HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 28 Jun 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S27/2024
File Title:	YBFZ v. Minister for Immigration, Citizenship and Multicultu
Registry:	Sydney
Document filed:	Form 27C - A-G SA Intervener's submissions
Filing party:	Intervener
Date filed:	28 Jun 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S27/2024

BETWEEN: **YBFZ**
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) to advance submissions in support of the Defendants.

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: SUBMISSIONS

4. The adjudgment and punishment of criminal guilt under a law of the Commonwealth is part of the judicial power of the Commonwealth that is exclusively entrusted to the courts designated by Ch III.[1] In *Chu Kheng Lim*, four members of this Court held that "putting to one side exceptional cases … the involuntary detention of a citizen in custody by the State is penal or punitive in character".[2]

5. Since *Chu Kheng Lim*, it has been recognised that other kinds of deprivation of liberty may also be characterised as punitive so as to fall within the exclusive judicial function. In *Alexander*, six members of this Court held that the power to strip a person of Australian citizenship had a punitive character.[3] Other traditional means of punishment, such as corporal and capital punishment, may also be taken to be punitive in character.[4]

6. Although the forms of detriment that may properly be characterised as punitive are not closed,[5] not every disadvantage amounts to punishment.[6] An important consideration bearing upon the character of an impugned power is the severity of the consequences that attend its exercise.[7] Those consequences may be measured by the extent to which

---

1 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 (***NZYQ***), 1013 [28] (the Court).

2 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Chu Kheng Lim***), 27 (Brennan, Deane and Dawson JJ), 10 (Mason CJ agreeing).

3 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 (***Alexander***), 375-376 [96] (Kiefel CJ, Keane and Gleeson JJ), 383 [120] (Gageler J), 402 [173] (Gordon J), 427 [247] (Edelman J).

4 *Alexander*, 367 [72] (Kiefel CJ, Keane and Gleeson JJ), 397 [159] (Gordon J); *Submissions of the Defendants* (**DS**), [28].

5 *Alexander*, 396 [158] (Gordon J).

6 *Submissions of the Plaintiff* (**PS**), [10]; DS, [31]; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 12 [17] (Gleeson CJ).

7 PS, [10]; DS, [28]-[29]; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 (***Benbrika (No 2)***), 907 [21]-[22] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 915 [63] (Gordon J), 924 [109] (Edelman J). Whilst, of course, there are other considerations that bear on the question of characterisation which have

the impugned power authorises incursions upon liberty.[8]

7. The severity of the consequences of citizen-stripping was central to the conclusion reached by a majority of this Court in *Alexander*, and then *Benbrika (No 2)*, that the powers in question were punitive in nature.[9] The reasoning in this regard proceeded, in part, by reference to a comparison between the detrimental effects of citizen-stripping and detention in custody. The effect of citizen-stripping was held to be as severe as detention in custody, if not more so.[10]

8. In the present proceeding, the Plaintiff invites the Court to characterise the discretion conferred on the First Defendant by cll 070.612A(1)(a) and (d) of Sch 2 to the *Migration Regulations 1994* (Cth), to impose curfew and electronic monitoring conditions (**the impugned conditions**), as punitive.

9. South Australia submits that the safest guide by which the severity of the detriment imposed by the impugned conditions may be assessed is by comparing the incursion on liberty occasioned by the impugned conditions with incursions that attend traditionally recognised forms of punishment. Punishment by way of citizen-stripping, corporal and capital punishment may be readily seen to be more severe than the impugned conditions. However, comparison with these forms of punishment can only be undertaken in a relatively abstract way. By contrast, the severity of the detriment imposed by the impugned conditions can more tangibly be contrasted to the "paradigm"[11] form of punishment invoked in *Chu Kheng Lim*, namely "detention … in custody".[12]

10. For the reasons that follow, the detrimental incursions upon liberty that attend the imposition of the impugned conditions can be seen to be of a different order of magnitude to those that occasion detention in custody.

---

been addressed in the parties' respective submissions, the focus of South Australia's submissions is on the severity of the detriment imposed by the impugned conditions.

8 *Alexander*, 368 [73] (Kiefel CJ, Keane and Gleeson JJ), 376-377 [98] (Gageler J agreeing in substance). The notion of liberty used in this context includes freedom of movement but goes beyond that meaning to include a broader class of civil liberties traditionally recognised.

