

Challenging externalisation: is litigation the answer?

Jessica Marsh

Litigation has achieved some positive results in challenging Australia's offshore processing framework but comes with risks.

Since August 2012, more than 4,000 people attempting to reach Australia by sea have been subject to offshore processing in 'regional processing countries' (RPCs) Nauru and Papua New Guinea. From July 2013, Australia's policy under Operation Sovereign Borders has barred people arriving by sea from ever being permanently settled in Australia. Litigation has become an important mechanism for holding the government to account and protecting the rights of people held offshore,¹ as well as 'transitory persons' transferred from RPCs to Australia.²

Medevac transfers

In response to a lack of adequate medical treatment in RPCs, from early 2018 to March 2019 lawyers made a large volume of applications in the Federal Court seeking urgent medical transfers for people (including many children) from RPCs to Australia. The underlying claims alleged negligence – that is, a breach of duty of care – and in each case the Court granted an 'interlocutory'

(temporary) injunction based on the risk of significant injury, ordering that the individuals in question be transferred to somewhere they could access treatment (that is, Australia) pending the hearing of the substantive negligence claim. As a result of this innovative strategy and the ensuing threatened and actual legal action, around 320 people were transferred onshore in 2018–19.³

On 1 March 2019, the Migration Amendment (Urgent Medical Treatment) Bill 2018 (known as the Medevac Bill) became law, with the government suffering a historic defeat, losing the first substantive vote in the House of Representatives since 1929. The purpose of the bill was to require that transfer decisions be based on medical assessments rather than on opaque bureaucratic processes. Until its repeal by the government in December 2019, the Medevac law facilitated 192 medical transfers to Australia without the need for court injunctions. Following the repeal, the need for litigation in the face of government inaction has arisen once again.

Habeas corpus litigation

Many transferees remained in some form of detention onshore – in immigration detention centres, community detention or ‘alternative places of detention’ (APODs) – and to date most are yet to receive the desperately needed medical interventions which were the basis for their urgent transfer to Australia. Due to the continuing deprivation of liberty, their mental and physical health conditions deteriorated further, and some even requested to return to RPCs. Those in APODs in particular faced unbearable situations, confined to small hotel rooms in urban centres for months, with no access to fresh air or direct sunlight, limited to pacing hotel corridors for exercise. These conditions became even more stifling and unsafe in the context of the COVID-19 global pandemic.

In September 2020, the Federal Court handed down a landmark judgment, *AJL20*, ordering – under the ancient writ of *habeas corpus* (protection against unlawful detention) – the immediate release of a

29-year-old Syrian (pseudonym ‘AJL20’) who had been held in onshore immigration detention for six years.⁴ The Federal Court found that detention is only lawful if it is for a permissible purpose under the Migration Act. In this case, the purported purpose was removal of AJL20 from Australia. The Court found that the government was not taking steps to remove AJL20 ‘as soon as reasonably practicable’ as required by the Act, and his detention had therefore become unlawful.

The decision was significant because indefinite detention has long been permissible under Australian law⁵ and this decision opened up new questions regarding the limits on the power to hold a person in immigration detention. The government would now be required to consider available pathways (such as removal) for people subject to prolonged detention; if such pathways were not progressing, alternatives to detention would need to be considered.

Following the decision, lawyers mobilised to identify further cases whereby detention was not supported by



High Court of Australia, Canberra.

a ‘permissible purpose’ under the Act – that is, removal or determination of a visa application – and began to prepare further *habeas corpus* applications, including for transitory persons detained onshore.

Around 100 *habeas corpus* applications were made to the courts, with many applications for transitory persons focusing on a short-term outcome – their release from onshore detention. The basis of many of these applications centred on a request by the individual to return to an RPC, with arguments that any subsequent detention onshore was unlawful if the government was not taking active steps towards removal. In many cases the applicant was desperate to be released from onshore detention but may not have appreciated the actual risk of return to an RPC and may not have wanted to return. This scenario therefore raised considerable ethical concerns for lawyers, and it was difficult to secure sector-wide agreement on a strategic approach.

In early 2021, the government began releasing some people from detention into the community. As the pattern of release seemed arbitrary, it is unclear to what extent the impending legal action may have played a role. Sustained public protests outside hotel APODs were also putting pressure on the government during this time.

As has often occurred following developments in the courts, the government introduced legislation in response to the Federal Court’s *AJL20* decision, seeking to safeguard the government’s power to indefinitely detain refugees.⁶

Unsurprisingly, the government also appealed against *AJL20* to the High Court. On 23 June 2021, the High Court handed down a narrowly split judgment overturning the Federal Court decision. The High Court found that Australia’s mandatory detention regime requires only that the detaining officer reasonably suspects a person to be an unlawful non-citizen until their actual removal (or other outcome), and that the legality of detention is not affected if that officer has some other unauthorised or even *mala fides* (bad faith) purpose for detaining or continuing to detain.⁷

Observations

Be mindful of unintended consequences: Litigation carries a range of risks, including setting unfavourable precedent that might prevent future claims, and settlement of cases without admission of liability and with confidentiality obligations that prevent disclosure of information that might lead to more informed public debate and ultimately to policy change. Further, in Australia, time and time again we have seen ostensible progress made through the courts followed by legislative change to prevent further challenges, often resulting in more draconian law and policy.

