HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

YBFZ PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS & ANOR DEFENDANTS

YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs
[2024] HCA 40
Date of Hearing: 6 August 2024
Date of Judgment: 6 November 2024
S27/2024

ORDER

The questions stated for the opinion of the Full Court in the special case filed on 23 May 2024 be answered as follows:

Question 1: *Is cl 070.612A(1)(a) of Sch 2 to the* Migration Regulations 1994 *(Cth) invalid because it infringes Ch III of the* Constitution, *either alone or in its operation with cl 070.612A(1)(d)?*

Answer: *Yes.*

Question 2: *Is cl 070.612A(1)(d) of Sch 2 to the* Migration Regulations 1994 *(Cth) invalid because it infringes Ch III of the* Constitution, *either alone or in its operation with cl 070.612A(1)(a)?*

Answer: *Yes.*

Question 3: *What, if any, relief should be granted to the plaintiff?*

Answer: *It should be declared that cl 070.612A(1)(a) and cl 070.612A(1)(d) of Sch 2 to the* Migration Regulations 1994 *(Cth) are invalid.*

Question 4: *Who should pay the costs of the special case?*

Answer: *The defendants.*

Representation

C L Lenehan SC and T M Wood with K E W Bones for the plaintiff (instructed by Refugee Legal)

S P Donaghue KC, Solicitor-General of the Commonwealth, with M A Hosking and S Zeleznikow for the defendants (instructed by Australian Government Solicitor)

M J Wait SC, Solicitor-General for the State of South Australia, with B L Garnaut for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor for South Australia)

CATCHWORDS

YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs

Constitutional law (Cth) – Judicial power of Commonwealth – Where cl 070.612A(1) of Sch 2 to *Migration Regulations 1994* (Cth) provides that each of conditions set out in paras (a)-(d) must be imposed on grant of Bridging R (Class WR) visa ("BVR") by Minister unless Minister "satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community" – Where condition in cl 070.612A(1)(a) ("monitoring condition") enables continuous electronic monitoring of person's location by requiring person to wear electronic monitoring device affixed around person's ankle – Where condition in cl 070.612A(1)(d) ("curfew condition") requires person to remain in specified location generally between 10.00 pm and 6.00 am – Where condition imposed on grant of BVR remains in force for period of 12 months from date of grant – Where failure to comply with monitoring condition or curfew condition an offence punishable by maximum penalty of five years' imprisonment or 300 penalty units or both and mandatory minimum sentence of one year's imprisonment – Where delegate of Minister granted plaintiff a BVR on conditions including monitoring condition and curfew condition – Where plaintiff arrested and charged with offences of failing to comply with monitoring condition and curfew condition – Whether cl 070.612A(1)(a) and (d) infringe Ch III of Constitution and are invalid.

Words and phrases – "arbitrary punishment", "bodily integrity", "curfew condition", "detention", "detriment", "exclusively judicial", "interference with individual liberty or bodily integrity", "judicial power", "legitimate and non-punitive purpose", "liberty", "*Lim* principle", "monitoring condition", "pre-eminent value", "prima facie punitive", "punishment", "punitive purpose", "purpose of punishment", "reasonably capable of being seen to be necessary", "separation of powers".

Criminal Code (Cth), Div 395.
Migration Act 1958 (Cth), ss 73, 76C, 76D, 76DA, 76E.
Migration Regulations 1994 (Cth), regs 2.25AA, 2.25AB, 2.25AE, Sch 2, cl 070.612A(1), Sch 8, cll 8620, 8621.

1 GAGELER CJ, GORDON, GLEESON AND JAGOT JJ. The special case in this matter contains the following questions:

(1) Is cl 070.612A(1)(a)[1] of Sch 2 to the *Migration Regulations 1994* (Cth) ("the Migration Regulations") invalid because it infringes Ch III of the Constitution, either alone or in its operation with cl 070.612A(1)(d)?

(2) Is cl 070.612A(1)(d) of Sch 2 to the Migration Regulations invalid because it infringes Ch III of the Constitution, either alone or in its operation with cl 070.612A(1)(a)?

2 Clause 070.612A(1) of Sch 2 to the Migration Regulations concerns the grant of a visa[2] to eligible non-citizens,[3] permitting these persons to remain in Australia, in effect, until it becomes reasonably practicable to remove them from Australia. By cl 070.612A(1), "each of the ... conditions [as set out in (a)-(d)] must be imposed [on the visa] by the Minister unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community". The condition referred to in cl 070.612A(1)(a) ("the monitoring condition") enables continuous electronic monitoring of the person's location by requiring the person to wear an electronic monitoring device affixed to the person (in practice, the device is secured around the person's ankle). The condition referred to in cl 070.612A(1)(d) ("the curfew condition") requires the person to remain in a specified location generally between the hours of 10.00 pm and 6.00 am.

3 In their terms, the curfew and monitoring conditions apply only to a visa to be granted to an alien within Australia within a certain class.[4] But underlying the

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1 As in force from 8 December 2023.

2 That is, a Bridging R (Class WR) visa which has one subclass, Subclass 070 (Bridging (Removal Pending)): Migration Regulations, reg 1.07 and Sch 1, item 1307, referred to in these reasons as a "BVR" or "visa".

3 Clause 070.612A(3) of Sch 2 to the Migration Regulations, read with regs 2.20(18), 2.25AA, and 2.25AB, applies if there was (at the time of the grant of the visa) no real prospect of the removal of the eligible non-citizen from Australia becoming practicable in the reasonably foreseeable future.

4 In substance, aliens who are in Australia, who hold no other visa permitting them to be in Australia, who would otherwise be held in immigration detention to facilitate their removal from Australia but who, in fact, cannot practically be removed from

questions in the special case are fundamental issues of constitutional principle of equal relevance to aliens within and citizens of Australia.

4 The constitutional limit on the legislative power of the Commonwealth Parliament which the plaintiff argues is transgressed by cl 070.612A(1)(a) and (d) derives from the separation by Ch III of the Constitution of the judicial power of the Commonwealth and from the exclusive assignment to that separated judicial power of authority to impose punishment.

5 For the following reasons, the imposition of each of the curfew condition and the monitoring condition on a BVR by the Executive Government of the Commonwealth is prima facie punitive and cannot be justified. Clause 070.612A(1)(a) and (d) of Sch 2 to the Migration Regulations infringe Ch III of the Constitution and are invalid.

Constitutional framework

6 The Constitution does not contain a Bill of Rights. That was the choice of the framers of the Constitution.[5] Chapter III, accordingly, does not embody any conception of free-standing rights. Nor does it create a constitutional limit applying to every law that imposes a detriment on a person. What Ch III does is to restrict the legislative and executive power of the Commonwealth by insisting that the judicial power of the Commonwealth may be exercised only by the judiciary. By reason of the "ancient principles of the common law"[6] underpinning the Constitution, the restrictions which are effected by Ch III's allocation of the judicial power of the Commonwealth exclusively to the judicial branch of government are carefully guarded by the courts.[7]

Australia, and who therefore can no longer lawfully be held in immigration detention to facilitate their removal, and therefore must be released into the Australian community.

5 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136.

6 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-521.

7 See, eg, *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497; *Harris v Caladine* (1991) 172 CLR 84 at 142, quoting *Northern Pipeline Construction Co v Marathon Pipe Line Co* (1982) 458 US 50 at 60.

7 Clause 070.612A(1)(a) and (d) formed part of the Commonwealth legislative response[8] to the Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.[9]

8 The specific constitutional principle restated and reinforced in *NZYQ* is that, exceptional cases aside,[10] "a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the Constitution unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose", such detention being "penal or punitive unless justified as otherwise".[11]

9 Of significance is that the outcome in *NZYQ* also depended on the "fundamental and long-established principle that no person – alien or non-alien – may be detained by the executive absent statutory authority or judicial mandate",[12] as "an alien who is actually within this country enjoys the protection of our law".[13] The lineage of the common law's refusal to deny its fundamental protections against arbitrary punishment by deprivation of life, bodily integrity, and liberty[14] to aliens within its jurisdiction is long and distinguished. For example, Dicey described as "absolutely acknowledged" that the writ of habeas corpus ensured that

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8 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth), commencing 18 November 2023; *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth), commencing 8 December 2023; *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth), commencing 8 December 2023.

9 (2023) 97 ALJR 1005; 415 ALR 254.

10 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28-29. See also *NZYQ* (2023) 97 ALJR 1005 at 1013 [28]; 415 ALR 254 at 262.

11 *NZYQ* (2023) 97 ALJR 1005 at 1015 [39]; 415 ALR 254 at 264.

12 *NZYQ* (2023) 97 ALJR 1005 at 1013 [27]; 415 ALR 254 at 262. See also *Re Bolton* (1987) 162 CLR 514 at 520-521, 528.

13 *Lim* (1992) 176 CLR 1 at 29.

14 See, eg, Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 1, ch 1 at 126-131, 135-137.

whenever "any Englishman or foreigner is alleged to be wrongfully deprived of liberty, the Court will issue the writ, have the person aggrieved brought before the Court, and if he has a right to liberty set him free".[15]

10 *NZYQ* depended further on the principle that the "relevant difference between a non-alien and an alien for the purposes of Ch III 'lies in the vulnerability of the alien to exclusion or deportation'".[16] It is the alien's "vulnerability ... to exclusion or deportation" that flows from both the common law and the Constitution and significantly diminishes "the protection which Ch III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process".[17] A concomitant of the "supreme power in a State ... to refuse to permit an alien to enter, either absolutely or subject to conditions, and to expel or deport"[18] is that a statutory power authorising the executive to detain an alien in custody for the purpose of receiving, investigating, and determining an application by that alien to remain in Australia or, after determination, to admit or deport the alien "is neither punitive in nature nor part of the judicial power of the Commonwealth", but "takes its character from the executive powers to exclude, admit and deport of which it is an incident".[19]

11 The essential point in *NZYQ* is that a legitimate and non-punitive purpose which in other circumstances would justify a non-citizen being detained in custody ceases to justify the detention if and for so long as there is no real prospect of the achievement of that purpose becoming practicable in the reasonably foreseeable future.[20] For the non-achievable purpose to have remained legitimate and non-punitive, and thereby to have continued to authorise the non-citizen's detention in custody, would have involved the kind of paradox commonly known as a

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15 Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 2nd ed (1886) at 234-235.

16 *NZYQ* (2023) 97 ALJR 1005 at 1013 [29]; 415 ALR 254 at 262, quoting *Lim* (1992) 176 CLR 1 at 29.

17 *Lim* (1992) 176 CLR 1 at 29.

18 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12-13 [18]. See also *Lim* (1992) 176 CLR 1 at 29.

19 *Lim* (1992) 176 CLR 1 at 32 (citation omitted).

20 See *ASF17 v The Commonwealth* (2024) 98 ALJR 782 at 784-785 [1], 788-789 [31]-[32].

"catch-22".[21] If permitted, this paradox would have fundamentally undermined the normative structure of the law in Australia. The reasoning in *NZYQ* turned its face from this self-defeating paradox.

12 Of fundamental importance for present purposes, however, is that *NZYQ* represents a specific example of a broader stream of common law and constitutional principle based on the pre-eminent value the law of this country gives to the protection of human life (from arbitrary capital punishment), limb, now called bodily integrity (from arbitrary corporal punishment), and liberty (from arbitrary detention). This reflects the common law's acceptance of the inherent and irreducible status of each human being in the compact between the individual and the state, a compact which this country inherited and within which the Constitution was enacted.[22]

13 The constitutional emanation of this underlying compact, the doctrine of the separation of powers entrenched in Ch III of the Constitution, ensures not only protection from arbitrary punishment but also the continuation of an independent and impartial judiciary "to enforce lawful limits on the exercise of public power".[23] In the words of Jacobs J:[24]

> "The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. *But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore*

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21 Heller, *Catch-22* (1961).

22 See, eg, Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 1, ch 1 at 126-131, 135-137; Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 2nd ed (1886) at 221-225. See also *Re Bolton* (1987) 162 CLR 514 at 528-529; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-12.

23 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 574 [104].

24 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 (emphasis added).

historically, are judged by that independent judiciary which is the bulwark of freedom."