9 *Alexander*, 368 [73]-[74] (Kiefel CJ, Keane and Gleeson JJ: "the loss of all entitlement to be both within the community and at liberty… matters of public rights of 'fundamental importance'"), 376-377 [98] (Gageler J agreeing in substance), 402 [172] (Gordon J, quoting *Trop v Dulles* (1958) 356 US 86, 101 (Warren CJ): "the total destruction of the individual's status in organized society"), 427 [248] (Edelman J: "a form of civil death"); *Benbrika (No 2)*, 915 [63]-[64] (Gordon J: "a permanent rupture in the relationship between the individual and the State … 'destroy[ing] for the individual the political existence that was centuries in the development.'"), 924 [110] (Edelman J: "one of the harshest forms of punishment that can be imposed. It results in the loss of many civil, political and social rights.")

10 *Alexander*, 368 [73] (Kiefel CJ, Keane and Gleeson JJ), 376-377 [98] (Gageler J agreeing in substance); *Benbrika (No 2)*, 915 [63]-[64] (Gordon J).

11 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (***Benbrika (No 1)***), 111 [73] (Gageler J).

12 *Chu Kheng Lim*, 27 (Brennan, Deane and Dawson JJ), 10 (Mason CJ agreeing).

Detention in custody

11. As noted above, *Chu Kheng Lim* held that the detention of a citizen "in custody by the State" is penal or punitive in character.[13] Contrary to the Plaintiff's submission, the words "in custody" are not "redundant".[14] Whilst it may readily be accepted that the notion of "detention in custody" is not confined to detention in prison,[15] and that "[a]ny form of involuntary detention, under any conditions, involves an interference with liberty",[16] the notion of "custody" connotes more than confinement to a particular location.

12. Inherent in the notion of "detention in custody" is a loss of autonomy and privacy.[17] Its core elements are forced detention and coercive treatment; prisoners sentenced by a court are "intentionally denied control over… basic matters because imprisonment is deliberately punitive".[18] It is "severe punishment"[19] and the "harshest form of punishment now exacted for wrongdoing in Australia".[20]

13. The notion of "detention in custody" is best exemplified by a consideration of legislation that provides for imprisonment in the "custody"[21] of correctional authorities. The South Australian legislation, which bears many similarities to correctional legislation of the other States and Territories, reveals that "detention in custody" will commonly include features of the following kind:

    13.1. The correctional authority determines the institution in which the prisoner is detained, may determine the part or area of that institution that the prisoner is located and, in specified circumstances, may separate a prisoner from all other prisoners.[22]

---

13 *Chu Kheng Lim*, 27 (Brennan, Deane and Dawson JJ), 10 (Mason CJ agreeing).

14 PS, [13].

15 PS, [14].

16 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 630 [35] (Gleeson CJ).

17 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 496 [13] (Gleeson CJ) quoting *Bell v Wolfish* (1979) 441 US 520, 537; M Groves "Immigration Detention vs Imprisonment; Differences explored" (2004) 29 *Alternative Law Journal* 228, 228.

18 M Groves "Immigration Detention vs Imprisonment; Differences explored" (2004) 29 *Alternative Law Journal* 228, 229-230.

19 *Power v The Queen* (1974) 131 CLR 623, 627 (Barwick CJ, Menzies, Stephen and Mason JJ).

20 *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***), 635 [212] (Hayne J), 662-663 [303] (Heydon J, agreeing). Although this observation is now subject to the recognition of citizen-stripping as a form of punishment (see [7] above).

21 *Correctional Services Act 1982* (SA) (**SA Act**), s 24(1). See also *Crimes (Administration of Sentences) Act 1999* (NSW) (**NSW Act**), ss 38(2) and 72(1); *Correctional Services Act 2014* (NT) (**NT Act**), s 8(1); *Corrective Services Act 2006* (Qld) (**Qld Act**), ss 7(1), (2), (4) and (6); *Corrections Act 1986* (Vic) (**Vic Act**), s 6A(1); *Prisons Act 1981* (WA) (**WA Act**), s 7(1). In the *Corrections Management Act 2007* (ACT) (**ACT Act**) and the *Corrections Act 1997* (Tas) (**Tas Act**), the term "custody" is not used in the context of a prisoner being in prison: cf ACT Act, ss 33(1), 35(1), 37 and 75; Tas Act, ss 6(1) and 26(1).

