

# Australian High Court strikes down ASIO-dictated detention of refugees

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The High Court yesterday ruled that government regulations that allow the Australian Security Intelligence Organisation (ASIO) to deny protection visas for refugees on the basis of adverse security assessments, thereby ensuring their indefinite detention, was illegal.

Every aspect of the Labor government's reactionary "border protection" regime is marked by a contempt for basic precepts of international and human rights law. The role of ASIO in keeping officially recognised refugees in detention centres for indefinite periods of time, on the basis of entirely secret and arbitrary "security" assessments, is just one of the mechanisms through which the government has sought to deny the basic right of people to claim asylum in Australia.

Yesterday's narrowly framed High Court ruling did not challenge any aspect of this framework and in fact explicitly endorsed several antidemocratic provisions of the security assessment process. Moreover, despite the unlawful character of the existing setup for assessing refugee visa approvals affected by adverse ASIO investigations, none of the more than 50 refugees currently held in detention centres will be released. The government and the Liberal-National opposition have made clear that they will quickly pass whatever legislation may be required to circumvent the High Court decision.

The High Court challenge to ASIO's role in detaining refugees was brought by refugee lawyer David Manne, representing a Tamil man identified only as "M47" who has spent nearly three years in a detention centre in Broadmeadows, Melbourne.

M47 was one of 78 Sri Lankan refugees who arrived in Australia on board the *Oceanic Viking* in October 2009. The vessel was transported back to Indonesia at the request of Australian authorities, who were seeking to deny those on board any chance to claim asylum in Australia. The Sri

Lankan refugees refused to disembark in Indonesia, triggering a four-week standoff that ended when Canberra agreed to quickly resettle them if they were found to be official refugees. Many of those on board were given refuge in Canada, the US, Norway, and New Zealand.

M47 was among a small contingent allowed into Australia. Despite being found to be a genuine refugee, however, ASIO issued an adverse security assessment in December 2009, confirmed by another assessment issued earlier this year. Such a finding plunges refugees into a legal and administrative black hole. Intelligence agents can take as long as they like to gather material that is then kept secret from the refugee under investigation, and from his or her lawyers. ASIO undoubtedly relies on purported evidence submitted by the government, military and security apparatus of the country from which the person being investigated has fled to avoid persecution. In M47's case, this involves the Sri Lankan administration of President Mahinda Rajapakse, notorious for its violent repression and accusations of "terrorism" directed against any of its opponents who are also part of the country's Tamil minority.

ASIO applies an effectively limitless definition of "security" when making threat assessments—criteria include espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, and more broadly, "the carrying out of Australia's responsibilities to any foreign country" in relation to any of these matters. These grounds for exclusion go far beyond the limited avenues for denying refugees visas under the Refugee Convention, such as war crimes and crimes against humanity.

Once ASIO has issued an adverse assessment, refugees have no avenue to challenge the decision, access the supposed evidence upon which the decision was made, or even to know of the criteria used to determine the "security

risk". Refused a refugee visa, they are unable to be sent back to their home country due to the Refugee Convention's prohibition of *refoulement* and also cannot be sent to a third country, because no other government will accept someone classified as a security risk in Australia. The refugees therefore remain in detention indefinitely. Many people have spent years in Australian facilities, with devastating effects on their mental health and overall wellbeing.

The High Court has now ruled that the ASIO security assessment procedure is inconsistent with the provisions of the Migration Act. Chief Justice Robert French stated that ASIO's role "negates important elements of the statutory scheme relating to decisions concerning protection visas". He explained that the ASIO process negates the Migration Act's provision for review and appeal.

French also concluded that the ASIO security assessment procedure "has the result that the effective decision-making power with respect to the disentitling condition which reposes in the Minister [of Immigration] ... is shifted ... into the hands of ASIO".

In other words, the court simply ruled that the power to deny visas to refugees must remain in the hands of the government and not delegated to the intelligence agencies. The immigration minister enjoys sweeping authority to deny visas on a so-called character test that allows for the exclusion of anyone who could allegedly "vilify a segment of the Australian community" or is "liable to become involved in activities that are disruptive to that community".

Chief Justice French declared that M47's visa application had not been validly considered and must be reviewed—but he added that "while that application is pending, the plaintiff can lawfully be detained pursuant to s 196 of the Migration Act".

The High Court rejected the argument made by M47's lawyers that the ASIO investigative process represented a denial of procedural fairness. Endorsing the secretive methods of the intelligence agency, the justices all insisted that the mere fact that ASIO interviewed the refugee and stated that they were investigating his alleged membership of the Liberation Tigers of Tamil Eelam (LTTE) meant that procedural fairness had been upheld.

The most significant aspect of the High Court ruling was its refusal to re-examine earlier rulings of the court permitting the government to indefinitely detain asylum seekers. Chief Justice Robert French dismissed this issue,

declaring: "It is not necessary, for present purposes, to determine whether his detention can lawfully be continued if his application for a protection visa is refused and there is no other country to which he can be removed."

In 2004, the High Court issued a series of landmark antidemocratic rulings authorising indefinite detention under the "aliens" power of the Australian constitution. (See "Australia's highest court sanctions indefinite detention") These rulings remain in full effect after yesterday's ruling.

The Greens nevertheless hailed the High Court's role. The party's refugee and immigration spokesperson Sarah Hanson-Young yesterday declared that the judgement marked "the first step in closing a long running legal black hole". She added that the Greens would next week put legislation before parliament to "fix the legal loophole that today's High Court decision has condemned".

This is nothing but parliamentary manoeuvring aimed at giving the Greens-backed minority government some political cover while it works out an agreement with the opposition on its own legislation to get around the High Court ruling.

Moreover, consistent with the Greens' nationalist agreement with the basic framework of so-called border protection, its bill next week will be merely aimed at making the process of regulating and restricting the entry of refugees into Australia more efficient and legally efficacious. The Greens' draft legislation will propose a review process for those denied visas by ASIO investigations, to "allow people to see the reasons for their adverse assessment and give them the chance to challenge their detention". Previously the Greens have suggested that a "special advocate" be provided with security clearances to review the evidence behind the refugees' assessments, as a means of ensuring that the refugees themselves remain in the dark.

The entire political establishment in Australia is of one mind when it comes to denying refugees and immigrants what ought to be a basic democratic right to live and work anywhere on the planet, with full and equal rights.



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