14 While "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment",[25] the subject of the "basic rights" of present concern are human life, bodily integrity, and liberty as described above. It is the evolution of the common law's repeated rejection of arbitrary punishment of the individual, and its expression in the doctrine of the separation of powers, which is of fundamental importance. In this evolution, the question whether courts alone historically exercised a power to order punishment by an interference with human life, bodily integrity, or liberty is relevant to but has never been determinative of the boundaries of exclusively judicial power for the purpose of Ch III. This is because determining those boundaries is not an exercise in formalism. While exclusive exercise of a power by the judiciary at the time of enactment of the Constitution will ordinarily suffice to make it "inevitable that the power ... is within the concept of judicial power as the framers of the Constitution must be taken to have understood it",[26] the converse does not follow. That is, it is "not that the characteristics of judicial power and of institutions qualified to exercise it are frozen in time", but that "those characteristics are deeply rooted in a tradition within which judicial protection of individual liberty against legislative or executive incursion has been a core value".[27]

15 The doctrine of the separation of powers and the common law rules protecting a person's liberty and bodily integrity spring from the same underlying values. But not every interference with individual liberty or bodily integrity involves punishment and, thereby, exclusively judicial power derived from Ch III of the Constitution. In *Marion's Case*, Mason CJ, Dawson, Toohey and Gaudron JJ referred with approval to Blackstone's statement that, in the protection of bodily integrity, the law "cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner".[28]

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25 *United States v Lovett* (1946) 328 US 303 at 324, quoted in *Kariapper v Wijesinha* [1968] AC 717 at 736.

26 *R v Davison* (1954) 90 CLR 353 at 382.

27 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 276 [141].

28 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 233, quoting Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 3, ch 8 at 120.

Their Honours also referred to the "fundamental principle" that, under the common law, "every person's body" is "inviolate".[29] This reflects the underlying common law norm that, in Brennan J's words, "each person has a unique dignity which the law respects and which it will protect".[30] However, these observations made in the context of expounding the common law do not translate into a free-standing constitutional right to protection from all interferences with bodily integrity or liberty. There are many interferences with bodily integrity and liberty authorised by the legislature, both significant and insignificant, which are non-punitive and therefore do not infringe on exclusively judicial power.

16 In the constitutional context the prima facie character of a power may be punitive by default (for example, a power to impose involuntary detention in custody). If not punitive by default, the task of characterisation of the power begins by determining the meaning and scope of the law; the law's practical and legal operation; and the end or object the law is designed to achieve (ascertained objectively from its whole text and context at a level of generality or specificity calibrated to the importance of the "constitutional value ... at stake"[31]). The object of the required analysis is ultimately "a single question of characterisation: whether the power to impose the detriment conferred by the law is properly characterised as punitive and therefore as exclusively judicial".[32]

17 As was said in *Lim*, "the Constitution's concern is with substance and not mere form" so that it would be "beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody *notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt*" as "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[33]

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29 *Marion's Case* (1992) 175 CLR 218 at 242. See also at 265-266.

30 *Marion's Case* (1992) 175 CLR 218 at 266.

31 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 378-379 [104]-[105]. See generally at 377-383 [101]-[119]. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132]; *Brown v Tasmania* (2017) 261 CLR 328 at 363 [101].

32 *Jones v The Commonwealth* (2023) 97 ALJR 936 at 946-947 [43]; 415 ALR 46 at 56.

33 *Lim* (1992) 176 CLR 1 at 27 (emphasis added).

18 In the constitutional context, in contemporary Australia, the question is whether there is *justification* for a non-judicial exercise of power interfering with liberty or bodily integrity.[34] Justification involves asking if the power having a prima facie punitive character (by default or otherwise) is reasonably capable of being seen to be necessary (in the relevant sense of "reasonably appropriate and adapted" rather than essential or indispensable[35]) for a legitimate and non-punitive purpose in which event the power's constitutional character is non-punitive.[36] By breaking the question of characterisation into these subsidiary steps, the method and structure of the required analysis accommodates the complexity that is inherent in the question of characterisation.

19 While framed as questions of infringement of Ch III, the plaintiff pleaded that the provisions exceed the regulation-making power in s 504(1) of the *Migration Act 1958* (Cth) ("the Migration Act") and the parties proceeded on the (correct) assumption that cl 070.612A(1)(a) and (d) are valid or invalid in all their applications. In these circumstances, the validity of the provisions depends on the questions asked, as power conferred by s 504 of the Migration Act could not and does not extend to the making of a regulation which would transgress a constitutional limit on the legislative power of the Commonwealth Parliament.[37]

The impugned conditions in context

20 The Migration Act provides for there to be classes of temporary visas, to be known as bridging visas, to be granted under Subdiv AF of Div 3 of Pt 2 of the Act[38] in such circumstances,[39] by reference to such criteria[40] and on such

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34 The death penalty for crime having been abolished in all States and Territories.

35 *Jones* (2023) 97 ALJR 936 at 946 [42]; 415 ALR 46 at 56, quoting *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39].

36 *NZYQ* (2023) 97 ALJR 1005 at 1015 [40]; 415 ALR 254 at 264-265. See also *Jones* (2023) 97 ALJR 936 at 946-947 [43]-[44]; 415 ALR 46 at 56.

37 See, eg, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 373 [104]; *Palmer v Western Australia* (2021) 272 CLR 505 at 546 [119]-[120].

38 Migration Act, s 37.

39 Migration Act, s 40(1).

40 Migration Act, s 31(3).

conditions[41] as are prescribed by regulation. The relevant class of visa, the BVR, is a prescribed class of temporary visa.[42] The BVR has just one subclass:[43] Subclass 070 (Bridging (Removal Pending)).

21 Within Subdiv AF of Div 3 of Pt 2 of the Migration Act, s 73 empowers the Minister to grant a bridging visa, with or without application, to an "eligible non-citizen" who the Minister is satisfied meets the criteria prescribed for its grant. For the purpose of s 73, an "eligible non-citizen" includes a non-citizen who is within a prescribed class.[44] Under the Migration Regulations, a non-citizen is within a prescribed class for the grant of a bridging visa[45] and is taken to meet criteria prescribed for the grant of a BVR without application[46] if there is no real prospect of removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future.

22 Clause 070.612A(1) of Sch 2 to the Migration Regulations provides that, if a BVR is granted to such a non-citizen:

> "each of the following conditions must be imposed by the Minister unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community ...:
>
> (a) 8621;
>
> (b) 8617;
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> (c) 8618;
>
> (d) 8620."

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41 Migration Act, s 41(1).

42 Migration Regulations, reg 2.01 and Sch 1, item 1307.

43 Migration Regulations, reg 1.07 and Sch 1, item 1307.

44 Migration Act, s 72(1)(b).

45 Migration Regulations, reg 2.20(1) and (18).

46 Migration Regulations, reg 2.25AB.

23 Clause 070.612A(2) requires the Minister to decide whether to impose each of the conditions listed in cl 070.612A(1) in the order in which they are listed.

24 By operation of s 76E of the Migration Act, the rules of natural justice do not apply to the making of a decision to grant a BVR under s 73 of that Act if the BVR is granted subject to one or more of the conditions listed in cl 070.612A(1) of Sch 2 to the Migration Regulations.[47] Instead, if the Minister makes a decision to grant a BVR subject to one or more of those conditions, the Minister must give notice of the decision to the non-citizen and invite the non-citizen to make representations.[48] The Minister must then grant a further BVR that is not subject to one or more of the conditions if the non-citizen makes representations in accordance with the invitation and "the Minister is satisfied that those conditions are not reasonably necessary for the protection of any part of the Australian community".[49]

25 The content of each of the four conditions listed in cl 070.612A(1) is set out in Sch 8 to the Migration Regulations.[50] Although only the conferral of authority to impose the first and the fourth of those conditions is impugned, the content of the other two conditions is important to the context within which the command of cl 070.612A(1) – that each condition listed "must be imposed by the Minister unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community" – is to be construed. The content of each of the four conditions therefore needs to be and is noted in the order in which the four conditions are listed in cl 070.612A(1).

26 The condition listed in cl 070.612A(1)(a), the monitoring condition, is as follows:

> "(1) The holder must wear a monitoring device at all times.
>
> (2) The holder must allow an authorised officer to fit, install, repair or remove the following:

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47 Migration Act, s 76E(2); Migration Regulations, reg 2.25AD.

48 Migration Act, s 76E(3).

49 Migration Act, s 76E(4).

50 See Migration Regulations, reg 2.05 read with the definition of "condition" in reg 1.03.

(a) the holder's monitoring device;

(b) any related monitoring equipment for the holder's monitoring device.

(3) The holder must take any steps specified in writing by the Minister, and any other reasonable steps, to ensure that the following remain in good working order:

(a) the holder's monitoring device;

(b) any related monitoring equipment for the holder's monitoring device.

(4) If the holder becomes aware that either of the following is not in good working order:

(a) the holder's monitoring device;

(b) any related monitoring equipment for the holder's monitoring device;

the holder must notify an authorised officer of that as soon as practicable.

(5) In this clause:

monitoring device means any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object.

related monitoring equipment, for a monitoring device, means any electronic equipment necessary for operating the monitoring device."

27 The references in sub-cll (2) and (4) of the monitoring condition to an "authorised officer" are references to an "authorised officer" designated by the Minister, under s 76F(6) of the Migration Act, in the *Migration (Monitoring Devices and Related Equipment – Authorised Officers) Authorisation 2023* (Cth). Imposition of the monitoring condition under cl 070.612A(1)(a) engages the power conferred on such an authorised officer by s 76F(1) of the Migration Act to do "all things necessary or convenient to be done" in relation to the holder of the BVR for purposes which include installing, fitting, maintaining, repairing and operating a monitoring device or related monitoring equipment. It also engages the

power conferred on an authorised officer by s 76F(2) of the Migration Act to collect, use, and disclose information (including personal information) about the holder of the BVR for purposes specified to include determining whether the holder has complied with a condition of a BVR[51] or has committed an offence under the Migration Act[52] as well as "protecting the community in relation to" the holder.[53]

28 The condition listed in cl 070.612A(1)(b), condition 8617, is as follows:

"The holder must notify Immigration of each of the following matters within 5 working days after the matter occurs:

(a) the holder receives, within any period of 30 days, an amount or amounts totalling AUD10 000 or more from one or more other persons;

(b) the holder transfers, within any period of 30 days, an amount or amounts totalling AUD10 000 or more to one or more other persons."

29 The condition listed in cl 070.612A(1)(c), condition 8618, is as follows:

"(1) If the holder incurs a debt or debts totalling AUD10 000 or more, the holder must notify Immigration within 5 working days after the holder incurs the debt or debts.

(2) If the holder is declared bankrupt, the holder must notify Immigration within 5 working days after the holder is so declared.

(3) The holder must notify Immigration of any significant change in relation to the holder's debts or bankruptcy within 5 working days after the change occurs."

30 The condition listed in cl 070.612A(1)(d), the curfew condition, is as follows:

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51 Migration Act, s 76F(2).

52 Migration Act, s 76F(2)(b).

53 Migration Act, s 76F(2)(c).

"(1) The holder must, between 10 pm on one day and 6 am the next day or between such other times as are specified in writing by the Minister, remain at a notified address for the holder for those days.

(2) If the Minister specifies other times for the purposes of subclause (1), the times must not be more than 8 hours apart.

(3) In this clause:

notified address for a holder for a particular day or days means any of the following:

(a) either:

(i) the address notified by the holder under condition 8513 [which provides that the holder 'must notify Immigration of his or her residential address within 5 working days of grant']; or

(ii) if the holder has notified another address under condition 8625 [which provides that the holder 'must notify the Minister of any change in ... an address of the holder ... within 2 working days after the change occurs'] – the last address so notified by the holder;

(b) an address at which the holder stays regularly because of a close personal relationship with a person at that address, and which the holder has notified to Immigration for the purposes of this paragraph;

(c) if, for the purposes of this paragraph, the holder notifies Immigration of an address for that day or those days no later than 12 pm on the day before that day or the earliest day of those days (as the case may be) – that address."

31 If a condition listed in cl 070.612A(1) is imposed on the grant of a BVR, the condition remains in force for a period of 12 months from the date of the grant,[54] but the condition does not prevent the grant of a further BVR subject to any one or more of the conditions listed in cl 070.612A(1) during or after the end

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54 Migration Regulations, reg 2.25AE(1).

of that 12-month period.[55] If such a further BVR is granted subject to any one or more of those conditions, the new condition or conditions will remain in force for a further period of 12 months from the date of that further grant.[56]

32 Non-compliance with a curfew condition imposed on the grant of a BVR is an offence against s 76C of the Migration Act. Non-compliance with a monitoring condition of a BVR is likewise an offence against s 76D of the Migration Act. Each offence is punishable by a maximum penalty of five years' imprisonment or 300 penalty units, or both,[57] subject to s 76DA of the Migration Act which provides that if a person is convicted of such an offence the court must impose a sentence of imprisonment of at least one year.