22 SA Act, ss 22(2), 24(2)(a) and 36; *Correctional Services Regulation 2016* (SA) (**SA Regulations**), r 18(17). See also ACT Act, ss 90(1), 91(1) and 92(1); NSW Act, ss 11(1), 23(1) and 78A(2) and (3); NT Act, ss 38(1)

13.2. The correctional authority may establish a regime for the day-to-day life of the prisoner including in respect of recreation and contact with other prisoners.[23]

13.3. The correctional authority may require the prisoner to perform specified work and the prisoner needs permission to perform any other remunerated or unremunerated work.[24]

13.4. The correctional authority may cause letters sent to or by the prisoner to be opened and examined for specified purposes[25] and the prisoner cannot receive any goods from outside the prison without permission.[26]

13.5. There are limits on the number of visits and visitors for the prisoner[27] and the circumstances of visits are regulated (for example, each visitor must be identified and a visitor cannot touch the prisoner without approval).[28]

13.6. Subject to exceptions, communications between the prisoner and another person may be monitored or recorded.[29]

13.7. The prisoner or their belongings may be searched, including by way of strip search.[30]

13.8. In specified circumstances, the prisoner may be directed to undergo medical examination or tests[31] and the prisoner may also be required to undergo drug testing.[32]

13.9. While in a correctional institution a prisoner is prohibited from having various items including alcohol, tobacco, pornography and a mobile phone.[33]

13.10. Officers may use such force against the prisoner as is reasonably necessary for the purposes of exercising powers or discharging duties under the correctional legislation.[34]

---

and 41; Qld Act, s 68(1); Tas Act, s 36(1); *Corrections Regulations* 2018 (Tas) (**Tas Regulations**), r 8(1); Vic Act, s 56; *Corrections Regulations 2019* (Vic) (**Vic Regulations**), r 32(1); WA Act, ss 26(1) and 43(1).

23 SA Act, s 24(2)(b). See also NSW Act, s 65A; WA Act, s 37(1).

24 SA Act, s 29(1) and (5). See also ACT Act, s 83; NSW Act, s 6(1); NT Act, s 54(1); Qld Act, s 66(1) and (2); Tas Act, s 33(1); WA Act, s 95(4).

25 SA Act, s 33(4). See also ACT Act, s 104(1); *Crimes (Administration of Sentence) Regulations 2014* (NSW) (**NSW Regulations**), r 112; Qld Act, s 45(1); Vic Act, s 47C; WA Act, s 67(2).

26 SA Act, s 33A(1). See also NSW Regulations, r 99; *Prisons Regulations 1982* (WA) (**WA Regulations**), r 36A.

27 SA Act, s 34(1); SA Regulations, r 39(1). See also ACT Act, ss 49(2) and 143(1); NSW Regulations, rr 74-77; NT Act, ss 98 and 99; Qld Act, s 153(1)(a); Vic Regulations, r 83(1); WA Regulations, r 52.

28 SA Act, s 34(4). See also NSW Regulations, rr 81, 93 and 100; NT Act, s 143(1); Qld Act, ss 154(1), 155(1) and 160(1); Tas Act, s 18(1); Vic Act, s 37(2); WA Regulations, r 53A.

29 SA Act, s 35A. See also ACT Act, s 103(2); NSW Regulations, r 119B(1); NT Act, s 105(1); Qld Act, s 52(1).

30 SA Act, s 37(1) and (2). See also ACT Act, s 111 and 113A; NSW Regulations, r 46(1); NT Act, ss 47 and 48; Qld Act, ss 33(1) and 35(1); Tas Act, s 22(1A); Vic Act, s 45(1); Vic Regulations, r 85; WA Act, s 41(1).

31 SA Regulations, r 41. See also NT Act, s 92; Qld Act, s 21(2); Vic Act, s 29(1)-(2); WA Act, s 95D.

32 SA Act, s 37AA(1). See also ACT Act, s 134; NSW Regulations, rr 157 and 159; NT Act, s 51(1); Qld Act, s 41; Tas Act, s 28(1); Vic Act, s 29A; WA Regulations, rr 26B-26E.

