended powers "to take, or cause to be taken, any action in relation to … regional processing."

As an immediate result of the ruling, 267 men, women and children, in similar situations to the young Bangladeshi mother—suffering serious trauma and health problems or having recently given birth to babies—face being transported back to Nauru.

Throughout their judgments, the judges referred to the refugees only as UMAs (Unauthorised Maritime Arrivals)—the official terminology designed to dehumanise them and deny their fundamental right, recognised by international law, to flee persecution and seek asylum.

The ruling sets a new global benchmark for the incarceration of innocent and desperate people in what amounts to Guantanamo Bay-style legal black holes—"offshore" facilities outside the jurisdiction of the courts.

In terms of domestic law, the majority judgments sidestepped previous, limited, constitutional restrictions on arbitrary executive detention. They effectively extended the powers of the state to detain refugees, and potentially other prisoners, without trial, in camps that are directly under Australia's control, but run by other governments on Canberra's behalf.

Despite a damning dissent by one judge, the other six members of the court relied on two legal fictions. First, that Nauru, a tiny impoverished former Australian colony of about 10,000 inhabitants, is the sovereign power detaining the refugees, not the Australian government, which orchestrates, finances and polices the detention.

Australian participation in the detention was "indisputable," according to the joint opinion of Chief Justice Robert French and justices Susan Kiefel and Geoffrey Nettle. Justice Stephen Gageler conceded that Australia "procured" the detention of asylum seekers on Nauru through its contractors, which exercised physical control over them. Justice Virginia Bell held that Australia "exercised effective control."

Despite these undeniable facts, the majority judges concluded, employing legal sophistry, that as soon as the Bangladeshi woman was forcibly transported by the Australian government to Nauru, she was "thereafter detained in custody under the laws of Nauru, administered by the Executive government of Nauru."

Justice Michelle Gordon's sole dissenting judgment demolished this claim in detail. She listed 12 facts demonstrating that, in reality, the Australian government "detained the plaintiff on Nauru." She cited the presence in the camp of uniformed Border Force officers, Canberra's supply of "security infrastructure," such as perimeter fencing and guard posts, and the provision of "garrison services" by an Australian government contractor, Transfield. Under its agreement with Nauru, the Australian government also retained the right to terminate the arrangement and "step in" and take over the Nauru Regional Processing Centre (RPC).

Gordon concluded:

> "The acts and conduct of the Commonwealth [Australia] just set out demonstrate that her detention in the Nauru RPC was 'facilitated, organised, caused, imposed [or] procured' by the Commonwealth. The Commonwealth asserted the right by its servants (or Transfield as its agent) to apply force to persons detained in the Nauru RPC for the purpose of confining those persons within the bounds of the place identified as the place of detention, the Nauru RPC. To that end, the Commonwealth asserted the right by its servants or agents to assault detainees and physically restrain them."

The second legal fiction was that detention on Nauru is simply for the purposes of refugee visa processing, and therefore not "punitive." That fiction was critical because "punishment" can be imposed constitutionally only by a judicial trial.

In reality, the previous Labor government of Julia Gillard reopened the Nauru and Manus camps in 2012, for the explicit purpose of punishing asylum seekers in order to deter others

from trying to reach Australia. The Labor government refused to put any time limit on detention. It insisted on a "no advantage test"—namely, that refugees would be detained for the same length of time that other asylum seekers were forced to wait to be processed in refugee camps in Africa or the Middle East. That could mean detention for up to 20 years.

This intent was embodied in the Memorandum of Understanding signed with Nauru's government. It specified the need for "a disincentive against Irregular Migration" and to ensure that "no benefit is gained through circumventing regular migration arrangements."

Yet, in the words of Justice Patrick Keane, another member of the majority, this deterrence was just an "intended consequence," not the "immediate purpose" of the transportation of refugees to Nauru, and therefore not "punitive."

By means of the two legal fictions, the judges evaded even the minimal limits on refugee detention set out in the court's 1992 *Chu Kheng Lim v Minister for Immigration* decision, which rubberstamped the mandatory imprisonment of all asylum seekers introduced by the Keating Labor government. In the *Lim*case*,* the court permitted the indefinite detention without trial of "aliens" (the Australian Constitution's term for non-citizens), on the reactionary basis that it was "reasonably necessary" for visa processing or deportation.

Australia's constitution has no bill of rights, but it contains a separation of powers between the executive, parliament and the judiciary. Because of that, the *Lim* ruling said "punitive" detention—beyond that necessary for processing or removal—would be illegal, unless ordered by a court.

Last week, however, the majority judges said these constraints did not apply to detention on Nauru because the Australian government no longer detained the refugees once they had been transported there. According to French, Kiefel and Nettle: " *Lim* has nothing to say about the validity of actions of the Commonwealth and its officers in participating in the detention of an alien by another State."

Only Justice Gordon objected, pointing out that the contract with Nauru meant extending the "aliens" power of the federal government to permit "offshore" detention that would be unlawful within Australia. This, she said, presented "a fundamental question about the power of the Parliament to provide for detention by the Commonwealth outside Australia."

None of the judges, including Gordon, called into question the underlying framework of repelling or incarcerating refugees. All accepted as "undoubted" the Australian government's legal power to forcibly remove the refugees to Nauru.

Four members of the court went further. They indicated that offshore detention could be constitutionally valid under the vague "executive power" of the government, even without the specific retrospective legislation adopted last June. But because of that amendment, the current government's continued assertion that it possessed such executive power, over and above statutory provisions, was now "hypothetical" or not "necessary" to be decided, they stated.

Only Gageler, a member of the majority, joined Gordon in rejecting the government's claim of non-statutory executive power. After a lengthy discourse on the importance of *habeas corpus* (no detention without judicial process), however, Gageler effectively backed the use of the retrospective amendment to overturn the principle. Despite the indefinite character of

the detention, he asserted—without explanation—that its duration was “capable of objective determination by a court at any time and from time to time.”

By means of such pseudo-legal justifications, the judges further eviscerated*habeas corpus*, which dates back to the Magna Carta of 1215 and became a critical principle in the 17th and 18th century struggles against arbitrary imprisonment by the absolute monarchies.

Confronted by widespread public revulsion to the ruling, Prime Minister Malcolm Turnbull’s government might ultimately decide, for purely electoral reasons, to allow some of the 267 refugees to remain in Australia. But more than 2,000 detainees will remain on Nauru and Papua New Guinea’s Manus Island, and Australia’s entire anti-refugee regime will stay in place, sanctioned by the High Court.

Successive Australian governments, Labor and Liberal-National alike, have made asylum seekers and immigrants scapegoats for the worsening social conditions being imposed on the working class. Some of the world’s most vulnerable people, many fleeing wars unleashed by the US and its allies, are being subjected to ever-more cruel and lawless imprisonment, setting precedents for wider use, not only in Australia but around the world, against growing opposition to war, austerity and repression.

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