The broader legislative response to *NZYQ*

33 On 8 November 2023, the High Court made orders in *NZYQ*. On 17 November 2023, and (as noted) in response to the orders made in *NZYQ*, the Commonwealth Parliament enacted the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) ("the Amendment Act"), which amended the Migration Act and directly amended the Migration Regulations. The Explanatory Memorandum relating to the Amendment Act explained the purpose of those amendments as being "to ensure non-citizens for whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future and who are therefore not capable of being subject to immigration detention [under ss 189(1) and 196(1) of the Migration Act] following the High Court's orders ... and who do not otherwise hold a visa are subject to appropriate visa conditions on any bridging visa granted to them following release".[58] The amendments pursued that purpose by providing for the imposition and enforcement of conditions on the grant to a non-citizen within that cohort of a BVR.

34 On 7 December 2023, the Commonwealth Parliament enacted the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) ("the Other Measures Act"). The Other

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55 Migration Regulations, reg 2.25AE(2).

56 Migration Regulations, reg 2.25AE(3).

57 Migration Act, ss 76B, 76C and 76D.

58 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 2.

Measures Act further amended the Migration Act in relation to the grant of a BVR.[59]

35 The Other Measures Act also inserted a new Div 395 into the Criminal Code which is given effect by the *Criminal Code Act 1995* (Cth).[60] The stated object of Div 395 is to protect the community from serious harm by providing that non-citizens who pose unacceptable risks of committing serious violent or sexual offences and who have no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future can be subject to community safety detention orders or community safety supervision orders.[61]

36 On the same day as the enactment of the Other Measures Act, the Governor-General in Council made the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth) ("the Amending Regulations") in the exercise of the general regulation-making power conferred by s 504 of the Migration Act. The Amending Regulations further amended the Migration Regulations with respect to the grant of a BVR, amongst other things, to ensure the ability of the Minister to grant such a visa without application, to provide for the imposition of a range of new and amended visa conditions, and to ensure that conditions imposed would remain operative for 12 months from the date of grant.[62] The Explanatory Statement to the Amending Regulations explained those further amendments to the Migration Regulations to be complementary to those already made by the Amendment Act and referred to them as "enhancing the BVR framework and further strengthening the Government's approach to managing risks to the Australian community".[63]

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59 See Other Measures Act, Sch 1.

60 *Criminal Code Act 1995* (Cth), s 3.

61 Criminal Code, s 395.1.

62 Amending Regulations, Sch 1, items 7, 8, 11, 12, 15 and 17.

63 Australia, Minister for Immigration, Citizenship and Multicultural Affairs, *Migration Amendment (Bridging Visa Conditions) Regulations 2023*, Explanatory Statement at 1.

Class of persons to which cl 070.612A(1) applies

37 As disclosed in the extrinsic material, the "*NZYQ* cohort" the subject of the legislative response "*includes* certain individuals with serious criminal histories"[64] but is not confined to such persons. Indeed, the power conferred by cl 070.612A(1) to impose conditions on the *NZYQ* cohort, on its face, is capable of exercise in respect of persons who are stateless, are from disputed territories, or who have practical health reasons that prevent their removal to another country (irrespective of the commission of any criminal offence in Australia or elsewhere).

38 Further, although it is common ground that cl 070.612A applies to people described as within the "*NZYQ* cohort", this short-hand description may mislead. While made in response to the circumstances of the *NZYQ* cohort, the relevant provisions will apply to any person who was, is, or becomes an eligible non-citizen subject to regs 2.25AA or 2.25AB of the Migration Regulations.

The plaintiff

39 The plaintiff is a stateless Eritrean who arrived in Australia aged 14 in 2002 as the holder of a Refugee (Subclass 200) visa. Between 2006 and 2017, he was convicted of serious offences and was sentenced to terms of imprisonment. His Refugee (Subclass 200) visa was cancelled under s 501(3A) of the Migration Act in 2017. Upon his release from imprisonment in 2018, he was taken into immigration detention under s 189(1) of the Migration Act.

40 In 2019, whilst in immigration detention, the plaintiff applied for a Protection (Subclass 866) visa. A delegate of the Minister for Home Affairs refused that application in 2020. In so doing, the delegate made findings which amount to a "protection finding" within the meaning of s 197C of the Migration Act. That protection finding has the consequence that s 198 of the Migration Act neither requires nor authorises removal of the plaintiff to Eritrea.

41 The plaintiff was released from immigration detention on 23 November 2023 based on an assessment then made that there was no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future, such that this Court's decision in *NZYQ* meant his detention was not authorised by the Migration Act. It is common ground between the parties that there was then

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64 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8318 (emphasis added).

and remains in fact no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future.

42 Soon after the plaintiff was released from immigration detention on 23 November 2023, the Minister granted the plaintiff a BVR in accordance with the Migration Regulations as then amended by the Amendment Act on conditions which included the monitoring condition and the curfew condition. Between 13 December 2023 and 16 February 2024, a delegate of the Minister granted three further BVRs to the plaintiff, one of which was on conditions which included the monitoring condition and the curfew condition. It is common ground between the parties that the grant of the BVR on 23 November 2023 was not authorised by the Migration Regulations as then amended by the Amendment Act (because the plaintiff was not then in immigration detention[65]) with the consequence that the grants of the three further BVRs were not authorised by the Migration Regulations (because the plaintiff did not then hold a valid BVR[66]).

43 Between 12 March and 2 April 2024, a delegate of the Minister granted the plaintiff three further BVRs each on conditions which included the monitoring condition and the curfew condition.

44 The plaintiff made representations to the Minister in respect of two of those further BVRs. After considering those representations with the benefit of advice from the Community Protection Board ("the Board"[67]), a delegate of the Minister on 11 July 2024 decided under s 76E of the Migration Act to refuse to grant the plaintiff a new BVR that did not impose the monitoring condition and the curfew condition. The basis for that decision was that the delegate was not satisfied that the monitoring condition and the curfew condition were not reasonably necessary for the protection of any part of the Australian community. The upshot is that the last of the further BVRs granted to the plaintiff by a delegate of the Minister – that granted on 2 April 2024 – remains in force on conditions which include the monitoring condition and the curfew condition.

45 The plaintiff in the meantime was arrested and charged on 13 June 2024 with four offences under s 76D of the Migration Act of failing to comply with the

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65 See Migration Regulations, reg 2.04 read with Sch 2, cl 070.411, as then amended by the Amendment Act.

66 See Migration Regulations, reg 2.25AB(1)(b), as then amended by the Amendment Act.

67 See [80] below.

monitoring condition of the BVR granted to him on 2 April 2024 and one offence under s 76C of the Migration Act of failing to comply with the curfew condition of that BVR. He was subsequently arrested and charged on 27 June 2024 with a further offence under s 76C of the Act of failing to comply with the curfew condition of that BVR. All six of those charges are presently pending in the Magistrates' Court of Victoria.

The substance and effect of the curfew condition

46 The plaintiff's argument against the constitutional validity of the power to impose the curfew condition involved three propositions. First, that the constitutional conception of an interference with liberty for the purpose of Ch III is to be aligned with the concept of "imprisonment" for the common law tort of false imprisonment. Second, that the detriment the curfew condition imposes on a visa-holder is to be characterised as a form of imprisonment and, accordingly, by default as prima facie punitive. Third, that to the extent that there is reasoning in *Thomas v Mowbray*[68] to the effect that the interim control order in that case did not involve detention in custody or infringe the principle established in *Lim*, it is wrong and should be overturned.

47 The constitutional validity of the curfew condition, however, does not depend on the correctness or otherwise of the three propositions. This is because, as explained below, the constitutional character of the curfew condition is prima facie punitive, irrespective of the resolution of these propositions. Accordingly, the prudential approach of this Court to avoid the formulation of a rule of constitutional law broader than required by the precise facts to which it is to be applied requires that answers not be given to these non-determinative issues.[69]

48 The curfew condition confines a person to a "notified address" from 10.00 pm on one day until 6.00 am the next day (or other times specified by the Minister), every day, for a period of 12 months. The notified address may be: the person's residential address; "an address at which the [person] stays regularly because of a close personal relationship with a person at that address"; or any

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68 (2007) 233 CLR 307.

69 *Tajjour v New South Wales* (2014) 254 CLR 508 at 588 [174]. See also *Clubb v Edwards* (2019) 267 CLR 171 at 216-217 [135]-[138]; *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 230 [22]; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248 [57]-[58]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 576-577 [114]-[116].

address notified no later than 12.00 pm on the previous day.[70] That is, the notified address may change from day to day provided that the person gives the required notice, enabling the person, for example, to stay with whomever the person chooses (in Australia) and wherever the person chooses (in Australia).

49 This said, the curfew condition restricts the person's movement to a single location for eight hours every night for 12 months (in circumstances where the statutory scheme contemplates that another visa may be granted subject to the same condition for another 12 months, and so on, until the person can be removed from Australia).[71] The essential character of the curfew condition is the confinement of the person's movement, every night, to a single location.

50 The detriments the curfew condition imposes on a person's liberty (under the pain of criminal sanction for a failure to comply and an associated mandatory sentence of imprisonment[72]) include: (a) the detriment on any given day of being required to be sufficiently organised to give notice of any change in notified address by 12.00 pm the day before the change occurs, failing which the person must be at the previous notified address for the curfew period; (b) the detriment each day of being required to be at and in the notified address by 10.00 pm, which inevitably would materially restrict activities outside of that location before 10.00 pm; (c) the detriment each day of having movement restricted to within the bounds of the notified address between 10.00 pm and 6.00 am; and (d) the psychological burden each day imposed by each of these other detriments. These detriments are not, as the defendants submitted, "comparatively slight" or "modest".

51 The detention imposed by the curfew condition is neither trivial nor transient in nature. For one-third of every day, the person is confined to a specified place. And they are required to remain at that specified place. The person is confined because if they leave the notified address, they will commit a criminal offence[73] and be subject to a mandatory minimum sentence of one year in prison.[74]

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70 Migration Regulations, Sch 8, cl 8620(3).

71 Migration Regulations, reg 2.25AE.

72 Migration Act, s 76C (as noted, the maximum penalty is five years' imprisonment or 300 penalty units, or both, but, by s 76DA, if a person is convicted of an offence against s 76C the court must impose a sentence of imprisonment of at least one year).

73 Migration Act, s 76C, unless the person has a "reasonable excuse".

74 Migration Act, s 76DA.

Further, because of the requirement they remain at a notified address for one-third of the day, the person's liberty to remain in the community during the other two-thirds of the day is also constrained. The person cannot travel any distance that would prevent them from returning in time to a "notified address".

52 Against this background, several considerations dictate the characterisation of cl 070.612A(1)(d) as prima facie punitive. First, the curfew condition involves a deprivation of liberty. Second, that deprivation of liberty is material and relatively long-term. Third, the deprivation of liberty applies and will apply to all persons within the class unless the Minister reaches the specified state of satisfaction.

53 Contrary to the defendants' submissions, the reasoning in *Thomas v Mowbray*[75] does not dictate the conclusion that the power to impose the curfew condition is non-punitive. In that case, a court could make an interim control order (which included a curfew requiring the person to be at an address notified in writing between the hours of 12.00 am and 5.00 am each day[76]) only if satisfied, on the balance of probabilities, of certain detailed requirements.[77] The issue in *Thomas v Mowbray* was "preventive restraints on liberty by judicial order".[78] The issue in this case is executive not judicial order. Accordingly, the re-opening of *Thomas v Mowbray* does not arise for consideration.

54 Nor do decisions of the House of Lords in which more restrictive curfews than those able to be imposed under cl 070.612A(1)(d) were held not to amount to a "deprivation of liberty" within the meaning of Art 5 of the European Convention on Human Rights ("the ECHR")[79] assist the defendants' arguments. In those decisions the House of Lords adopted jurisprudence developed in the European Court of Human Rights to draw a distinction between a "deprivation" of liberty and a "restriction" upon liberty. The development of the distinction by the European Court of Human Rights is explicable by reference to the unqualified terms in which Art 5 of the ECHR expresses the right to liberty which it guarantees

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75 (2007) 233 CLR 307.

