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HIGH COURT OF AUSTRALIA RULES INDEFINITE DETENTION TO BE UNCONSTITUTIONAL – WHY EUROPE SHOULD PAY ATTENTION

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On 8 November 2023, the High Court of Australia handed down a landmark decision in the case of *NZYQ*, declaring the long-held policy of indefinite detention for genuine asylum seekers or stateless individuals with no prospects of resettlement to be constitutionally invalid. As a result, over 140 individuals held in immigration detention were ordered by the relevant Minister to be released. The decision overturned a 20-year legal precedent, coming just before the UK Supreme Court ruling invalidating the Rwanda deal.

Although the High Court decision is specific to the Australian legal setting, many politicians in Europe have cited Australia's deterrent-based policy as *the* model for an orderly refugee intake process. As such, this post will consider the High Court decision in the context of the ongoing European debate regarding the legality of policies and proposals aimed at dealing with the large numbers of asylum seekers arriving in the EU.

Background to the decision

Australia's immigration policies have long been criticised for violating Australia's international human rights obligations. The current legislative regime, which dates to 1992, requires anyone without a valid visa to be

held in immigration detention. Explicit pre-1992 restrictions on the length of detention (273 days) were replaced by a 'reasonableness' test. From 2001, mandatory detention was coupled with offshore processing. The so-called 'Pacific Solution' mandated that asylum seekers arriving by boat be sent offshore to various pacific islands to have their claims processed. The policy was dismantled in 2008, and then was re-established in 2011/12, along with the policy of turning boats back to their point of origin.

The High Court has generally upheld the legality of Australia's immigration policies, with some important exceptions. When NZYQ made his application to the High Court, the basis for the legality of Australia's immigration policies could be found in the 2004 precedent of *Al-Kateb v Godwin*. *Al-Kateb* held that so long as the purpose underlying the detention of an individual is linked to deportation or removal, whether either of these purposes can be given effect to at a particular moment in time is immaterial to determining the constitutional validity of the legislation.

NZYQ v Minister for Immigration, Citizenship and Home Affairs and Anor

Facts

The case concerned a Rohingya man, who arrived in Australia by boat in 2012. Although assessed as having a well-founded fear of persecution in Myanmar, under the Australian Government's policy of refusing the granting of permanent settlement pathways for asylum seekers who arrive by boat, the individual was granted a temporary visa. After being convicted of child sex offences in 2015, his temporary visa was cancelled by the Minister in accordance with their powers under the Act.

As a non-citizen, non-visa holder, who could not be returned to Myanmar due to Australia's non-refoulement obligations, and who would be unlikely to be granted asylum in an appropriate third country due to his conviction, the Minister determined to hold the individual in immigration detention. Under sections 189 and 196 of the Migration Act, an individual must be held in detention until they are removed, deported or granted a visa. There are no legislated time limits.

The Plaintiff argued before the Court that the relevant sections of the Act must be read considering the possibility of removal, which was impossible

in this instance. He also argued that involuntary detention is a judicial and not an executive function (as a form of punishment), and therefore the sections of the Act facilitating said detention are constitutionally invalid. The Government opposed the application, arguing that the precedent of *Al-Kateb* should continue to be followed.

Decision of the Court

Having come to a majority position on the position of the Plaintiff at the hearing on 8 November 2023, the Court delivered an immediate decision, ordering NZYQ be released from detention. On 29 November 2023, the Court, in unanimity, delivered its reasons for its 8 November decision. It approached the questions before it in three steps: first, whether the precedent of *Al-Kateb* should be reconsidered; second, the basis upon which *Al-Kateb* ought to be re-considered; and third, to construct a new test for determining the constitutional validity of executive ordered detention, which is as follows:

'...the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia as coming to an end when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future...'

The core principles underlying the decision, are:

- 'Detention is penal or punitive unless justified as otherwise.'
- 'For an identified legislative objective to amount to a legitimate and non-punitive purpose, the legislative objective must be capable of being achieved in fact. The purpose must also be both legitimate *and* non-punitive. "Legitimate" refers to the need for the purpose said to justify detention to be compatible with the constitutionally prescribed system of government.'
- 'The legitimate purposes of detention – those purposes which are capable of displacing the default characterisation of detention as punitive – must be regarded as exceptional.'