In relation to the medevac transfers, an unintended outcome for many people transferred onshore was ongoing restrictive detention, and in some cases prolonged family separation of immediate family members.

In relation to the *habeas corpus* applications, the serious ethical questions raised were well founded. In the context of prolonged and damaging detention, desperate people have been faced with impossible choices – remain in indefinite detention onshore or return to unsafe situations in RPCs (in probable breach of *non-refoulement* obligations). As feared, following the releases, the government did start returning some people to RPCs. Further, following the seemingly arbitrary pattern of release, the resulting chaos and confusion caused some refugees to withdraw their applications for resettlement to the US, their only available durable solution, due to the mistaken belief that those with ongoing applications would continue to be detained.

These episodes illustrate complex dilemmas that can arise for human rights lawyers who are accountable to their individual client and to the courts, but who should also be mindful of systemic impacts and who must balance short-term outcomes with longer-term risks.

Sector coordination is important: The medevac litigation and resulting injunctions were the result of coordinated efforts by lawyers, advocates and medical professionals

who formed the Medical Evacuation Response Group. While cases were assessed on their own merits and strategy was necessarily tailored to individual circumstances, the coordinated approach allowed for a rapid scaling up of assistance, including shared resources and learning. This is an example of where strategic litigation opened up a feasible litigation pathway for others to follow in the slipstream, and probably resulted in many saved lives. National Justice Project lawyers said of the medevac litigation, "...there is now an army of lawyers around Australia with the expertise to challenge the Minister when he withholds life-saving care."⁸

The ethical concerns arising from the high-volume *habeas corpus* litigation underlined the importance of public interest lawyers coordinating to ensure consistent messaging to a large group of prospective litigants, ensuring they are properly informed of risks and the need for individualised legal advice.⁹ Following the disappointing *AJL20* High Court decision, sector coordination will remain crucial, as advocates continue to seek an appropriate test case with which to challenge indefinite detention in Australia.

Litigation must be complemented by other strategies: Legal action has resulted in some individual results; however, it has not been able to provide the ultimate durable solutions desperately needed for those subject to Australia's externalisation policies. Legal efforts must operate in parallel with wider advocacy, such as the effective Kids Off Nauru campaign, the ongoing Operation Not Forgotten campaign which aims to secure community-sponsored resettlement to Canada for refugees excluded from the Australia-US resettlement deal, and the Time for a Home campaign aimed at refugees who still lack permanent protection after all these years.

Conclusion

In Australia, litigation has proved an important means of challenging the offshore framework and has had some successes at the individual level, resulting in compensation, medical transfers, and release from detention. However, it has failed to dismantle the system

of externalisation, and often a step forward in the courts has led to a harsh legislative response by the government, reversing any gains and blocking future challenges. Perhaps the most important role that litigation plays is ensuring an authoritative court record of injustices, which may one day support a national reckoning of a cruel era of externalisation and the shameful treatment of those punished so harshly for simply seeking Australia's protection.

In recent times, it has been disturbing to see other States replicating Australia's inhumane approach. Strategies of resistance used by lawyers in Australia may well provide instructive for lawyers in other countries whose governments are improperly seeking to externalise their own international responsibilities.

Jessica Marsh jessica.m@asrc.org.au @majixi
Senior Solicitor, Asylum Seeker Resource Centre

This article is written in the author's personal capacity.

1. This article discusses recent litigation. For analysis of earlier challenges to the externalisation framework see: Refugee Council of Australia 'Australia's offshore processing regime: The facts – Legal challenges' www.refugeecouncil.org.au/offshore-processing-facts/6/; and Holly G (2020) 'Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation,' *German Law Journal*, 21, pp549–570.
2. Australia's *Migration Act 1958* deems all people transferred to RPCs to be 'transitory persons.' The government has power to transfer a transitory person from an RPC to Australia for a 'temporary purpose' including medical treatment. See Kaldor Centre, 15 December 2020, 'Medical transfers from offshore processing to Australia' bit.ly/Kaldor-medical-transfers-2020
3. Senate Legal and Constitutional Affairs Committee 'Migration Amendment (Repairing Medical Transfers) Bill 2019', October 2019 [2.98] bit.ly/AUgov-medical-transfers-2019
4. *AJL20 v Commonwealth of Australia* [2020] FCA 1305 bit.ly/AJL20-judgment-2020
5. *Al-Kateb v Godwin* [2004] HCA 37: <https://eresources.hcourt.gov.au/showCase/2004/HCA/37>
6. Kaldor Centre 'Joint statement from refugee law organisations in response to the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021', 13 May 2021 bit.ly/Kaldor-20210513
7. *Commonwealth of Australia v AJL20* [2021] HCA 21 www.hcourt.gov.au/cases/case_c16-2020
8. Talbot A and Newhouse G (2019) 'Strategic litigation, offshore detention and the Medevac Bill', *Court of Conscience*, Issue 13, pp85–90 bit.ly/Conscience-Talbot-Newhouse-2019
9. See Asylum Seeker Resource Centre et al (2020) 'Information Sheet for People in Detention Considering Legal Action Seeking Release' bit.ly/ASRC-factsheet-people-in-detention-2020