76 *Thomas* (2007) 233 CLR 307 at 323 [2], 492-493 [554].

77 *Thomas* (2007) 233 CLR 307 at 325-326 [9].

78 *Thomas* (2007) 233 CLR 307 at 330 [18].

79 See *Secretary of State for the Home Department v MB* [2008] AC 440; *Secretary of State for the Home Department v E* [2008] AC 499. Compare *Secretary of State for the Home Department v JJ* [2008] AC 385.

and which gives rise to a need "to preserve the key distinction between [that] unqualified right to liberty and the qualified rights of freedom of movement, communication, association and so forth".[80]

55 Further, and again contrary to the defendants' submissions, other types of curfews (for example, to prevent infectious diseases spreading or to restore public order) do not assist. Curfews may be of many different kinds and for many different purposes and, by reason thereof, will have different constitutional significance.

The substance and effect of the monitoring condition

56 The definition of "monitoring device" in condition 8621 and in s 76D(7) of the Migration Act refers to "any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object". The facts in the special case identify the electronic device currently used pursuant to condition 8621. While the monitoring could be carried out by a device other than the monitoring device described in the facts in the special case, it is that monitoring device which is used. The constitutional question is to be answered by reference to a device of that kind.

57 The salient features of the monitoring device in this context include that an officer of the Australian Border Force fits the device around the ankle of the visa-holder subject to the monitoring condition. The fitting of the monitoring device necessarily involves what would otherwise be the commission of the tort of trespass to the person (in the forms of assault and battery). The monitoring device then continues in contact with the wearer thereafter, as a direct and immediate continuing consequence of what would otherwise be the tort of trespass.

58 The monitoring device is neither small nor discreet. It would be described as a chunky form of ankle cuff in a plastic cover. It would not be mistaken for any form of jewellery. Nor would it be invisible under many forms of clothing (apart from, for example, long loose clothing). The monitoring device appears to be precisely what it is, an ankle cuff that many people would automatically associate with the monitoring of the location of the wearer because they present some kind of risk. It may safely be inferred that no person wearing the monitoring device, while awake, could become unaware of its presence. Its continued presence on the

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80 *JJ* [2008] AC 385 at 419 [44]. See Arts 10 and 11 and Art 2 of Protocol 4 of the European Convention on Human Rights (1953).

body, whilst not a cause of pain or physical discomfort, cannot be described as only a slight or modest interference with bodily integrity.

59 One reason a person subject to the monitoring condition could not forget or ignore the monitoring device is because they are instructed to charge it twice a day for at least 90 minutes each time (and it vibrates if its charge is low). Given that it is a criminal offence punishable by a mandatory minimum sentence of one year's imprisonment to fail to take any specified steps to ensure that the monitoring device remains in good working order,[81] no person subject to the monitoring condition would be unconcerned by the need to ensure that the monitoring device remains charged.

60 The detriments the monitoring condition imposes affecting the bodily integrity of the wearer are material and relatively long-term as: (a) the wearer would always be aware of the physical presence of the monitoring device and the continuous monitoring function (24 hours a day, seven days a week, for 12 months) it is performing, which is both a real physical and a real psychological and emotional burden; (b) the charging requirements involve wearing an additional charging device for about three hours a day every day for 12 months, in circumstances where the wearer has to keep the charging device charged (by using the separate dock, which is to be plugged into a mains power supply), imposing, under pain of criminal sanction, a real physical burden on the wearer from wearing the charging device and a real psychological and emotional burden of ensuring the charging of the charging device and the monitoring device; and (c) to make the monitoring device invisible to others would require wearing certain types of clothing. Further, and in common with the curfew condition, the statutory scheme contemplates that another visa may be granted subject to the same condition for another 12 months, and so on, until the person can be removed from Australia.[82]

61 The monitoring condition also effects an involuntary restraint on the liberty of the person wearing the monitoring device. The practical effect of the charging requirement and the other requirements to keep the device in good working order is to prevent an individual from being separated for an extended period from any place that has access to a mains power supply. While the charging device (once charged) can be unplugged from the mains power supply and attached to the monitoring device, the charging device itself must be kept regularly charged which is done by plugging the charging device into a mains power supply. Further, as persons unknown to the individual will be continuously tracking the individual's

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81 Migration Act, ss 76D(3) and 76DA; Migration Regulations, Sch 8, cl 8621(3).

82 Migration Regulations, reg 2.25AE.

location (which would be likely to divulge to these persons unknown the individual's religious, political, sexual, and other personal affiliations and associations), the individual may be deterred from going to places they may otherwise go because of shame or a fear of adverse consequences from the Commonwealth or other persons with access to the information. In evaluating the seriousness of these constraints, it is always necessary to recall that (in common with contravention of the curfew condition) contravention of the monitoring condition carries a maximum penalty of five years' imprisonment or 300 penalty units, or both, but at minimum a mandatory sentence of imprisonment of at least one year for such contravention.[83]

62 While there is no hint in the statutory text, the extrinsic material, or the overall context that a contemplated object or end of the monitoring condition is to set the wearer apart from other persons in Australia by a visible mark conveying their status as an unworthy or dangerous person or a criminal, the monitoring device will be visible to all unless covered by certain types of clothing. The requirement to wear certain types of clothing to prevent others from seeing the monitoring device, irrespective of the appropriateness of that clothing to the weather or circumstances, is a further encroachment on the personal liberty of the individual. The monitoring device, if visible, is also likely to expose the wearer to a degradation of autonomy, the practical effect of which is to further restrict the individual's movement and therefore liberty.

63 Clause 070.612A(1)(a) is prima facie punitive for these reasons.

Justification for impugned conditions

64 The words "prima facie" in the conclusion of a prima facie punitive characterisation of cl 070.612A(1)(a) and (d) have work to do. They convey that such a characterisation is not sufficient to establish that the power to impose those conditions contravenes Ch III of the Constitution. A law conferring the power may bear the character of being prima facie punitive but be valid if the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose.

65 The stated purpose of "protection of any part of the Australian community" is expressed at a high level of generality. The provision, for example, does not identify the nature, degree, or extent of the harm sought to be protected against or the nature, degree, or extent of the required state of non-satisfaction by the Minister

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83 Migration Act, ss 76B, 76D, 76DA.

necessary to authorise the Minister not to impose the curfew and monitoring conditions on the person's visa.

66 The defendants submitted, however, that cl 070.612A(1) should be construed to mean that the conditions must be imposed by the Minister unless the Minister is satisfied that it is not reasonably necessary to impose the condition for the protection of any part of the Australian community "*from the risk of harm arising from future offending*". By this means, the defendants sought to support the argument that cl 070.612A(1) was sufficiently confined in its operation to be capable of constitutional justification. The submission cannot be accepted.

67 The rules of statutory interpretation do not extend to reading into cl 070.612A(1) the words "from the risk of harm arising from future offending". That limitation is inconsistent with the words used in the provision (namely, "the protection of any part of the Australian community"), the broader context of the provision, and the multiplicity of purposes of the suite of legislative reforms responding to *NZYQ* contemplated in the extrinsic material.

68 First, the text of cl 070.612A(1) is expressed to be concerned with "the protection of any part of the Australian community". It does not refer to "protection ... from the risk of harm arising from future offending". Those words may be read into the text only if, as a matter of statutory interpretation, they are necessarily implied by the broader context of cl 070.612A. That is not the case. As explained, cl 070.612A(1) confers power on the Minister to impose four conditions, including conditions concerning receiving or transferring money[84] and concerning debt and bankruptcy.[85] For cl 070.612A(1) to be directed at protection of the community from the risk of harm arising from future offending, those conditions also must necessarily be directed at that purpose. It is far from clear that those conditions are directed to that purpose.

69 Second, the context in which cl 070.612A(1) appears is inconsistent with reading in the additional words "from the risk of harm arising from future offending". That context includes both cl 070.612B and the community safety order regime which were enacted as part of the same suite of legislative reforms.

70 Clause 070.612B applies in addition to cl 070.612A. Clause 070.612B applies if the visa-holder "has been convicted of an offence involving a minor or any other vulnerable person" or "has been convicted of an offence involving

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84 Migration Regulations, Sch 2, cl 070.612A(1)(b), Sch 8, cl 8617.

85 Migration Regulations, Sch 2, cl 070.612A(1)(c), Sch 8, cl 8618.

violence or sexual assault", in which event specified additional conditions must be imposed. The fact that cl 070.612B expressly applies to individuals who are part of the *NZYQ* cohort and who have been convicted of certain offences indicates that had the intention been to limit cl 070.612A(1) to protecting the community from the harm arising from future offending, the power to impose the conditions would have been framed more specifically and, for example, would have expressly referred to criminal offending.

71 The community safety order regime and cl 070.612A(1)(a) and (d) are mutually exclusive.[86] The scheme adopted by Div 395 of the Criminal Code in pursuit of its object is to empower the Supreme Court of a State or Territory, on application by the Minister administering the Migration Act, to make a community safety order including a community safety supervision order in respect of a non-citizen who has been convicted of a serious violent or sexual offence if there is no real prospect of removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future.[87] The Supreme Court of a State or Territory is empowered to make a community safety supervision order only if satisfied, on the balance of probabilities, that the non-citizen to be subjected to the order "poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence" and if satisfied that such conditions as may have been imposed on the grant of a visa held by the non-citizen under the Migration Act "would not be effective in protecting the community from serious harm by addressing the unacceptable risk".[88]

72 The contrast between cl 070.612A(1) and the community safety order regime is stark and, it must be inferred, reflects the legislative intention.

73 Third, the extrinsic material relating to the suite of legislative reforms responding to *NZYQ* of which cl 070.612A(1) forms part also identifies multiple objects of the provisions including: safety of the Australian community; appropriate and proportionate management of this class of persons; facilitation of the removal of this class of persons from Australia when it becomes practicable to do so; deterrence of this class of persons from future criminal offending (including by increasing the prospects of detection of future offences); and maintaining the confidence of the Australian community in the migration system being well-

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86 Migration Act, s 76AA(6)-(7).

87 Criminal Code, ss 395.5(1), 395.8.

88 Criminal Code, s 395.13(1)(b) and (c).

managed.[89] This latter purpose of ensuring public confidence in the management of Australia's migration system is apparent from several aspects of the extrinsic material including the references to, for example: (a) the need to "support the effective management of noncitizens released from immigration detention following the decision of the High Court in the matter of NZYQ";[90] (b) the reasonable expectations of the Australian community;[91] and (c) the "overarching objective [being] to bolster the existing framework and ensure an enduring, and appropriately robust, framework for the management of NZYQ affected non-citizens over the long-term"[92] in the Second Reading Speech in respect of the *Migration Amendment (Bridging Visa Conditions) Bill 2023*; as well as (d) "[t]he current requirements for BVR holders are being further strengthened through this Bill to reflect the current environment and the expectations of the Australian community in respect to the management of non-citizens holding BVRs, in light of the implications of the orders in NZYQ";[93] and (e) that "[t]he Australian community expects well-managed migration"[94] in the Explanatory Memorandum in respect of the *Migration Amendment (Bridging Visa Conditions) Bill 2023*.

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89 See, eg, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8318; Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 2, 4; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 November 2023 at 8510; Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023*, Explanatory Memorandum at 2-3; Australia, Minister for Immigration, Citizenship and Multicultural Affairs, *Migration Amendment (Bridging Visa Conditions) Regulations 2023*, Explanatory Statement at 8.

90 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8318.

91 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8318.

92 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8320.

93 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 2.

94 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 2.