The Court found that while the legislative objectives underlying administrative immigration detention were constitutionally valid – preventing aliens pending deportation/preventing aliens from entering

the Australian community – these objectives must have factual and temporal limitations to avoid falling afoul of the abovementioned principles. The facts of this case demonstrated that the relevant legislation failed to anticipate a situation where 'there is no real prospect of the removal of the alien from Australia becoming practicable in the reasonably foreseeable future', meaning that the legislative objectives could not be met, rendering the provisions punitive, in contravention of the doctrine of the separation of powers and therefore constitutionally invalid.

Interestingly, the Court signalled that there is nothing to prevent the Government from legislating an alternative, judicially governed, preventative basis for detaining those considered to be a serious risk to the Australian community.

The response by the Australian Government to the High Court decision

Within days of the 8 November decision, without waiting for the publication of the Court's reasons, the Government passed legislation creating a new bridging visa for detainees who had to be released because they were in similar situations to NZYQ. Whilst allowed in the community, the released individuals are subject to strict curfews, must wear tracking bracelets, are subject to restrictions on where they are able to live, on their ability to work and face gaol time should they breach any of the visa conditions. This legislation is already facing a High Court challenge.

After the High Court published the reasons for its decision, the Government indicated its intention to pass additional legislation to establish a preventative detention regime, similar to that which exists for individuals convicted of terrorist offences. This system would allow the Minister to apply to a court for an order that specific individuals who have been convicted of serious crimes continue to be detained pending their removal or deportation.

Reflections

Constitutional

By making the connection between indefinite administrative detention, punishment and the important distinction between the powers of the

executive and those of the judiciary, the High Court has drawn attention to the link between protection against arbitrary detention, the rule of law (in particular, the concept of legality) and the doctrine of the separation of powers. Without a domestic human rights framework, the reliance on constitutional principle for substantive rights and obligations is particularly important in the Australian context. That being said, as the doctrine of the separation of powers is recognised as a fundamental component of the rule of law in the jurisprudence of the ECtHR and the CJEU (see A.K. and Others), European Member States of both jurisdictions ought to be aware of the potential constitutional and human rights-based limitations to current policy efforts to replicate policies similar to those struck-down by the Australian High Court.

The response of the Australian Government and the main opposition party to the High Court decision, possess similarities in tone and substance to that of the UK Government's response to the Supreme Court decision. What is most striking is the veiled disregard for the reasoning of the courts, and subsequent attempts in both jurisdictions to out-legislate their rulings. From a meta-constitutional perspective, what we seem to be witnessing is a demonstration of just how limited the powers of courts vis-à-vis the protection of minority rights are in the face of populist politics.

Reflecting on the situation in Europe, with the rule of law crisis exposing the limitations of the CJEU's power to enforce adherence to core liberal democratic constitutional principles in Member States, and with a host of EU countries pursuing policies that will inevitably end up before national and European courts, there is the potential for an already heated constitutional environment to become explosive. In many respects, the future legitimacy of the CJEU and the ECtHR, and with them, the fundamental and convention-based rights regimes, will be determined by how they manage to navigate the politics of immigration policy. If the Australian situation is anything to go by, these institutions will need political help to make it through intact. The words and actions of judges will not be enough.

Human Rights

While the High Court's decision is welcome, the Government's response

raises the prospect of Australia continuing to act as a pariah vis-a-vis its international human rights obligations. Despite being a party to key conventions like the ICCPR, both the new visa sub-category and the proposed preventative detention measure are clear breaches of Australia's obligations. Indeed, they are important examples of the trend of using citizenship to justify discriminatory practices. While Australian citizens who have completed a criminal sentence are allowed back into the community, non-citizens, under the proposed legislation, will face either detention for their perceived risk to the community, or draconian, indefinite visa conditions.

In Europe, the Australian example raises the question of whether legislated or constitutionally shrined bills/conventions on human rights may hinder the adoption of similar polices. The answer is seemingly mixed. Despite constitutionally enshrined human rights protections, EU Member States are not properly held for violations. That being the case, unlike Australia, in the EU there is a limitation on the duration of detention: 18 months (Article 15(5) & 15(6) Return Directive). While the 'hotspot approach' has often operated to undermine the presumption against detention, it cannot be compared to the Australian policy of mandatory detention.

Although there are important legal differences between the Australian and Europe's human rights regimes, the European Commission's recent endorsement of Italy's agreement with Albania to externalise refugee processing, demonstrates the fragility of all human rights-based discourses, no matter the nature of their legal entrenchment, in the face of populist politics.

There is a sense that Europe is at a crossroad. The Australian situation ought to give its leaders pause for thought before they choose the path they intend to pursue.