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Does the Australian Constitution allow harsh and inhumane detention? The decision in *Behrooz*

In *Behrooz*, the High Court held that Commonwealth legislation providing for detention of non-citizens was within the legislative power conferred by the Australian Constitution, even if the detention possibly involved harsh or inhumane treatment of detainees.[1]

Background to the case

Mahran Behrooz is an Iranian national who arrived in Australia in January 2001 without a visa. Under the *Migration Act 1958* he was an unlawful non-citizen.[2] The Act requires that an unlawful non-citizen be detained[3] and kept in immigration detention until he or she is removed, deported or granted a visa.[4] Mr Behrooz was detained at the Woomera Detention Centre from shortly after his arrival.

The Migration Act provides that a detainee must not escape from immigration detention.[5] Mr Behrooz 'departed' Woomera on 18 November 2001, and was subsequently charged with escaping from immigration detention. [6]

History of the litigation

Mr Behrooz sought to obtain material relating to conditions at Woomera from the Commonwealth. His aim was to establish that those conditions were so harsh as to make detention at Woomera something other than 'immigration detention' within the meaning of those words in the Migration Act. If detention at Woomera was not 'immigration detention' Mr Behrooz's departure from Woomera would not constitute an escape from immigration detention.

The Commonwealth argued production of such material would be 'oppressive' and an abuse of the process of the Court, primarily on the basis that the documents sought could not establish a defence for Mr Behrooz. The South Australian Magistrates Court largely dismissed this argument.[7]

The Commonwealth appealed to the Supreme Court of South Australia.[8] Justice Gray allowed the appeal. He held that detention at Woomera was detention under the Migration Act, regardless of the conditions of detention. Therefore the material sought by Mr Behrooz was irrelevant to the charge of escaping. Justice Gray's view was that no matter how harsh or inhumane conditions of immigration detention may or may not have been, the detention would still be authorised by section 196 of the Migration Act.

He then held that as Mr Behrooz was lawfully in custody, he had no right to go free, even if he could establish that he had been subjected to harsh or inhumane treatment. Such treatment could give rise to a remedy in civil law for which damages may be awarded, but not to a right to remove himself from custody.[9]

Leave to appeal to the Full Court of the Supreme Court of South Australia was refused. However, Justices Gummow, Kirby and Hayne granted leave to appeal to the High Court.

Issues argued before the Court

In *Chu Kheng Lim v Minister for Immigration*,[10] the High Court had held that it was within the executive power of the Commonwealth to confer authority to detain in custody that was:

> … limited to what is reasonably capable of being seen as necessary for the processes of deportation or necessary to enable an application for an entry permit to be made and considered.[11]

Counsel for Mr Behrooz argued that conditions of detention that went beyond what was 'reasonably necessary' would not be a valid exercise of executive power. This would amount to punitive detention of a non-citizen, which would not be permissible unless it was authorised by a court.[12]

An alternative argument was that harsh or inhumane treatment is not within the meaning of 'detention':

> It is a question of definition ... if conditions … are so awful that they do not then respond to the word in an Australian statute, 'prison', 'detention', 'punishment', then a person is not in prison, detention or punishment.[13]

The majority judgments

In the view of the majority of the High Court, evidence of unlawful treatment, and even of 'harsh and inhumane' treatment, was not relevant to a charge of escaping from immigration detention. Mr Behrooz was therefore not able to obtain the documents he sought.

It was not necessary for the Court to consider whether conditions of detention at Woomera actually were harsh or inhumane.

Chief Justice Gleeson held that unlawful treatment will not alter the nature of detention under the Migration Act, which will remain 'immigration detention within the meaning of the Act' regardless of the conditions of detention.[14] Escape from such detention will constitute an offence.