74 Fourth, the identity of the *NZYQ* cohort does not require reading in the additional words contended for by the defendants. As noted, while the *NZYQ* cohort may largely consist of persons with criminal records, as the defendants acknowledged, to be part of the *NZYQ* cohort a person does not need to have committed a crime.[95]

75 Fifth, s 3A(1) of the Migration Act and s 15A of the *Acts Interpretation Act 1901* (Cth) do not permit cl 070.612A(1) to be construed more narrowly than the ordinary grammatical meaning of its language. Both s 3A(1) of the Migration Act and s 15A of the *Acts Interpretation Act* depend on it being reasonably open to construe the provision, in some application, as within constitutional limits (in which event the provision has that more confined meaning and operation in all its applications). Neither provision, however, permits the confining of the field of operation of a statutory provision in circumstances where that more confined field is incapable of specification with any certainty. Nor does s 13(2) of the *Legislation Act 2003* (Cth) so permit. Although s 13(2) calls for a provision of a legislative instrument to be given a restrictive "secondary construction" if and to the extent that the provision on its primary construction would be beyond the power to make it conferred by its enabling legislation,[96] the sub-section does not authorise a provision to be given "a different meaning or even operation from that which it possesses as it stands in the [legislative instrument] read as a whole".[97] Such provisions simply do not authorise the re-drafting of a provision or the making of policy choices of that kind by a court. Re-drafting of that kind is never a form of "reasonably open" construction.[98]

76 For these reasons, it must be accepted that cl 070.612A(1) means precisely what it says, that its object is the "protection of any part of the Australian community" in the broad sense discussed above. The risk of harm with which cl 070.612A(1) is concerned must be taken to be designedly unparticularised and indeterminate.

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95 See [37]-[38] above.

96 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 657.

97 See *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 372. See also *Spence v Queensland* (2019) 268 CLR 355 at 414-416 [85]-[91].

98 eg, *Ruhani v Director of Police* (2005) 222 CLR 489 at 538-539 [148]-[149]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 604-605 [76]-[79].

77 The defendants submitted further, however, that, "in considering whether it is 'reasonably necessary to impose [a] condition for the protection of any part of the Australian community', the Minister must consider the nature of the harm that is likely to occur without the condition, and whether the condition is 'reasonably necessary' to protect any part of the Australian community from that harm", and to do so the Minister must take into account several matters[99] including "the nature of the harm that the visa holder may cause to any part of the Australian community" and "the likelihood of that harm eventuating".

78 These submissions concern the exercise of the power in cl 070.612A(1) as if cl 070.612A(1) is to be construed as narrowly as the defendants proposed and as if the concept of "harm" in cl 070.612A(1) is confined to a recognisable legal wrong (such as, for example, the infliction of physical violence). As explained, neither assumption is justified. For this reason, the defendants' submissions cannot be accepted.

79 On its proper construction, cl 070.612A(1) is broad and flexible and authorises uncertain and unpredictable outcomes. It requires the monitoring and curfew conditions to be imposed on the visa of every person within the class unless the Minister can reach the specified state of satisfaction. That specified state of satisfaction involves a wide conception of protection of the Australian community, which extends well beyond protection from the risk of harm arising from persons within the class committing future offences and does not specify the degree or extent of: (a) the protection that is sought to be achieved; (b) the risk to such protection before the Minister may reach the required state of satisfaction; or (c) the required state of satisfaction other than at the level of "reasonable necessity" which, properly construed, means only appropriate or adapted and not essential or indispensable. This is why the plaintiff's description of cl 070.612A(1)(a) and (d) as "free-floating", "elastic", and "abstract and ill-defined", is correct.

80 The defendants also referred to the agreed facts in the special case, which disclose the role of the Board in making recommendations to the Minister in respect of the imposition of the prescribed conditions under cl 070.612A(1). The agreed facts in the special case record that the Board was established by the exercise of Commonwealth non-statutory executive power[100] and is not conferred with any functions or powers under the Migration Act or the Migration Regulations, or any other legislation or regulations. The existence of detailed

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99 By analogy to *Vella* (2019) 269 CLR 219 at 234 [20], 241 [43], 244 [51], 253 [75], 272-273 [128]-[129].

100 Constitution, s 61.

guidelines under which the Board operates would be relevant to any action for judicial review of the Minister's exercise of the power based on a recommendation of the Board. However, the questions reserved by the special case are concerned with whether cl 070.612A(1)(a) and (d) are valid conferrals of authority on the Minister to impose the monitoring condition and the curfew condition on the grant of a BVR. No question is raised as to the manner in which the Minister, on the advice of the Board, has administered those provisions in practice. The proper constitutional characterisation of a statutory power is not to be determined by associated non-statutory guidelines in respect of the operation of the power that may change at any time. Therefore, no more need be said about the Board. For the same reason, it is not to the point that, in the actual exercise of the power, some members of the class have been subjected to the imposition of the curfew and monitoring conditions and others have not.

81 The fundamental difficulty with cl 070.612A(1) is that protection of every part of the Australian community from any harm at all, like the protection of the Australian community as a whole, is "a concept of such elasticity that it is not necessarily inconsistent with the imposition ... of a criminal punishment following an adjudication of criminal guilt – a function which lies in the heartland of judicial power".[101] Clause 070.612A(1) therefore casts its net over all members of the class in circumstances where escape from this net depends on the Minister forming an opinion which the Minister is legally entitled not to form in a broad and flexible, as well as uncertain and unpredictable, range of circumstances not necessarily connected to the existence of any real risk of physical or other harm to any member of the Australian community.

82 Finally, even if the words "from harm" may be read in, "protection of any part of the Australian community from harm", a purpose expressed at that level of generality, is not a legitimate non-punitive purpose for Ch III. What harm? Clause 070.612A(1) does not require the harm to be of a sufficient degree of seriousness to involve the commission of a serious criminal offence. In fact, the harm does not need to be of a sufficient degree of seriousness to involve the commission of any criminal offence. The purported non-punitive purpose does not refer to any harm associated with criminal conduct. Even if it did, where the Court has accepted that protection of the community from the harm of criminal offending is a legitimate non-punitive purpose for a Commonwealth law which authorises imprisonment, the harm to which those laws were directed was a more specific harm, such as the harm caused to the community by terrorism. If protection from

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101 *Alexander* (2022) 276 CLR 336 at 380 [111]. See also *Garlett v Western Australia* (2022) 277 CLR 1 at 64-65 [179].

any harm of any nature, degree, or extent were a legitimate non-punitive purpose, the very point of the legitimacy requirement would be undermined.

83 As the power to impose each of the curfew condition and the monitoring condition on a non-citizen by the Executive Government of the Commonwealth is prima facie punitive and there is no legitimate non-punitive purpose justifying the power, the power is to be characterised as punitive and therefore infringes on the exclusively judicial power of the Commonwealth in Ch III of the Constitution.

84 While it is not essential to so observe, even if protection of the Australian community from the risk of harm arising from future offending were accepted to be a legitimate and non-punitive purpose, cl 070.612A(1)(a) and (d) are not reasonably capable of being seen as necessary for that purpose.

85 The required state of satisfaction in cl 070.612A(1)(a) and (d) involves a positive state of mind about a negative stipulation ("the Minister is satisfied that it is not reasonably necessary to impose that condition") so that if the Minister cannot be so satisfied the conditions must be imposed, meaning that the provision resolves all doubt and uncertainty in favour of the imposition of the conditions. It does so, moreover, in circumstances where the person's right to make representations against the conditions being imposed exists only after the conditions have been imposed. In the case of the power to impose the impugned conditions, therefore, the power can be exercised even where it cannot be and has not been established that the imposition of the condition is reasonably necessary for the achievement of the purported legitimate non-punitive purpose because the default position is that the Minister imposes the condition. Indeed, there may be cases where the Minister never has the information necessary to meaningfully assess whether the imposition of the condition is not reasonably necessary for the protection of the Australian community. In these cases, the condition will generally remain imposed for up to 12 months, notwithstanding that it is not reasonably necessary to impose the condition to protect any part of the Australian community. The law is framed such that, Ch III aside, the consequences set out above may result.

86 Therefore, the impugned powers to impose the curfew condition and the monitoring condition are not calibrated to the constitutional test.

Answers to questions

87 The impugned conditions involve a price that persons within the relevant class must pay for their presence in the Australian community. The impugned conditions are a form of extra-judicial collective punishment based on membership of the class. Accordingly, cl 070.612A(1)(a) and (d) infringe on the judicial power

of the Commonwealth vested exclusively in the judiciary by Ch III of the Constitution and are invalid.

88 For these reasons the questions formally reserved for the consideration of the Full Court are to be answered as follows:

(1) Is cl 070.612A(1)(a) of Sch 2 to the Migration Regulations invalid because it infringes Ch III of the Constitution, either alone or in its operation with cl 070.612A(1)(d)?

Answer: Yes.

(2) Is cl 070.612A(1)(d) of Sch 2 to the Migration Regulations invalid because it infringes Ch III of the Constitution, either alone or in its operation with cl 070.612A(1)(a)?

Answer: Yes.

(3) What, if any, relief should be granted to the plaintiff?

Answer: It should be declared that cl 070.612A(1)(a) and cl 070.612A(1)(d) of Sch 2 to the Migration Regulations are invalid.

(4) Who should pay the costs of the special case?

Answer: The defendants.

EDELMAN J.

The issue and the answer in a nutshell

89 An executive decision is made which subjects an alien who has committed offences to visa conditions pursuant to the *Migration Regulations 1994* (Cth). The conditions require that the alien be detained at their home, or other nominated place, between 10pm and 6am every day with their movements monitored at all times by a conspicuous monitoring device attached to their body. In the second reading speech for the legislation that amended the *Migration Regulations* to permit the imposition of these conditions upon the relevant cohort of aliens (including the plaintiff),[102] the Minister for Immigration, Citizenship and Multicultural Affairs described the cohort to whom the legislation might apply as "individuals with serious criminal histories" and "a history of serious criminal offending".[103] The Explanatory Memorandum to the Bill described the purpose of one of the conditions as "to deter the individual from committing further offences".[104] That purpose was shared with a regime introduced concurrently which empowered the making of judicial orders to restrain the liberty of people who had been "convicted of a serious violent or sexual offence".[105]

90 The questions in this special case are *not* concerned with whether these conditions can be imposed on aliens at all. The questions concern whether the clause of the *Migration Regulations* that purported to permit the imposition of these conditions by the Executive conferred a power of punishment on the Executive. If so, then that clause was invalid because, at the Commonwealth level, punishment is an exclusively judicial power and subject to principles of judicial process.

91 There is no doubt, and it was properly conceded by the defendants, that in Australian constitutional law the restriction of an offender's liberty as a response to the *past* commission of a crime is punitive and is an exclusively judicial function. It would reduce the separation of powers to ritual formalism if a rigid line were drawn between, on the one hand, restrictions on an offender's liberty due to the past commission of a crime and, on the other hand, restrictions on an

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102 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth), Sch 2, items 8, 13.

103 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8318.

104 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 29 [178], 41.

105 *Criminal Code* (Cth), s 395.5(1)(a).

offender's liberty due to the past commission of a crime leading to the anticipated *future* commission of a crime. Like the former, the latter is widely recognised as punishment.[106] As HLA Hart said of the treatment of the former and the latter in different ways simply by the expedient of a verbal incantation of "protection of the community" from criminal offending:[107]

> "Certainly the prisoner who after serving a three-year sentence is told that his punishment is over but that a seven-year period of preventive detention awaits him and that this is a 'measure' of social protection, not a punishment, might think he was being tormented by a barren piece of conceptualism—though he might not express himself in that way."

92 Although that conclusion would be sufficient to answer the questions in this special case in favour of the plaintiff, it is necessary in these reasons to explain in some detail what is meant by punishment and why the application of this concept in this special case should not be extended by fiction. The necessity arises because in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ("*Lim*"),[108] this Court extended the constitutional concept of punishment, beyond any meaning that the concept is capable of bearing, to circumstances where legislation providing for detention in order to deport aliens had the effect that some aliens were detained for a period that was longer than was reasonably capable of being seen as necessary for their deportation. In other words, legislation that employed means to achieve its purposes in a disproportionate fashion was said to be "punitive" in its disproportionate application to particular individuals. I have previously adopted and applied this use of the language of "punishment", although noting that it involves the use of "punishment" in a sense that is "novel" or

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106 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 154 [196], citing Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 166-167, Husak, "Lifting the Cloak: Preventive Detention as Punishment" (2011) 48 *San Diego Law Review* 1173, Ferzan, "Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible" (2011) 96 *Minnesota Law Review* 141, Ashworth and Zedner, *Preventive Justice* (2014) at 14-17, Zedner, "Penal subversions: When is a punishment not punishment, who decides and on what grounds?" (2016) 20 *Theoretical Criminology* 3, and Nathan, "Punishment the Easy Way" (2022) 16 *Criminal Law and Philosophy* 77.

107 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 166-167. See also *Minogue v Victoria* (2019) 268 CLR 1 at 26 [47].

108 (1992) 176 CLR 1 at 26-27.