33 SA Regulations, r 8. See also NSW Regulations, rr 122, 148 and 322; Vic Regulations, r 65.

34 SA Act, s 86. See also ACT Act, s 138(1); NSW Regulations, rr 129 and 131; NT Act, s 42(3); Qld Act, s 143(1); Tas Act, s 34B(1); Vic Act, s 23(2); WA Act, s 14(1)(d).

The curfew condition

14. The all-encompassing nature of custodial detention can readily be distinguished from the impugned curfew condition. The curfew condition does not inherently involve a loss of autonomy or privacy of the same nature or to the same extent. In particular, the curfew condition is limited to a restriction that for up to 8 hours per day the visa holder must remain at a notified address of that person's choosing. Significantly, it does not otherwise have the features of detention in custody addressed above in respect of forced detention, coercive treatment and the denial of personal autonomy. A visa holder subject to the curfew condition may, for example, choose where and with whom to live, engage in any day-to-day activities outside of curfew hours, receive or send any goods or letters, have unrestricted contact with any other person at the nominated address during curfew hours and not be subject to the prospect of being searched or subject to the immediate use of reasonable force.

15. Once the qualitative distinction between detention in custody and curfew is appreciated, the flaws with the Plaintiff's attempt to align the notion of "detention" for the purpose of Ch III with the common law principles that ground a claim for false imprisonment,[35] become apparent. Even if it can be said that for the purposes of the law of false imprisonment "[t]he essence of imprisonment is being made to stay in a particular place by another person",[36] that is a necessary, but insufficient, attribute of "detention in custody". The false imprisonment authorities provide incomplete analogies because they ignore the important custodial aspect of the notion addressed in *Chu Kheng Lim*.

Immigration detention

16. The Plaintiff seeks to draw an analogy between the curfew condition and the conditions applicable in immigration detention.[37] However, a much more powerful analogy is available between immigration detention and traditional detention in prison.

17. Immigration detention shares "many, if not all, of the physical features and administrative arrangements commonly found in prisons".[38] For example, an

---

35 PS, [15]-[16].

36 PS, [19], quoting *R (Jalloh (formerly Jallah) v Secretary of State for the Home Department* [2021] AC 262, 272 [24].

37 PS, [18].

38 *Al-Kateb*, 650 [264] (Hayne J), 662-663 [303] (Heydon J, agreeing).

immigration detainee has no choice as to the place of their detention, cannot leave that place without permission, cannot determine who else might be in that place, may be the subject of a search (and in some circumstances, a strip search),[39] and may be subject to the immediate use of such force as is reasonably necessary so as to be taken or kept in that detention.[40] By virtue of the immigration authority's powers over the place of detention, the immigration authority can also control who visits the place, the conditions of entry for a visitor (including for the screening of a visitor),[41] and what items or correspondence may be received by an immigration detainee. In the circumstances, an immigration detainee has substantially curtailed control over their day-to-day activities and other choices. It is not surprising therefore that it has been observed that, "there is little practical difference between many of the features of immigration detention and imprisonment and that those held in immigration detention are in many ways treated like prisoners".[42]

18. The analogy that can be drawn between immigration detention and detention in custody speaks strongly against the comparison that the Plaintiff seeks to draw between immigration detention and the imposition of a curfew.[43]

Thomas v Mowbray[44]

19. As the Plaintiff properly acknowledges,[45] in *Thomas* a majority of this Court rejected a submission that the imposition of a control order, which included a curfew condition, was punitive in nature so as to engage the *Lim* principle.[46] The Plaintiff, undertaking the perfunctory task of reviewing the *John* factors,[47] now invites the Court to re-open *Thomas*.[48] In doing so, the Plaintiff fails, with respect, to apply the "strongly conservative cautionary principle" unanimously reaffirmed in *NZYQ*.[49]

---

39 *Migration Act 1958* (Cth), ss 252 and 252A.
40 *Migration Act 1958* (Cth), ss 5 (see definition of "detain") and 180.
41 As to screening, see *Migration Act 1958* (Cth), s 252G.
42 M Groves "Immigration Detention vs Imprisonment; Differences explored" (2004) 29 *Alternative Law Journal* 228, 228.
43 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 concerned arrangements outside Australia's territorial jurisdiction in which the detention was "not actually implemented" by the Commonwealth: see, 70 [41] (French CJ, Kiefel and Nettle JJ).
44 *Thomas v Mowbray* (2007) 233 CLR 307 (***Thomas***).
45 PS, [21].
46 *Thomas*, 330 [18] (Gleeson CJ), 357 [121] (Gummow and Crennan JJ), 509 [600] (Callinan J, agreeing), 526 [651] (Heydon J, agreeing).
47 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417.
48 PS, [23].
49 *NZYQ*, 1011 [17]-[18] and 1015 [35] (the Court).

