Indefinite detention continues for people who cannot be forcibly deported

High Court ruling in *ASF17 v Commonwealth of Australia* [2024] HCA 19

On 10 May 2024, the High Court handed down its judgment in the case of *ASF17.*[1]

The decision followed the High Court's ruling in *NZYQ*[2] in November 2023, in which the Court held it was unlawful for the Australian Government to continue detaining a person in immigration detention where there was no real prospect of the person's removal from Australia becoming practicable in the reasonably foreseeable future. That case was brought by a plaintiff who was both stateless and engaged Australia's international protection obligations. In *ASF17*, the Court considered whether the same limitation on detention applied to a person who did not have a formal protection finding, but could not be removed because his country of origin refuses to accept the forced return of its citizens and he had not consented to return.

Facts

The appellant, ASF17, is an Iranian man who arrived in Australia seeking asylum in 2013. He has been detained continuously since 2014. He has not been convicted of any offence in Australia.[3]

His application for a protection visa was refused by the Department of Home Affairs and he was excluded from the merits review process. Judicial review of that decision concluded that the delegate had not properly considered all aspects of ASF17's claim for protection, but the visa refusal was nonetheless upheld on other grounds. ASF17 is one of thousands of people refused refugee protection through the flawed 'Fast Track' assessment process.

Although the Department of Home Affairs had been under an obligation to remove ASF17 to Iran since 2018, it had been unable to do so. The Government of Iran has a longstanding policy of refusing to accept the forced returns of its citizens. ASF17 had, since his arrival, continuously refused to consent to returning to Iran or meeting with Iranian authorities for the purposes of obtaining a travel document. He was willing to be removed to any other country in the world.

In light of the High Court's decision in *NZYQ*¸ ASF17 brought an application in the Federal Court for a writ of *habeas corpus,* arguing there was no real prospect of his removal becoming practicable in the reasonably foreseeable future. In the course of that litigation, ASF17 disclosed for the first time that he is bisexual, and that his refusal to consent to removal is based on his fear of returning to Iran where sex between men is illegal and can attract the death penalty. [4]

A single judge of the Federal Court dismissed his application, finding that an assessment of the future practicability of removal must have regard to all actions that could be taken, including actions that could be taken if ASF17 cooperated.[5]

On appeal, ASF17 argued firstly that because he was under no legal duty to consent to or assist with his deportation, his refusal to meet with the Iranian authorities should be treated as a fact which simply meant his removal would not become practicable. His cooperation or otherwise was irrelevant.

---

[1] *ASF17 v Commonwealth of Australia* [2024] HCA 19 ('*ASF17*').
[2] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (2023) 97 ALJR 1005.
[3] *ASF17* at [51].
[4] *ASF17 v The Commonwealth* [2024] FCA 7 at [132].
[5] *ASF17 v The Commonwealth* [2024] FCA 7 at [128].

Alternatively, he argued that non-cooperation will undermine any real prospect of removal becoming practicable if there is a "good reason" for it - including a genuine, subjective fear of harm on return.

The Commonwealth Attorney-General exercised his power to seek an order uplifting ASF17's appeal to the High Court of Australia.

Intervention

Shortly before ASF17's case was determined in the Federal Court, another Iranian man given the pseudonym AZC20 was released from immigration detention after also bringing an application for *habeas corpus* in reliance on *NZYQ.* A different Federal Court judge found that AZC20's longstanding refusal to return to Iran meant that he was unlikely to change his mind in the reasonably foreseeable future. On the basis of AZC20's significant mental health concerns, developed over a decade in detention, the judge did not consider that AZC20 had the capacity to change his mind and engage with removal processes.[6]

As the appeal in *ASF17* challenged the correctness of the decision pertaining to AZC20 and could have impacted his liberty, AZC20 was granted leave to intervene in the High Court proceeding.[7]

Decision

The High Court unanimously dismissed the appeal, finding that the Commonwealth's continued detention of ASF17 was lawful.