"deemed"[109] and "loose".[110] Transparency requires explicit recognition that this distorted extension of the concept of punishment in *Lim* is a fiction. In law, fictions should be exposed. In these reasons, this extension of punishment is described as the "*Lim* punishment fiction".

93 This Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ("*NZYQ*")[111] created further difficulty by introducing a related fiction: that a legitimate general purpose will be deemed not to be Parliament's purpose in particular cases where it is not practically achievable in the reasonably foreseeable future in those particular cases.[112] The recognition of the *Lim* punishment fiction and the *NZYQ* purpose fiction does not necessarily deny the correctness of the result that was achieved in each case, despite those results being achieved by application of fictions. But the acceptance of those results requires that the reasoning be reconceptualised, without the use of fiction. A clear explanation for why the home detention and monitoring conditions are for the purposes of punishment requires decoupling the *Lim* punishment fiction from the proper concept of punishment, in turn requiring a reconceptualisation of the *Lim* punishment fiction.

94 The *Lim* punishment fiction cannot be justified by reference to the fundamental rights of every person. It can be accepted that a person's fundamental rights can be expressed in the terms that Blackstone used, being "the right of personal security, the right of personal liberty; and the right of private property".[113] But the *Constitution* creates no fiction that a disproportionate Commonwealth law that permits a person's property to be taken is punitive. The *Constitution* creates no fiction that a disproportionate law that impairs personal security is punitive. And the *Constitution* creates no fiction that a disproportionate law that impairs liberty is punitive. Any role for these fundamental rights in the *Constitution* is only in relation to principles of construction concerning the scope of the heads of legislative power. Thus, the *Constitution* imposes an express limit on legislative power concerning acquisition of property by the Commonwealth.[114] And it may be arguable that issues of proportionality (whether a law is "reasonably capable of

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109 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1017 [52]; 415 ALR 254 at 267. See also *ASF17 v Commonwealth* (2024) 98 ALJR 782 at 796 [70].

110 *ASF17 v Commonwealth* (2024) 98 ALJR 782 at 795 [66].

111 (2023) 97 ALJR 1005; 415 ALR 254.

112 *ASF17 v Commonwealth* (2024) 98 ALJR 782 at 795 [68].

113 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 1 at 125.

114 *Constitution*, s 51(xxxi).

being seen as necessary") inform the limits of legislative power concerning laws that impose extreme impositions or constraints upon the fundamental rights of personal security or personal liberty.

95 To reiterate: the stated questions of law in this special case are not concerned with whether the Commonwealth has legislative power to permit the imposition of home detention or monitoring conditions upon aliens who have committed offences but are at liberty in the community because there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future.[115] The present questions of law ask, in effect, only whether the regulations that empower the imposition of these conditions upon the relevant cohort of aliens do so for the purposes of punishment.

The facts in a nutshell

96 The plaintiff is a stateless refugee who arrived in Australia at the age of 14 as the holder of a refugee visa. He suffers from schizophrenia. Between 2005 and 2017 he committed a range of criminal offences. In 2017, the Minister cancelled the plaintiff's refugee visa under s 501(3A) of the *Migration Act 1958* (Cth). From 12 April 2018, following his release from prison, the plaintiff has been held in immigration detention centres, at Melbourne Immigration Transit Accommodation, or in hospital for treatment of his psychosis. During his detention, the plaintiff applied for a protection visa. A delegate of the Minister refused that application. The delegate made a "protection finding"[116] that the plaintiff was a person to whom Australia owed protection obligations.[117] But the delegate refused the protection visa because the plaintiff was found to be a person who, having been convicted of a particularly serious crime, was a danger to the Australian community.[118]

97 On 8 November 2023, this Court delivered its decision in *NZYQ*.[119] The Minister concluded that there was no real prospect of removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future. The plaintiff was released from detention. Between 23 November 2023 and 2 April 2024, the plaintiff was issued, or purportedly issued, with seven visas, each subject to various conditions. The defendants accept that the first four visas were affected by

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115 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1018 [55]; 415 ALR 254 at 268.

116 *Migration Act 1958* (Cth), s 197C(5).

117 For the reason identified in the *Migration Act*, s 36(2)(aa).

118 *Migration Act*, s 36(1C)(b).

119 (2023) 97 ALJR 1005; 415 ALR 254.

jurisdictional error. The fifth, sixth and seventh visas were issued to the plaintiff in March and April 2024. Two of the conditions attached to those visas are conditions 8620 and 8621. In broad terms, conditions 8620 and 8621 imposed restrictions on the plaintiff's liberty that confined him to periods of home detention and subjected him to wearing an ankle bracelet that would monitor his movements. The submissions in this special case focused upon those two conditions in their application to the plaintiff's seventh visa.

The source and meaning of the conditions

The source, terms and imposition of the conditions

98 The fifth, sixth and seventh visas granted to the plaintiff were "Subclass 070" bridging visas, granted under the power to grant bridging visas in s 73 of the *Migration Act*. Section 41 of the *Migration Act* permits the regulations to "provide that visas, or visas of a specified class, are subject to specified conditions". Section 504 of the *Migration Act* is a broad regulation-making power with terms that are sufficiently general to empower the making of regulations imposing such conditions.

99 The relevant regulations under which the plaintiff's fifth, sixth and seventh Subclass 070 bridging visas were granted are regs 2.25AA (fifth visa) and 2.25AB (sixth and seventh visas) of the *Migration Regulations*. Regulation 2.25AB was inserted into the *Migration Regulations* by the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) on 18 November 2023 and regs 2.25AA and 2.25AB were amended on 8 December 2023 by the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth).

100 Those regulations, as amended, empower the Minister to grant, respectively, an initial and a subsequent bridging visa. The powers are conditioned upon the alien's release from detention[120] and either the Minister being satisfied that their "removal from Australia is not reasonably practicable" (in relation to the initial visa)[121] or there being "no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future" (in relation to subsequent visas).[122]

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120 See *Migration Regulations 1994* (Cth), reg 2.25AA(1)(b), which operates where s 195A of the *Migration Act* is not available.

121 *Migration Regulations*, reg 2.25AA(2).

122 *Migration Regulations*, reg 2.25AB(1)(a), read with reg 2.20(18).

101 Clause 070.612A of Sch 2 to the *Migration Regulations* provides for the imposition of particular conditions upon Subclass 070 bridging visas issued by the Minister under regs 2.25AA or 2.25AB, relevantly as follows:

> "... each of the following conditions must be imposed by the Minister unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community".

102 Four conditions are prescribed in the following order: (a) condition 8621; (b) condition 8617; (c) condition 8618; and (d) condition 8620. The two conditions challenged by the plaintiff are conditions 8621 and 8620. Those two conditions, which are the focus of this special case, provide as follows:

> "**8621** (1) The holder must wear a monitoring device at all times.
>
> (2) The holder must allow an authorised officer to fit, install, repair or remove the following:
>
> (a) the holder's monitoring device;
>
> (b) any related monitoring equipment for the holder's monitoring device.
>
> (3) The holder must take any steps specified in writing by the Minister, and any other reasonable steps, to ensure that the following remain in good working order:
>
> (a) the holder's monitoring device;
>
> (b) any related monitoring equipment for the holder's monitoring device.
>
> (4) If the holder becomes aware that either of the following is not in good working order:
>
> (a) the holder's monitoring device;
>
> (b) any related monitoring equipment for the holder's monitoring device;
>
> the holder must notify an authorised officer of that as soon as practicable.

(5) In this clause:

monitoring device means any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object.

related monitoring equipment, for a monitoring device, means any electronic equipment necessary for operating the monitoring device."

"**8620** (1) The holder must, between 10 pm on one day and 6 am the next day or between such other times as are specified in writing by the Minister, remain at a notified address for the holder for those days.

(2) If the Minister specifies other times for the purposes of subclause (1), the times must not be more than 8 hours apart.

(3) In this clause:

notified address for a holder for a particular day or days means any of the following:

(a) either:

(i) the address notified by the holder under condition 8513 [residential address]; or

(ii) if the holder has notified another address under condition 8625 [change of address]—the last address so notified by the holder;

(b) an address at which the holder stays regularly because of a close personal relationship with a person at that address, and which the holder has notified to Immigration for the purposes of this paragraph;

(c) if, for the purposes of this paragraph, the holder notifies Immigration of an address for that day or those days no later than 12 pm on the day before that day or the earliest day of those days (as the case may be)—that address."

103 The other two prescribed conditions, which were not imposed on the plaintiff, are concerned with: (condition 8617) the visa holder notifying the Department within five working days of having received or transferred amounts of $10,000 within any period of 30 days; and (condition 8618) the visa holder

notifying the Department within five working days of incurring a debt or debts of $10,000 or more, being declared bankrupt, or any significant change to the holder's debts or bankruptcy.

104 In this special case, the parties adopted the shorthand of "monitoring condition" to describe condition 8621 and "curfew condition" to describe condition 8620. The latter label is an inapt euphemism. There is a distinction between a "curfew" and "home detention".[123] A curfew only prevents movement after nightfall.[124] Condition 8620 goes further and confines the subject to a particular place and empowers the Minister to impose the eight hours of detention over a period that could include daytime. Condition 8620 is more appropriately described as "home detention".

105 In deciding whether to impose any or all of the conditions, the Minister is assisted by a non-statutory advisory board established by the Executive Government and styled "The Community Protection Board". The Community Protection Board was designed to provide "informed, impartial and evidence-based recommendations that support the management of individuals who pose a risk to the safety and security of the Australian community while immigration compliance activity progresses". There are Guidelines for consideration relevant to the imposition of visa conditions ("Guidelines") that the Community Protection Board is to follow in assisting the Minister to assess whether the conditions are not reasonably necessary for the protection of any part of the Australian community. The Guidelines require the Board to focus upon: "[i]mmigration history; criminality; [b]ehaviour in criminal custody and/or immigration detention; [b]ehaviour and compliance with visa condition[s] while in the community; [m]edical and health information (inclusive of psychological); [i]dentity information; [s]ecurity information; and [w]hether there are any other circumstances that are likely to increase the risk the individual may pose to the Australian community; and [o]ther information relevant to the person's circumstances or conduct that is available to the Department".

106 The Guidelines require a sequential approach to decision making so that the reasonable necessity of a condition would be assessed in light of conditions that the Board has already determined will be imposed. The Board is to first consider any reasonable necessity of the monitoring condition before turning to the reasonable necessity of other conditions including the home detention condition. The Guidelines identify relevant considerations to be taken into account in assessing the level of risk that a person poses to any part of the Australian community that focus upon past offences committed by that person: the nature and

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123 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 245 [53].

124 *The Macquarie Dictionary*, 6th ed (2013) at 368, "curfew", sense 3.

frequency of past offending; rehabilitation; and the extent to which other conditions and other factors will address the risk to the Australian community.

107 A decision by the Minister to grant a Subclass 070 visa that is subject to a home detention condition or a monitoring condition, in circumstances where there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future, is not subject to "the rules of natural justice".[125] But, as soon as practicable after making the decision, the Minister must give the alien a written notice setting out the decision and an invitation to make representations "as to why the first visa should not be subject to one or more of the conditions".[126] If the Minister is satisfied from those representations that the "conditions are not reasonably necessary for the protection of any part of the Australian community" then the Minister must grant a second visa that is not subject to those conditions.[127] The first visa will then cease to be in effect.[128]

108 The *Migration Act* provides for wide powers and consequences in relation to the home detention and monitoring conditions. Authorised officers[129] have power to "do all things necessary or convenient" for purposes including installing, maintaining and operating the monitoring device,[130] and may "collect, use, or disclose" information to others for purposes including: determining whether there has been a breach of the conditions of the monitored person's visa;[131] determining whether the monitored person has breached offence provisions of the *Migration Act* or *Migration Regulations*;[132] and "protecting the community in relation to persons who are subject to monitoring".[133]

109 The offences under the *Migration Act* that can be committed by holders of Subclass 070 visas include: failing, without a reasonable excuse, to comply with

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125 *Migration Act*, s 76E(1) and (2).

126 *Migration Act*, s 76E(3).

127 *Migration Act*, s 76E(4).

128 *Migration Act*, ss 82(3), 68(4), 68(5).

129 *Migration Act*, s 76F(6).

130 *Migration Act*, s 76F(1).

131 *Migration Act*, s 76F(2)(a).

132 *Migration Act*, s 76F(2)(b).

