

Indefinite detention of asylum seekers is lawful. Yes, that's what the High Court has determined

The court's ruling on asylum seekers appears to champion confusion, contradiction and inaction, while giving the green light to indefinite detention.



(IMAGE: GORKIE/PRIVATE MEDIA)

Kafka would be so pleased. That our courts of law have become completely at ease with identifying every refugee and asylum seeker by letters and numbers rather than their names, that's delightful enough. But the High Court, in its latest ruling in favour of the Morrison government's policy of eternal uncertainty for anyone who dares float towards our sacred shore, has now put the icing on the post-modern cake.

Our protagonist is AJL20 (if you missed my first point, the earlier authorities cited by the court in this decision include M76/2013, M96A/2016, ASP15/2016, WAIS and plain M).

AJL20 arrived here in 2005 from Syria on a child visa. In 2014 the government cancelled his visa on character grounds because of a criminal conviction. He became, in the lexicon of the *Migration Act*, an "unlawful non-citizen" and went into immigration detention, remaining there until late 2020 when a Federal Court judge ordered his release. The government appealed to the High Court, which last week ruled 4-3 in its favour.

The particular problem was that, for 14 months in 2019-20, AJL20's detention had been both purposeless and potentially limitless. Between his original detention in 2014 and July 2019, AJL20's applications for protection visas had been winding through the byzantine processes of the Immigration Department before the minister finally refused to grant him one. That was the end of his hope of staying in Australia — leaving only deportation back to Syria.

He wasn't deported, however, and the department did nothing about deporting him. Its reasoning was that to do so would be to send him to a place where he would quite likely die, Syria being what it is. Australia has obligations of *non-refoulement* (to not send people back to a place of danger) under the Refugee Convention.

However, the convention is not part of Australian law and there is nothing legally stopping us from ignoring it. More importantly, the *Migration Act* was amended by this government to explicitly provide that, for the purposes of its mandatory stipulation, unlawful non-citizens must be removed from Australia "as soon as reasonably practicable", our *non-refoulement* obligations are "irrelevant".

AJL20, unsurprisingly, had never asked to be sent back to Syria. The government, caught between the mandate that he not be allowed to stay here and its preference to not send him there, simply left him to rot in immigration detention.

In the Federal Court, Justice Mordecai Bromberg had ruled that AJL20's detention since July 2019 was unlawful. The basic legal principle, protected by the constitution, is that detaining a person against their will is something only the courts can do as punishment for a crime. The principle has a few exceptions, such as being held in remand pending trial, scheduling a person for mental health reasons, or (relevantly) detaining an unlawful non-citizen who is physically in Australia.

Detention of a non-citizen, the courts have said, is not punitive, provided it is only for the purposes which the *Migration Act* serves: either pending the possible granting of a visa, or pending deportation. The government has no power to detain non-citizens otherwise; if it did, that would be necessarily punitive and therefore constitutionally impermissible.

Bromberg said that, because the government had effectively given up trying to deport AJL20, his detention had become indefinite and was therefore illegal.

Four High Court judges disagreed. Their decision says that although the government wasn't doing anything about AJL20's situation, it was supposed to be removing him "as soon as practicable" because that's what the *Migration Act* requires it to do. Therefore it was in breach of the act, and the only legal remedy for that is to force it to do its job.

That is — and here's where it gets literally Kafkaesque — AJL20's detention could continue, lawfully, forever, despite the government's failure to deport him, as it is required, to a place where he will be killed, and the only thing the law can do to help him is to force the government to deport him to Syria. If he asks.

The other three judges said that that's a bit nuts. The detention of AJL20 stopped being lawful the moment the government stopped doing anything about bringing it to an end. It could achieve that in two ways: by deporting him, or by giving him a visa to stay. The one thing it couldn't do is what it did, which is nothing at all.

The minority judges also gave a nod to Kafka in their acknowledgment of the legal consequences of their (and Bromberg's) interpretation of the law. Because the detention was illegal, AJL20 was entitled to *habeas corpus* and an order for his immediate release, as Bromberg had ordered. However, unless he was then granted a visa, or voluntarily left the country, the *Migration Act* then mandated that he be immediately taken back into detention (as an unlawful non-citizen, which he still was and is).

What does this mean? For AJL20, and for every other poor sucker caught in the surrealist maze of our immigration system, it means going back into detention which the High Court has now narrowly confirmed can continue literally forever without ever constituting a form of punishment.

Confirmed: indefinite detention of asylum seekers is lawful. All hope to the contrary, under the current High Court at least, is gone.

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