20. Traditionally, that cautionary principle has been upheld by this Court declining to depart from its earlier decisions unless satisfied that they are "plainly wrong".[50] A threshold test of this kind does not attempt to import a "very definite rule",[51] but rather serves the important function of avoiding the departure from earlier authority simply on the basis that the present coram of the Court takes a different view on the merits of existing precedent.[52] As illustrated by the Court's recent overruling of *Al-Kateb*,[53] it may be accepted that a particular precedent can come to be seen, over time, as an "outlier in the stream of authority"[54] such that it may appropriately be overruled.[55] Yet, the "strongly conservative cautionary principle" demands that, even where "the

---

50 A "plainly wrong", "clearly wrong", "manifestly wrong" or "fundamental error" test has been applied on many occasions: *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278-279 (Isaacs J, 'clearly wrong' or 'manifestly wrong'), 288 (Higgins J, agreeing), 292 (Powers J, 'clearly wrong'); *R v Commonwealth Court of Conciliation and Arbitration; ex parte The Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 54 (***The Tramways Case (No 1)***), 58 (Griffith CJ, 'manifestly wrong'), 69 (Barton J, 'manifestly wrong' or 'clearly wrong'), 86-87 (Powers J, 'clearly wrong'); *Cain v Malone* (1942) 66 CLR 10 (***Cain***), 15 (Latham CJ, 'manifestly wrong'), 15-16 (Rich J, 'clearly wrong'), 17 (McTiernan J, agreeing with Latham CJ); *Perpetual Executors and Trustees Association of Australia Ltd v Commissioner of Taxation (Cth)* (1949) 77 CLR 493, 496 (Latham CJ for the Court, 'manifestly wrong'); *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 (***Perpetual Trustee***), 261 (McTiernan J, 'manifestly wrong'), 266 (Williams J, 'manifestly wrong'); *Victoria v Commonwealth* (1957) 99 CLR 575 (***Victoria***), 626 (McTiernan J, 'manifestly wrong'), 629 (Williams J, 'manifestly wrong'); *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372, 377 (Dixon CJ, 'fundamental error'), 381 (Kitto J agreeing), 390 (Windeyer J agreeing); *Parker v The Queen* (1963) 111 CLR 610, 632-633 (Dixon CJ, 'misconceived and wrong', 'fundamental' propositions, with agreement of Taylor, Menzies, Windeyer and Owen JJ); *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13-14 (Mason J, 'plainly erroneous', 'manifestly incorrect', 'manifestly erroneous'); *Stevens v Head* (1993) 176 CLR 433, 464 (Gaudron J, 'wrong and fundamentally so'); *McGinty v Western Australia* (1996) 186 CLR 140, 235 (McHugh J, 'fundamentally wrong'); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (the Court, 'manifestly wrong'); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 552 (Dawson J, 'plainly wrong'), 576 (McHugh J, 'plainly wrong'); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 421 [90] (McHugh J, 'clearly wrong'), 518 [376] (Callinan J agreeing); *Barns v Barns* (2003) 214 CLR 169, 205 [104] (Gummow and Hayne JJ, 'wrong in a significant respect'); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 61 [120] (Gummow J, 'erred in a significant respect'); *Vunilagi v The Queen* (2023) 97 ALJR 627, 655 [132], 661 [163]-[164], 665 [178], 673 [221] (Edelman J, 'manifestly wrong', 'clearly wrong', 'fundamentally contrary to basic principle', 'significant and manifest error or injustice'); *Vanderstock v Victoria* (2023) 98 ALJR 208, 356 [608]-[609] (Edelman J, 'fundamentally contrary to basic principle', 'significant or manifest error or injustice', 'manifestly wrong'). See, also, J Edelman, "Overturning Al-Kateb v Godwin: Unanswered Questions about the Rules of Precedent" (Sir Harry Gibbs Memorial Oration, unpublished paper, Gold Coast, 25 May 2024).

51 *Perpetual Trustee*, 243-244 (Dixon J).