133 *Migration Act*, s 76F(2)(c).

the requirements of a home detention condition;[134] and failing, without a reasonable excuse,[135] to comply with the requirements of a monitoring condition to wear a monitoring device at all times,[136] to allow an authorised officer to fit, install, repair or remove the device and related equipment,[137] to take steps to ensure that the device and related equipment remain in good working order,[138] or to notify an authorised officer that the monitoring device or related equipment are not in good working order.[139] In each case the maximum penalty is five years imprisonment or 300 penalty units or both,[140] and there is a mandatory minimum penalty of one year imprisonment for any of the monitoring offences described above.[141]

The interpretation of the conditions and their purpose

110 The negative terms in which cl 070.612A is cast have the effect that if the Minister has any uncertainty about whether a condition might be reasonably necessary for the protection of any part of the Australian community then the condition must be imposed. But the open textured terms of cl 070.612A invite the immediate question of what is the subject matter about which the Minister must be certain. What is required for the Minister to be satisfied that a condition is not "reasonably necessary ... for the protection of any part of the Australian community"?

111 There are only two real possibilities for the meaning of the phrase "protection of any part of the Australian community". The first, supported by the plaintiff, is that the phrase is concerned with protection from any form of harm or detriment. That would include any harm or detriment arising from any lawful acts. The second, which was ultimately the position adopted by the defendants, was that the phrase is concerned with protection from harm arising from the future commission of offences.

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134 *Migration Act*, s 76C.

135 *Migration Act*, s 76D(6).

136 *Migration Act*, s 76D(1).

137 *Migration Act*, s 76D(2).

138 *Migration Act*, s 76D(3).

139 *Migration Act*, s 76D(4).

140 *Migration Act*, ss 76C, 76D.

141 *Migration Act*, s 76DA.

112 The only merit of the first interpretation is that it is consistent with the strict literal meaning of the words used. But that is not a proper approach to interpretation, by which the meaning of words is considered in context within the sentences they form, by reference to the intention of a notional Parliament. When the proper approach to interpretation is applied, the first interpretation is highly implausible. It would cover a sweeping range of possibilities from harm or detriment caused by unlawful acts that threaten the safety or security of members of the Australian community, through to lawful but risky business enterprise that might cause financial loss to the community, or even possible harm to the public caused by innocent infection from any minor illness held or likely to be contracted by a visa holder.

113 It is difficult to see how Parliament could rationally be taken to have been concerned with visa holders who are lawfully entrepreneurial or who sneeze a lot. Unsurprisingly, the first interpretation is not how cl 070.612A was understood by the Executive Government when it established the Community Protection Board for the purpose of advising on the "safety and security of the Australian community", concepts which are narrower than the abstract concept of harm. Nor is it consistent with the focus upon past offending in the Guidelines. Nor is it consistent with the proposed sequential approach to the imposition of conditions that cl 070.612A(2) requires the Minister to follow and that the Guidelines require the Board to follow. That sequential approach requires that the conditions be considered as part of an iterative exercise concerned with monitoring, then financial transaction reporting, then bankruptcy and debt reporting, and then, as a matter of last resort, home detention (even though the Community Protection Board had recommended that 10 people be subject to home detention but not monitoring). That iterative approach also assumes that there is an underlying and common focus upon future offending in each of the conditions in cl 070.612A.

114 The understanding of the Executive Government and its approach to the application of cl 070.612A cannot change the interpretation of that clause. Nor is the interpretation of cl 070.612A affected by the defendants' position that the clause is concerned with protection from harm arising from the future commission of offences. But the understanding of the Executive Government and the position of the defendants is correct and consistent with cl 070.612A(2). This interpretation does, of course, add detail to the application of cl 070.612A that is not present in the text itself. But that is an almost inevitable result when interpreting any open-textured provision.

115 By contrast, the plaintiff's proposed interpretation of cl 070.612A is a hemianopsic approach that ignores the surrounding context of the clause. One aspect of that surrounding context is cl 070.612B, which was inserted into the

Migration Regulations by the same Act that inserted cl 070.612A.[142] Another aspect is Div 395 of the *Criminal Code*, which was inserted into the *Criminal Code Act 1995* (Cth) on the same day the *Migration Regulations* were amended to give cll 070.612A and 070.612B their current form.[143]

116 Clause 070.612B requires mandatory additional conditions for holders of a visa who have been convicted of: (1) "an offence involving a minor or any other vulnerable person";[144] and (2) "an offence involving violence or sexual assault".[145] In relation to (1), the required conditions are wide-ranging and concern: notification to the Department of details of people residing at the visa holder's residential address[146] and the visa holder's association with or membership of organisations that engage in activities involving more than incidental contact with minors or vulnerable persons;[147] notification to the Minister of any change in an online profile or user name of the visa holder;[148] a prohibition upon performing work or participating in any regular organised activity involving more than incidental contact with minors or vulnerable persons;[149] and a prohibition upon going within 200m of a school, childcare centre or day care centre.[150] In relation to (2), the required condition is that the visa holder must not contact, or attempt to contact, the victim of the offence or a member of the victim's family.[151]

117 When cl 070.612A is read together with cl 070.612B the purpose of Parliament is clear and is consistent with how it was understood by the Executive Government in its establishment of the Community Protection Board.

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142 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth), Sch 2, item 8; amended by *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth), Sch 1, item 18.

143 *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth), Sch 2, item 5.

144 *Migration Regulations*, cl 070.612B(1).

145 *Migration Regulations*, cl 070.612B(2).

146 *Migration Regulations*, Sch 8, condition 8612.

147 *Migration Regulations*, Sch 8, condition 8615.

148 *Migration Regulations*, Sch 8, condition 8626.

149 *Migration Regulations*, Sch 8, condition 8622.

150 *Migration Regulations*, Sch 8, condition 8623.

151 *Migration Regulations*, Sch 8, condition 8624.

Clause 070.612A is a response to the prospect of future offending in very general terms. Clause 070.612B is a response to more specific categories of offence. The conditions prescribed by cl 070.612A are an attempt to protect the Australian community from the risk of harm arising from future offending. The conditions concerning monitoring and home detention are an attempt specifically to deter offending by physical acts when the visa holder comes in contact with others. In this context, the other two conditions prescribed by cl 070.612A can only be understood as an attempt to deter offending by online activity in their concern with the ubiquitous possibilities of online financial offences including money laundering, fraud and deception. Indeed, it was common ground that the condition concerning notification of receipts or payments of more than $10,000 was concerned with financial crime. But so too, the notification to the Department of debts of $10,000 or more, being declared bankrupt, or any significant change to the holder's debts or bankruptcy, is an attempt to guard against the prospect of online financial offences such as fraud that would otherwise be difficult to detect and which would become more likely in the circumstances requiring notification. The purpose of cl 070.612A as an attempt to protect the Australian community from the risk of harm arising from future offending is put beyond doubt by the further context of Div 395 of the *Criminal Code*, which is entitled "[c]ommunity safety orders". Division 395 of the *Criminal Code* and the amendments to cll 070.612A and 070.612B of the *Migration Regulations* were part of the same scheme of legislative reform, enacted in response to this Court's decision in *NZYQ*. These two components commenced jointly on 8 December 2023. The objects provision of Div 395 described the object, in similar terms to cl 070.612A, as being to "protect the community from serious harm"[152] and continued by explaining how that object would be fulfilled in terms directly concerned with offending: by empowering a Supreme Court of a State or Territory to make a community safety order against persons who have been convicted of a serious violent or sexual offence or a serious foreign violent or sexual offence.[153]

118 The extrinsic material relating to the *Migration Amendment (Bridging Visa Conditions) Bill 2023* also supports the conclusion that the home detention and electronic monitoring conditions are imposed for the purpose of protection of the Australian community from harm arising from the future commission of offences. During the second reading speech, the Minister for Immigration, Citizenship and Multicultural Affairs described the aliens to whom these conditions relate under cl 070.612A as "individuals with serious criminal histories" and "a history of

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152 *Criminal Code*, s 395.1.

153 *Criminal Code*, s 395.5(1)(a) and (2)(a).

serious criminal offending".[154] The Minister later reiterated that the Bill responded to "serious criminals who can no longer be placed in detention".[155] The Explanatory Memorandum to the Bill also described the purpose of the electronic monitoring condition as "to deter the individual from committing further offences".[156]

119 Although the Explanatory Memorandum also suggested that a consequence of electronic monitoring would be that it "will also assist with prevention of absconding behaviour",[157] this anticipated *consequence* could not be said to be a purpose of either the electronic monitoring condition or the home detention condition. If this were truly the purpose of imposing the conditions then the conditions would be needed for potentially all visa holders. In any event, however, even if the prevention of visa holders from absconding were a further purpose of either of the conditions, the existence of one punitive purpose, [158] "any part" of the judicial function,[159] or at most a "principal" purpose,[160] is sufficient to invalidate the conditions.

120 For these reasons, the better interpretation of cl 070.612A is that of the defendants. The phrase "protection of any part of the Australian community" is concerned with protection from harm arising from the future commission of offences. As to the application of that meaning, the sequential approach in the Guidelines, and the emphasis in the Guidelines upon application of the conditions to achieve the goal of cl 070.612A(1) in the manner least restrictive of the liberty of the visa holder, followed the same general approach as the required application of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) ("the SCPO

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154 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8318. See also Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 2.

155 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8396.

156 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 29 [178], 41.

157 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 29 [178], 41.

158 *ASF17 v Commonwealth* (2024) 98 ALJR 782 at 801 [97].

159 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

160 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 368-369 [75].

Act") set out by this Court in *Vella v Commissioner of Police (NSW)*.[161] The defendants submitted that this approach was what Parliament had intended by the open textured provision in cl 070.612A(1). That submission is correct. The interpretative approach to cl 070.612A(1) set out in the Guidelines reflected the intention of Parliament.

121 The proper application of the SCPO Act was explained in a joint judgment of four members of this Court in *Vella v Commissioner of Police (NSW)*.[162] Section 6(1) of the SCPO Act provides that "[a] serious crime prevention order may contain such prohibitions, restrictions, requirements and other provisions as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities." There is a strong resonance between the meaning of cl 070.612A and the meaning of s 6(1) of the SCPO Act once cl 070.612A is understood as requiring the imposition of conditions unless the Minister considers that they are not reasonably necessary for the protection from harm arising from the future commission of offences.

122 The application of cl 070.612A, like the relevant application of s 6(1) of the SCPO Act, requires four steps. First, there is a "backward-looking" step which considers whether the person has committed any offences in the past.[163] Other than in the most exceptional circumstances, a person who has committed no offences in the past cannot reasonably be treated as likely to offend in the future. Secondly, and in light of any past offending, there is a "forward-looking" requirement that the Minister must assess whether there is a real or significant risk to the Australian community arising from the future commission of offences by the visa holder.[164] Thirdly, the Minister must assess whether there are reasonable grounds to consider that the imposition of conditions might prevent, restrict or disrupt the future offending.[165] Fourthly, and consistently with the sequential approach provided in the Guidelines for the Community Protection Board to follow, the Minister must assess the "reasonable necessity" of the imposition of each condition.[166] That requires an approach which balances, on the one hand, the likelihood that a condition will prevent, restrict or disrupt future offending and the seriousness of

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161 (2019) 269 CLR 219.

162 (2019) 269 CLR 219.

163 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 240 [41].

164 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 241 [43].

165 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 242 [47].

166 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 243-244 [49]-[50].

that offending and, on the other hand, the extent to which the condition will intrude upon the visa holder's liberty.[167]

123 What is plain is that the commission of past offending, and the nature of that offending, is central to the exercise that the Minister is required to perform.

The concepts of punishment and prevention

What is punishment?

124 In a description to which this Court has referred on numerous occasions,[168] HLA Hart famously described the "standard or central case" of punishment as involving the following elements: (i) pain or unpleasant consequences; (ii) for an offence against legal rules; (iii) of an actual or supposed offender for their offence; (iv) intentionally administered by humans other than the offender; and (v) imposed and administered by an authority constituted by a legal system against which the offence is committed.[169] As Hart recognised, his description was only of the standard or central case of punishment. He said that his description was not exhaustive or definitional; he recognised that it might be "especially tempting" for someone who wished to constrain the notion of punishment to "abuse [the] definition" by relying upon the absence of conditions (ii) and (iii).[170] Hart explained that outside the standard case there were instances of punishment including harm done:[171]

> "to those innocent of any crime, chosen at random, or to the wife and children of the offender ... And here the wrong reply is: *That*, by definition, would not be 'punishment'".