Six justices (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ) delivered a joint judgment concluding that detention which is continuing because of a voluntary decision of the person detained cannot be characterised as penal or punitive.[8]

In applying the test set out in *NZYQ*, the majority held that for removal to be practicable, there must first be a country to which the person can be removed, and their removal to that country must be permissible under the Migration Act.[9] Section 197C of the Act does not permit the involuntary removal of a person for whom a "protection finding" has been made under the Act, to the country where they are at risk of harm. But for anyone else who does not already have an established protection finding, the question of whether or not they are owed protection obligations is irrelevant to the duty to remove them.[10] The statutory consequence is that for a person such as ASF17, a fear of harm is insufficient to preclude removal, irrespective of whether that claim might be genuine or well-founded.[11]

Once a removal country is identified, the question is then whether there are practically available steps which, if taken, can realistically be predicted to result in removal. Those steps may include administrative processes requiring a person's cooperation. Those steps remain practically available even if a person refuses to take them.[12]

The majority considered that the concept of a 'good reason' for refusing to cooperate, as expressed in the earlier case of *Plaintiff M47*,[13] was directed to whether non-cooperation could be explained by

---

[6] *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497.
[7] *ASF17* at [15]-[16]; [84].
[8] *ASF17* at [42].
[9] *ASF17* at [35].
[10] See *Migration Act 1958* (Cth), s 197C(1).
[11] *ASF17* at [38].
[12] *ASF17* at [41].
[13] *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285.

incapacity by reason of, for example, any medical condition or mental illness. The critical consideration in that case was whether it was within the person's power to cooperate.[14]

It had been conceded at trial that ASF17's cooperation with the process of obtaining a travel document was the only barrier to his removal to Iran. In circumstances in which ASF17 had the capacity to change his mind and obtain a travel document, but had chosen not to do so, the majority found that the constitutional limit on detention had not been exceeded.[15]

Justice Edelman's approach

Edelman J concluded that the appeal should be dismissed on the basis of different reasoning, building on the separate approach he had taken in *NZYQ*.

The majority in *NZYQ* had reasoned that if there is no real prospect of removal occurring, then it can no longer be said there is a legitimate and non-punitive purpose which justifies detention. Edelman J argued this approach would mean that ASF17's primary argument – that non-cooperation is irrelevant to whether the purpose can be achieved – would succeed. Edelman J considered that removal remains a valid purpose even if it cannot be achieved, but the means of achieving it may become disproportionate, and therefore impermissibly punitive, in certain circumstances.

In this case, Edelman J found that ongoing detention can still be considered necessary for the purpose of removing a person who might refuse, without any incapacity, to provide assistance with their removal. He considered detention in those circumstances is proportionate because, "perhaps with advice, counselling and relocation assistance, there is a real prospect that such persons might consent to removal in the reasonably foreseeable future".[16]

Edelman J was critical of the primary judge's reliance on a "legal fiction" that deemed a person to be cooperative for the purpose of assessing whether removal would become practicable. This involved a contortion of the concept of cooperation, when in fact what would be required was the subjugation or capitulation of the person.[17]

In relation to AZC20's intervention, Edelman J expressly found that where a person lacks the capacity to cooperate with removal efforts, continued detention will be disproportionate and the statutory duties relating to detention must be disapplied.[18]

Although agreeing that ASF17's detention remained constitutionally permissible, Edelman J pointed out the significant gaps in Australia's migration laws which mean that a person who faces a real risk of persecution in their country might not obtain a formal protection finding under the Act. ASF17's bisexuality was not contested, but this – and other aspects of his protection claim – had never been properly considered.[19] As Edelman J observed, there remains only the possibility of discretionary Ministerial intervention to determine whether ASF17's protection claims are properly assessed, or whether he will "*continue to be detained in immigration detention pending his consent to be returned*

[14] *ASF17* at [44].
[15] *ASF17* at [48] – [49].
[16] *ASF17* at [62].
[17] ASF17 at [89], [94].
[18] *ASF17* at [107].
[19] *ASF17* at [63].

to a country where he might be executed if he were to express, privately and consensually, what has been found to be his genuine sexual identity."[20]

Commentary

The Court's decision invites ASF17 to choose between remaining detained for the rest of his life, or agreeing to return to a country where he will face persecution on the basis of his sexual orientation. His circumstances highlight the profound failure of the 'Fast Track' processing system and the inadequacy of discretionary Ministerial powers in remedying it.

In comparable jurisdictions like the UK and Europe, the law recognises that there must be limits on indefinite detention in all circumstances. The High Court's decision in this case means that in Australia, indefinite detention is unlawful for some but not others - no matter their reasons for refusing to consent to removal, unless they lack capacity to do so.

As at February 2024, 76 people in Australian detention centres had been detained for longer than five years. Whatever the reasons that they cannot be removed, it is difficult to see how continued, indefinite detention could ever be seen as an appropriate response.

This summary was prepared by Joel Harriss and Josephine Langbien of the Human Rights Law Centre.

[20] *ASF17* at [127].