52 *The Tramways Case (No 1)*, 58 (Griffith CJ), 69 (Barton J); *Cain*, 15 (Latham CJ), 17 (McTiernan J, agreeing); *Perpetual Trustee*, 244, 253 (Dixon J); *Hughes and Vale Pty Ltd v New South Wales [No 1]* (1953) 87 CLR 49, 70 (Dixon CJ); *Victoria*, 615 (Dixon CJ), 658 (Kitto J, agreeing); *Queensland v The Commonwealth* (1977) 139 CLR 585 (***Queensland***), 599, 600, 603-604 (Gibbs J); *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 39-40 (McHugh J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 365-366 [125] (Hayne J).

53 *Al-Kateb v Godwin* (2004) 219 CLR 562.

54 *NZYQ*, 1014 [35] (the Court).

55 This principled approach to overruling has been applied on many occasions. See, for example, *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 71 [55]-[56] (Gleeson CJ, Gaudron and Gummow JJ), 105 [167] (Callinan J).

taxonomy of 'truth' and 'error'"[56] is inapt to describe a decision when judged according to the jurisprudence that prevailed at the time of its making, "the error … has been made manifest by later cases".[57] The Plaintiff has not demonstrated that *Thomas* was plainly wrong.

The monitoring condition

21. Similarly, the electronic monitoring condition impugned by the Plaintiff imposes a much lesser incursion on liberty than that which normally accompanies detention in custody imposed by a court for punishment of criminal guilt.

22. As to privacy,[58] the only data under the electronic monitoring condition that is recorded, transmitted, monitored or stored is about the visa holder's location and movement. Unlike a prisoner in custody, there is no opportunity for the conversations or communications of the visa holder to be monitored, no opportunity to observe the visa holder's activities and no opportunity to identify the persons with whom the visa holder associates. As such, the Plaintiff's analogy to the "perfect prison design where the inmates believe they may be watched at any moment but cannot be sure if that is so"[59] is a rhetorical exaggeration and rather highlights just how different the kinds of monitoring and surveillance are. Further, the electronic monitoring condition confers no power of search (including strip search) that is another burden on privacy associated with detention in custody.

23. In respect of bodily integrity,[60] the effect of the electronic monitoring condition is relatively modest. As the Defendants' identify, electronic monitoring does not inflict any physical harm or pain, and there is no requirement that the device remain visible.[61] Any discomfort or embarrassment from electronic monitoring is comparatively insignificant compared to being imprisoned where a prisoner is confined and is subject to the prospect of involuntary medical assessments, being searched and having reasonable force applied to them.

---

56 *NZYQ*, 1015 [35] (the Court), quoting *Wurridjal v Commonwealth* (2009) 237 CLR 309, 353 [71] (French CJ).
57 *Queensland*, 630 (Aickin J).
58 Cf PS, [50]-[52]; DS, [58].
59 PS, [52] fn 149.
60 Cf PS, [49]; DS, [57].
61 DS, [57].

Conclusion

24. South Australia submits that, in several specific contexts,[62] the imposition of curfews and electronic monitoring offer effective means by which community protection may be promoted in a manner that also allows for a substantial degree of personal autonomy and privacy. Whilst measures at a Commonwealth level that severely curtail liberty fall to be justified by reference to non-punitive purposes that they pursue, the existence of a constitutional limit ought not obscure the core responsibility of the legislative branch, in the absence of a bill of rights, to strike the appropriate trade-off between the preservation of civil liberties and the protection of the community.[63] That legislative responsibility may all the more readily be perceived under the state constitutions in the absence of the separation of powers. Given that the constitutional limitation recognised in *Chu Kheng Lim* has no direct application to the states,[64] analysis undertaken within that rubric ought not be assumed to have broader significance.

Part V: TIME ESTIMATE

25. It is estimated that up to 15 minutes will be required for the presentation of South Australia's oral argument.

Dated: 28 June 2024

…….. ……..

