The Politics of Indefinite Detention in Australia

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The High Court of Australia is not known for its zealotry in protecting human rights, and certainly not when considering the persuasive pull of international law and conventions. The Australian Parliament is usually given a generous hand in making policies that tend to outrage such conventions, a freedom made that much easier by an absence of any bill of rights.

A grim example of this was the 2004 High Court decision of *Al-Kateb v Godwin*, which gave the Commonwealth full assurance that policies on indefinitely detaining unwanted, designated "unlawful" arrivals were entirely within its power. The case concerned the application of various provisions of the *Migration Act 1958* (Cth) requiring an officer of the Commonwealth to detain those reasonably suspected to be unlawful citizens in the migration zone and held in immigration detention till their deportation or grant of a visa.

In such provisions, a pincer movement against such "unlawful citizens" had been enshrined with stunning cynicism. Once detained and having their status determined, such individuals might be found to be refugees. Accordingly, they might receive a visa, though not if they were those undesirables marooned in the offshore concentration camps of Nauru and Manus Island. Since 2013, Australian governments have proclaimed that those undocumented souls seeking refuge in Australia by boat would never be given the chance to settle in the country. Even in the event of being deemed refugees, they might still be refused a visa on character grounds or face the prospect of deportation to a third country, the latter being something of a favourite of Australian policy makers for two decades. (A gaggle of European states have also been impressed by this formula.)

What, then, of stateless citizens found to be refugees and without fault? Or those who would not be accepted by a third country? Or those who, having been convicted of an offence and served time for it, could be placed in a vicious limbo of de facto carceral administration for the rest of their natural lives, undesired by any country, and not allowed out in the

Australian community for failing to meet visa requirements and deemed a threat to society?

To answer these questions, the facts of Al-Kateb are worth recounting. **Ahmed Ali Al-Kateb** was a stateless Palestinian born in Kuwait in 1976, having sought sanctuary in Australia in December 2000 without a passport or visa. He was duly detained under the *Migration Act*. Efforts to gain a protection visa proved futile. The Refugee Review Tribunal and the Federal Court agreed with the decision makers. With Australia having ceased to be an option, Al-Kateb informed the Department of Immigration and Multicultural Affairs that he wished to be transferred to Kuwait or Gaza. Those efforts also came to naught.

Al-Kateb's cupboard of legal options started looking increasingly threadbare. With little else possible, he resorted to that immemorial principle of Britannic common law that he be released on *habeas corpus* grounds. After all, the Australian authorities surely had no reason to continue detaining him. He had committed no crime, and there was "no real likelihood or prospect" of Al-Kateb's removal outside the country in the reasonably foreseeable future, a point acknowledged by the Federal Court.

In a granite hard decision, the High Court rejected the claim. For one thing, the discretion was *mandatory* under the legislation, not discretionary. Nor was the exercise of such a detention power punitive, thereby violating the separation of powers. In Chief Justice Gleeson's words:

> "A person in the position of the appellant might be young or old, dangerous or harmless, likely or unlikely to abscond, recently in detention or someone who had been there for years, healthy or unhealthy, badly affected by incarceration or relatively unaffected. The considerations that might bear upon the reasonableness of a discretionary decision to detain such a person do not operate."

Justice McHugh also reiterated the view that the *Migration Act* required "the indefinite detention of Mr Al-Kateb, notwithstanding that it is unlikely that any country in the foreseeable future will give him entry to that country. The words of the three sections [189, 196, 198] are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights." With Australia lacking any express constitutional protection of *habeas corpus*, Al-Kateb was doomed.

Efforts to challenge this ghastly precedent over the years faltered. In the meantime, periods of lengthy immigration detention ballooned. Currently, the average period of time individuals held in immigration detention by Australian authorities is 708 days. In May 2022, the detention period reached a dubious peak of 736 days, with 138 having spent time in detention for over five years.

All this has changed. On November 8, the High Court handed down a stunning decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*, thereby archiving *Al-Kateb* as a dark, judicial episode.

NZYQ was a stateless Rohingya applicant who had fled Myanmar and journeyed to Australia by boat in September 2012. He received a bridging visa in September 2014. In January 2015, he was arrested and charged with a child sexual offence, his visa cancelled, and prison term imposed. Despite receiving parole in May 2018, he was immediately thrown into immigration detention. As a person regarded as stateless by Myanmar and facing a genuine risk of persecution on his return, NZYQ also faced the prospect of perennial detention for not

having a visa. On character grounds, Australian authorities could continue to refuse granting it. It also seems that no third country option arose as a serious possibility, though this will only be known with certainty once the judgment is published.

Much to the surprise of those present, NZYQ's legal team received the news after two days of oral argument that it was unconstitutional to detain a person where there was no real prospect of being removed from Australia. As a consequence, the court held that provisions under the *Migration Act* obliging the authorities to detain "unlawful non-citizens" for such inordinate periods should be read as beyond the immigration power of the Commonwealth. NZYQ's administrative detention, being deemed unlawful, necessitated his release.

The decision immediately affects 92 people in immigration detention. But as the Australian Human Rights Commission reminds us, the perverse cruelties of Australia's detention system has, over the last two decades, affected "the lives of tens of thousands of people, most of whom came to this country seeking protection as refugees."

Panicked, the Albanese government has tried dousing the fires of concern, though some of these have been lit by a few parliamentarians prone to pyromania. Public safety, it has been suggested, might be compromised by these reprobates newly Instead of acknowledging the human rights dimension of the case, the **Home Secretary Claire O'Neil** came close to slighting the High Court. "If I had any legal power to do it, I would keep every one of those people in detention." This was irrespective of the fact that they had served time for any offences they had committed.

A government spokesperson was also quick to point out in the immediate aftermath of the High Court decision that, "Individuals released into the community from immigration detention may be subject to certain visa conditions." But instead of waiting for the decision's full publication, the government has cobbled a mash of legislative measures in a paroxysm of populism.

On November 16, **Immigration Minister Andrew Giles** introduced laws applicable to 83 released detainees, among them three murderers and a number of unspecified sex offenders. "The Australian community reasonably expects that all non-citizens in Australia will obey Australian laws." Some would, for instance, be electronically tagged. Curfews could also be imposed. Attached visa conditions could also include notification requirements for changes of address, any illegal activities or change of address."These measures," Giles stated, "are consistent with the legitimate objective of community safety and the rights and interests of the public." How these objectives square with such savage punishments as five-year prison terms in violation is hard to see.

The opposition leader, **Peter Dutton**, was left unsatisfied by the proposals. As a proud, demagogic hater of civil liberties, he feels that prolonged punishment is the preferred formula. How this will be done constitutionally is not something that bothers his minute, vengeful imagination. But he proved enough of a fantasist to link the release of the detainees to the threat of rising antisemitism in Australia, a cavalier effort verging on the imbecilic.

In responding to Dutton's conflating resolution, Prime Minister Albanese thundered that linking "antisemitism with the decision of the high court, is beyond contempt." But the entire chapter had been beyond contempt. Instead of respecting the central tenets of a fair judicial system, the major parties have heaped scorn upon it. It affirms the penological

fixation Australian politicians continue to suffer from when considering the plight of refugees and asylum seekers who dare arrive via unconventional channels. They are the pseudo-criminals who pay people traffickers, the indecent queue jumpers, the unprincipled, cashed up opportunists.

Given that Australia already has a suppressive regime of post-release control measures that effectively mock and caricature sentences served by prolonging state surveillance and control of society's "most dangerous", another set of legal measures seeking to achieve precisely the same purpose serves to deaden liberty that bit more.

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