

## High Court challenge to offshore immigration detention power fails

Written by Amy Maguire, Senior Lecturer in International Law and Human Rights, University of Newcastle

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The decision reveals the striking breadth of the government's power to deal with asylum seekers and refugees in ways that directly contravene international law. AAP/Eoin Blackwell

The High Court has today [rejected a claim](#) that the Australian government can only exercise its powers outside Australia for purposes that would be legal under the law of the relevant foreign country.

This means the Australian government had and has the power to establish and maintain its offshore immigration detention facility in Papua New Guinea, despite detention of asylum seekers there violating PNG law.

### Background to the decision

The case [commenced](#) in May 2016. The initial application was a class action seeking relief on international, constitutional, administrative and civil law grounds. The court later permitted the plaintiff to file an [amended application](#) on more limited grounds.

The sole current plaintiff is an Iranian man, taken into Australian jurisdiction while on board an asylum-seeker vessel in July 2013. He was transported to Christmas Island, detained, and categorised as an “[unlawful non-citizen](#)”. In August 2013 the plaintiff was transferred to the offshore immigration detention facility on Manus Island.

The plaintiff claims to be a refugee but has not participated in the assessment process in PNG. He does not want to be settled there as a refugee due to [fear of reprisals](#) after giving eyewitness testimony at the trial of those convicted for the killing of Reza Barati. He has not been officially detained since around May 2016, but feels effectively detained due to the [hostile environment](#) outside the grounds of the detention centre.

The case decided today responded to the decision of the [PNG Supreme Court](#) in the Namah case. That court

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[found](#)

that Australia's detention of asylum seekers on Manus Island violated PNG law.

Unlike in Australia, PNG has constitutional human rights protections. These forbid the deprivation of personal liberty in most cases where a person has not committed a crime.

PNG announced the detention centre would close. Its prime minister, [Peter O'Neill](#), asked Australia to make other arrangements for all asylum seekers still on Manus Island. No such arrangement has yet been made for the plaintiff in this case. He cannot be forcibly returned to Iran, as Iran [refuses to accept](#) involuntary returns.

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**Further reading:** [\*\*\*How a charter of rights could protect Australians's fundamental freedoms\*\*\*](#)

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## What was the High Court asked to determine?

The court was asked to determine whether the Australian government [has power under the Constitution](#) to do the things it has done to the plaintiff (and many others).

The Namah decision prompted most of the questions put to the court. They tested whether Australia could validly make and continue its arrangements for offshore processing and detention of asylum seekers on Manus Island, in light of the Supreme Court decision that those arrangements violate constitutional rights protections in PNG.

At [the hearing](#) in May 2017, Chief Justice Susan Kiefel asked the plaintiff's barrister how the Namah decision could bear on the court's interpretation of the Australian government's powers under the Migration Act. Those powers are defined by the act and must be interpreted

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according to the Australian Constitution.

The plaintiff argued the Constitution should be read to imply a limitation on governmental power. Specifically:

That the power is to be used for a legal purpose, meaning a purpose legal where it is exercised, where it has effect.

The PNG Supreme Court found it was illegal for Australia and PNG to bring in and detain asylum seekers on Manus Island. The plaintiff therefore argued that Australia was exercising its powers for an illegal purpose.

The plaintiff's barrister, Tom Molomby, [continued](#) :

... it is somewhat internally contradictory to regard the Australian Constitution as establishing a rule of law for our nation, yet capable of giving power to committing acts in other countries which are contrary to the law of that nation.

The court was also asked to consider whether Australia's statutory powers to do things necessary for regional processing of asylum seekers in PNG depend on whether those things are legal under PNG law.

The [plaintiff argued](#) that:

The agreements being beyond power in Papua New Guinea, they were also beyond power in Australia. There is no power to make an agreement with a party that does not itself have power to make the agreement. There can be no power to perform an impossibility.

### The High Court's reasons

The full bench of the court decided unanimously to reject the plaintiff's application. The [judgment](#) noted that the plaintiff was not able to cite any authority in prior case law or the text or structure of the Constitution for the arguments made.

On this basis, the court concluded that:

... there should be no doubt that neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to the domestic law of another country.

The court further decided the plaintiff had misunderstood the significance of the *Namah* decision in the context of this application. According to the court, this decision said nothing about the PNG government's capacity to enter into an arrangement with the Australian government to establish or maintain the detention centre.

The PNG Supreme Court decision found that the bringing in, detention and treatment of asylum seekers on Manus Island violated constitutional rights protections in PNG. But it did not mean the PNG government acted beyond power in agreeing its arrangement with Australia.

The High Court rejected the plaintiff's claim that the Australian government's statutory power, under the Migration Act, depended on whether relevant actions were legal under PNG law. The court relied on an [earlier decision](#) that related to offshore immigration detention in Nauru.

According to the court in that case:

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The lawfulness or unlawfulness of executive government action under Australian law or under the law of a foreign country conversely does not determine whether or not that action falls within the scope of the statutory capacity or authority conferred by the section.

### The bigger picture

This judgment is one in a series that demonstrates the lack of human rights protections in Australian law. It again reveals the striking breadth of the government's power to deal with asylum seekers and refugees in ways that directly [contravene international law](#).

However, cracks continue to widen in Australia's punitive system of mandatory offshore detention for asylum seekers who travel by boat. The agreement Australia had with the US to transfer refugees there from Manus Island remains in doubt.

The lack of interest in the people at the heart of the dilemma was starkly revealed in the leaked transcript of the now-infamous [Donald Trump-Malcolm Turnbull](#) phone call.

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**Further reading:** [\*Trump-Turnbull call: trading people like pawns undermines the goals of international co-operation\*](#)

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Earlier this week, Liberal MP Russell Broadbent broke ranks with the government, calling for Australia to take responsibility for detained refugees who do not find resettlement in the US. Broadbent spoke out against the prospect of [indefinite detention](#) for people who have not committed any crime.

After today's decision, the responsibility to bring Australian law and practice into line with international legal obligations remains squarely with the government. The High Court has not found justification to intervene.

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