MJ Wait SC
Solicitor-General for South Australia
T: (08) 7424 6583
michael.wait@sa.gov.au

B Garnaut
Counsel for the Attorney-General (SA)
T: (08) 7322 7000
benjamin.garnaut@sa.gov.au

62 In South Australia, electronic monitoring conditions may be imposed in sentencing (for example, a monitoring order, which may require the wearing of an electronic monitoring device, may be made pursuant to s 99L of the *Criminal Procedure Act 1921* (SA) in relation to a defendant who presents a risk of committing a further bushfire offence). Curfew and monitoring conditions can also be imposed by courts other than upon the adjudgment of criminal guilt (for example, the Supreme Court can impose curfew and electronic monitoring conditions when imposing supervision orders pursuant to ss 7 and 10 of the *Criminal Law (High Risk Offenders) Act 2015* (SA)). Further, curfew and monitoring conditions can be imposed by executive bodies (for example, the Commissioner of Police may issue a requirement to a serious registrable offender, pursuant to s 66N of the *Child Sex Offenders Registration Act 2006* (SA), that he or she wear a tracking device).

63 DS, [26].

64 *Garlett v Western Australia* (2022) 96 ALJR 888, 902 [40] (Kiefel CJ, Keane and Steward JJ), 928 [184] (Gordon J), 942 [248] (Edelman J), 950-951 [293]-[296], 953 [306] (Gleeson J). By contrast, Justice Gageler considered that an infringement of the *Lim* principle would also offend the *Kable* doctrine (917 [136]).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S39/2024

BETWEEN: **YBFZ**
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTRUARL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNEXURE
PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

No.	Description	Date in Force	Provision
	Constitutional provisions		
1.	Commonwealth Constitution	Current	ss 75-77
	Commonwealth statutory provisions		
1.	*Migration Act 1958*		ss 5, 180, 252, 252A, 252G
2.	*Migration Regulations 1994*	Current	Sch 2 cl 070.612A(1)(a) and (d)
	State statutory provisions		
1.	*Child Sex Offenders Registration Act 2006* (SA)	Current	s 66N
2.	*Correctional Services Act 1982* (SA)	Current	ss 22(2), 24(1), 24(2)(a), 29(1) and (5), 33(4), 33A, 34(1) and (4), 35A, 36, 37(1) and (2), 37AA(1), 86
3.	*Correctional Services Act 2014* (NT)	Current	ss 8(1), 38(1), 41, 42(3), 47, 48, 51(1), 54(1), 92 98, 99, 105(1), 143(1)

No.	Description	Date in Force	Provision
4.	*Correctional Services Regulations 2016* (SA)	Current	rr 8, 18(8), 18(17), 39(1), 41
5.	*Corrections Act 1986* (Vic)	Current	ss 6A(1), 29(1) and (2), 23(2), 29A, 37(2), 45(1), 47C, 56
6.	*Corrections Act 1997* (Tas)	Current	ss 6(1), 18(1), 22(1A), 26(1), 28(1), 33(1), 34B(1), 36(1), Sch 1 It 10
7.	*Corrections Management Act 2007* (ACT)	Current	ss 33(1), 35(1), 37, 49(2), 75, 83, 90(1), 91(1) and 92(1), 103(2), 104(1), 111, 113A, 134, 138(1), 143(1)
8.	*Corrections Regulations 2018* (Tas)	Current	rr 8(1)
9.	*Corrections Regulations 2019* (Vic)	Current	rr 32(1), 65, 83(1), 85,
10.	*Corrective Services Act 2006* (Qld)	Current	ss 7(1), (2), (4) and (6), 21(2), 33(1), 35(1), 41, 45(1), 52(1), 66(1) and (2), 68(1), 143(1) 153(1)(a), 154(1), 155(1), 160(1)
11.	*Crimes (Administration of Sentences) Act 1999* (NSW)	Current	ss 6(1), 11(1), 23(1) 38(2), 65A 72(1), 78A(2) and (3)
12.	*Crimes Administration of Sentences Regulations 2014* (NSW)	Current	rr 46(1), 74, 75, 76, 77, 81, 93, 99, 100, 112, 119B(1), 122, 129, 131, 146, 148, 157, 159, 322
13.	*Criminal Law (High Risk Offenders) Act 2015* (SA)	Current	ss 7, 10
14.	*Criminal Procedure Act 1921* (SA)	Current	s 99L
15.	*Prisons Act 1981* (WA)	Current	ss 7(1), 14(1)(d), 26(1), 37(1), 41(1), 43(1), 67(2), 95, 95D
16.	*Prisons Regulations 1982* (WA)	Current	rr 26B, 26C, 26D, 26E, 36A, 52, 53A