Chief Justice Gleeson rejected the argument that harsh conditions may render immigration detention

punitive and thus an invalid exercise of judicial power.[15] In his view so long as detention remains for the purpose of excluding a person from the Australian community whilst their application for permission to enter Australia is processed (and pending deportation if the application fails), it is not punitive. The reality of the conditions of detention as experienced by a detainee is not relevant.

Justices McHugh, Gummow and Heydon, in a joint judgment, also held that the conditions of immigration detention are irrelevant to a charge of escaping from immigration detention.

On the basis of a literal examination of the wording of the Migration Act, Justice Hayne held that the detention authorised by the Migration Act was not limited to such detention as is 'reasonably necessary' for migration control purposes. He did not address the question whether the word 'detention' can encompass keeping a person in harsh and inhumane conditions.

The judgment of Justice Callinan was confined to the question of whether harsh conditions of detention of an unlawful non-citizen may constitute punishment, which may only be imposed by courts.[16] He held that conditions of detention had no relevance to whether there was lawful authority to detain. He stated:

> The question whether the law authorizing detention (and saying nothing about the conditions of it) is reasonably capable of being seen as necessary for a legitimate purpose within the aliens power, cannot be concerned with a qualitative assessment of the conditions of detention. It is concerned with the purpose of the law authorizing detention.[17]

If the law actually specified particular conditions of detention then a court could consider whether these were for a legitimate purpose related to the aliens power. However if the law is silent the detention may be under any conditions (subject to the safeguards of the civil and criminal law).

The dissenting judgment

Is the majority view 'a legal answer that future generations will condemn'?[18]

Justice Kirby delivered the sole dissenting judgment in this case. He rejected the view that the case should be decided on the basis of the common law relating to escape from custody. His view was that the issue in *Behrooz* related to 'the meaning and operation of a provision in a law enacted by the Parliament', upon which the common law could provide little assistance.[19]

Justice Kirby held that a Commonwealth law cannot define what constitutes detention. A court could arguably find that conditions at a detention centre were so harsh and inhumane that there was not, in law, 'detention'.[20] Legislation that provides for 'detention' is a valid exercise of Commonwealth power to legislate with respect to aliens; legislation that provides for something that is not 'detention' may not be supported by the aliens power.

Justice Kirby also concluded that it would be constitutionally invalid to submit an alien to punishment without a judicial order. Furthermore, whether or not particular treatment constituted 'punishment' could, in his view, only be determined by a court on the basis of evidence.

In Justice Kirby's view Mr Behrooz should have been allowed to obtain evidence relevant to the question whether the treatment he received at Woomera constituted punishment.

Conclusion

The result of this decision is that the High Court has decided that the Commonwealth has power under the Australian Constitution to provide for detention of non-citizens regardless of whether the conditions of detention are harsh and inhumane.

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1. *Behrooz v Secretary of the Department of Immigration and Multicultural Affairs* (2004) 208 ALR 271.
2. Section 14 of the Migration Act.
3. Section 189 of the Migration Act.
4. Section 196 of the Migration Act.
5. Section 197A of the Migration Act.
6. The term 'departure' was used by Hayne J, who described it as 'designedly neutral': *Behrooz* op. cit. per Hayne J at 311.
7. The summonses to produce documents were set aside in respect of some documents that related to certain periods and solely to minors.
8. *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Behrooz* (2002) 84 SASR 453.
9. *R v Deputy Governor of Parkhurst Prison: Ex parte Hague*, [1992] 1 AC 58 at 165.
10. (1992) 176 CLR 1.
11. (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ.
12. ibid.
13. *Behrooz v Secretary of the Department of Immigration and Multicultural Affairs* [2003] HCA Trans 456 p. 12.
14. *Behrooz* op.cit. note 1 at 277–278.
15. Chapter III of the Constitution requires that Commonwealth judicial power be exercised only by courts.
16. *Behrooz* op.cit. note 1 at 314.
17. ibid. at 326.
18. *Behrooz* op.cit. note 1 per Kirby J at 306.
19. ibid. at 296.
20. ibid. at 299.

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