125 The point being made by Hart was that punishment is a concept with a clear core but an uncertain periphery. Nevertheless, conduct by the State will be

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167 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 244 [51].

168 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [265]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 641 [174]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 424 [238]; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 924 [109], 930 [140]; 415 ALR 1 at 30, 38. See Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 4-5.

169 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 4-5.

170 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 5.

171 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 6 (emphasis in original).

punishment when the commission of an offence or wrong by that person "is among [the State's] reasons for making [the person] suffer".[172] For example, a person who is detained or fined by the State for the commission of an offence is punished because a reason for the detention or fine was their wrongdoing. As explained below, the same characterisation of punishment should be recognised where a person is subject to home detention or monitoring due to predicted future behaviour where that prediction is based on the past commission of offences.[173]

126 The sentencing of offenders with punishment in proportion to the gravity of their offence reflects the traditional system of penology which sees punishment as backward-looking with retribution or just deserts as its core justification. The imposition of consequences such as home detention and monitoring based on predictions of future behaviour is an additional, newer form of penology, which can be described as "protective punishment".[174] That newer penology combines the backward-looking aspects of punishment (the commission of a past offence) with consequences based upon predictions of future behaviour. Nevertheless, as Professor Zedner has observed, "there is considerable overlap between the old and new penologies".[175]

127 This Court has long acknowledged that the imposition of harsh or unpleasant consequences on a person based upon predictions of future behaviour is punishment. An example is the unanimous decision in *Chester v The Queen*[176] which recognised as punishment an order for "the protection of society" that was both disproportionate and decoupled from retribution. In that case, this Court considered a provision which empowered a judicial order for indefinite detention at the conclusion of a term of imprisonment served for an indictable offence, "designed for the protection of the public from persons with a propensity to commit serious crimes".[177] The Court held that an order of that nature was contrary to the

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172 Gardner, "Introduction", in Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (2008) at xxv.

173 See also Husak, "Lifting the Cloak: Preventive Detention as Punishment" (2011) 48 *San Diego Law Review* 1173 at 1193-1194.

174 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 149 [182]; *Garlett v Western Australia* (2022) 277 CLR 1 at 94 [258]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1017 [51]; 415 ALR 254 at 267; *ASF17 v Commonwealth* (2024) 98 ALJR 782 at 801 [97].

175 Zedner, *Criminal Justice* (2004) at 291.

176 (1988) 165 CLR 611.

177 *Chester v The Queen* (1988) 165 CLR 611 at 618.

"fundamental principle of proportionality" and that the "stark and extraordinary nature of [the] punishment" should be confined to exceptional cases.[178]

128 As *Chester v The Queen* demonstrates, a harsh or unpleasant consequence does not cease to be punishment because it is not concerned with retribution or because it might be disproportionate to an offence, including one for which punishment has already been administered. The consequence might be unjust but it remains punishment. For instance, there can be little doubt that the effect of the decision of the majority of this Court in *Australian Building and Construction Commissioner v Pattinson*[179] was to impose "real punishment"[180] despite the disproportionate nature of the order that was reinstated. In that case, a majority of this Court reinstated a substantial penalty upon Mr Pattinson, a retired builder, whose only contravention in his lifetime of work was a reckless misrepresentation, telling two people that they needed to be members of a union, causing the loss of a single day of work for those two people.[181] In reinstating the penalty, the majority held that there was "no place for a 'notion of proportionality'" in the imposition of the civil penalty as punishment.[182]

129 Although, in some cases, the harshness of the consequence for a person might invite an inference that the purpose of the imposition of that harsh consequence was a purpose of punishment such as retribution or specific or general deterrence, the harshness of a consequence is only one factor to consider when assessing the purpose of that consequence. A parking fine imposed for the purposes of retribution and deterrence remains a punishment if it is set at $10 rather than $500. Likewise, if the State detains a person for the commission of an offence it remains a punishment if they were only detained briefly and were treated "very civilly [and provided] with beef-steaks and beer".[183]

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178 *Chester v The Queen* (1988) 165 CLR 611 at 618-619.

179 (2022) 274 CLR 450.

180 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 473 [57], citing *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* [1978] ATPR ¶40-091 at 17,896. See also *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,153.

181 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 479 [82].

182 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 457 [10].

183 *Huckle v Money* (1763) 2 Wils KB 205 at 205 [95 ER 768 at 768].

Punishment and prevention/protection

130 There is a competing view which has little to commend it. In reasoning which Hart lampooned more than half a century earlier as "a barren piece of conceptualism",[184] and which Professor Zedner described as a "none too subtle linguistic trick",[185] four members of this Court in *Minister for Home Affairs v Benbrika*[186] characterised judicial orders for preventive detention as "protective and not punitive". With great respect, that is a basic category error. Prevention or protection, on the one hand, and punishment, on the other, are not separate categories.[187] As I explained in the same case, prevention of the commission of offences and protection of the community from offending are goals or purposes of punishment;[188] it has been said that a reason that criminal law, with its focus upon the various purposes of punishment, exists is "for the protection of society".[189] Unsurprisingly, any distinction between punishment and prevention or protection has been politely described in this Court as being, at best, "elusive".[190]

131 The reasoning of the joint judgment in *Benbrika* is also contrary to authority. The reasoning of the joint judgment is inconsistent with the reasoning in *Veen v The Queen (No 2)*,[191] where four members of this Court emphasised that the imposition of proportionate punishment takes "the protection of society" as a "material factor in fixing an appropriate sentence".[192] The reasoning of the joint judgment in *Benbrika* is inconsistent with the rejection of a strict dichotomy

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184 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 166-167.

185 Zedner, "Preventive Justice or Pre-Punishment? The Case of Control Orders" (2007) 60 *Current Legal Problems* 174 at 193.

186 (2021) 272 CLR 68 at 99 [39].

187 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 380 [111].

188 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 149 [183].

189 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589 [11], quoting *United States v Chandler* (1968) 393 F 2d 920 at 929. See also Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 18 at 249.

190 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 145 [32]. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [82].

191 (1988) 164 CLR 465.

192 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 473.

between punishment and protection taken by five members of this Court in *Fardon v Attorney-General (Qld)*.[193] And the reasoning of the joint judgment in *Benbrika* is inconsistent with the recognition, explained above, in the unanimous decision of this Court in *Chester v The Queen*[194] that an order that was made for "the protection of society" could be punitive.

132 There are also basic reasons of morality which illustrate why the joint judgment in *Benbrika* was wrong to treat punishment and prevention as separate categories. If preventive restraints upon liberty, based upon offending conduct and designed to control future behaviour, were to be reclassified from punitive measures to purely protective measures, then those restraints would be freed from expectations of predictability and proportionality to the seriousness of past criminal conduct. The logic of treating punishment as though it were purely preventive without recognising the human agency involved in the past criminal conduct "ends by degrading us to the status of [non-human] animals or things".[195]

The constitutional concept of punishment

Basic constitutional propositions

133 In *R v Kirby; Ex parte Boilermakers' Society of Australia*[196] a majority of this Court held that the *Constitution* prohibits the creation by the Commonwealth Parliament of a court or tribunal that exercises both executive and judicial power. Just as a federal court could not exercise administrative power, "Chap. III does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to the judicial power".[197] One example given of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth was the power to punish, which "plainly must rest upon Chap. III".[198] In other words, the power to punish

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193 See the discussion in *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 163-164 [214], referring to *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589 [11], 597 [34], 610 [74], 611 [77], 612-613 [81]-[82], 631 [147], 644 [185], 647 [196].

194 (1988) 165 CLR 611.

195 Sher, *Desert* (1987) at 75.

196 (1956) 94 CLR 254.

197 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 296.

198 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 287.

under a Commonwealth law can be exercised only by a court within Ch III of the *Constitution*.

134 In *Lim*,[199] a joint judgment of three members of this Court (with whom Gaudron J relevantly agreed[200]) described the standard or core case of punishment, the power of adjudication and punishment of criminal guilt, as within this exclusively judicial power. It is well established that this core instance of punishment is an exclusively judicial power.[201] In assessing whether other powers are punitive and therefore exclusively judicial, this Court has repeatedly applied the approach of determining whether a law is imposed for the "purposes of punishment",[202] usually deploying (and sometimes expressly acknowledging) the understanding of punishment set out above,[203] as described by Hart.

135 The exercise of characterisation of a harsh or unpleasant consequence as punishment for the purposes of Ch III becomes more difficult at the periphery between judicial and executive power. In those cases, the characterisation should be performed not merely by reference to analogies with the core, or standard case, of punishment (the sentencing of offenders for criminal convictions[204]) or by reference to concepts which are outside the periphery of the concept of

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199 (1992) 176 CLR 1 at 27.

200 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 53. See also at 70 (McHugh J).

201 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97-98; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 610-611 [75]-[77]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [15]; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 90-91 [18]-[19]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 366 [67]; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 910 [41], 912 [50], 920 [89]-[90]; 415 ALR 1 at 11-12, 14, 24-25. See also Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 1 at 132-133; Coke, *The Second Part of the Institutes of the Laws of England* (1797) at 589; Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 202.

202 See, eg, *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 594 [22].

203 At [124]-[127].

204 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 157 [200], 158 [204], 172-173 [233].

punishment.[205] The characterisation should also take into account the historical treatment until, and at, the time of Federation, of the power to be exercised as within the categories of judicial, legislative, or executive,[206] or as a chameleon power which takes its character from the nature of the body that is exercising it.[207]

Punishment, regulation, and conditions subsequent

136 There are circumstances in which a harsh or unpleasant consequence following offending has not been characterised as punishment for the purposes of Ch III of the *Constitution*. These circumstances usually arise because the purpose behind imposition of those consequences is too far from the purposes of the core or standard case of punishment including retribution and general or specific deterrence. These cases, where the power to impose a harsh or unpleasant consequence has been treated as an executive power rather than a judicial power, usually involve the regulation of an anterior right or benefit.

137 The most obvious instance is where an absence of offending is a condition subsequent for the continued existence of an anterior right or benefit.[208] A simple example where an absence of offending is a condition subsequent for the continued existence of a right or benefit, rather than the imposition of a punishment, is where a status, licence or power is granted on the condition that privileges exercised under the status, licence or power do not involve the commission of a relevant offence. The subsequent loss of the status, licence, or power upon commission of a relevant offence is not punishment.[209] So too, when a visa is effectively subject

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205 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 634 [155].

206 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 469; *R v Davison* (1954) 90 CLR 353 at 365, 383; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, 53, 66-67.

207 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360; *Sue v Hill* (1999) 199 CLR 462 at 516-517 [134]-[135].

208 See *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 920-921 [92]; 415 ALR 1 at 25.

209 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 376 [49], 378-379 [58]-[59], 380 [63], 386 [79]. See also *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at 385 [11], 386 [16]; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542.

to conditions that require cancellation of the visa if "the Minister is satisfied that the [visa holder] does not pass the character test", such as by having a substantial criminal record,[210] it is not punishment for the Minister to exercise a power to cancel the visa when the holder receives a substantial criminal record.[211] The criminal offending is "merely a factum that demonstrated a failure to comply with express or implied conditions for remaining in Australia".[212] The purpose of that condition subsequent is to "regulate ... [the] presence in ... Australia of non-citizens".[213]

138 The labels used by a law to describe conduct or to describe a harsh or unpleasant consequence are not determinative of whether the law imposes a consequence as punishment for an offence or as a means to regulate a right or benefit. For instance, a consequence might not be punitive for the purposes of Ch III even if the law is described as creating "offences" and providing for their "punishment". An example is the decision of this Court in *R v White; Ex parte Byrnes*.[214] In that case, this Court held that the "choice of language"[215] in s 55 of the *Public Service Act 1922* (Cth) was not determinative. The language had described various breaches of discipline as "offences" and disciplinary action as "punishment". The section was concerned with determinations by officers primarily related to "status, conditions or other relations" and did not "impose a fine which was recoverable at law by any lawful means", but instead was nothing more than a deduction from salary as part of "the regulation of ... a very large body of people with respect to their work for and their relations with the Commonwealth Crown".[216]

139 Conversely, it is not determinative that a law describes a harsh or unpleasant consequence with a label other than "punishment" or describes the conduct for which the consequence is imposed with a label other than "offence". In *Alexander v Minister for Home Affairs*,[217] this Court considered the characterisation of

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210 *Migration Act*, s 501(3A).

211 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 347-348 [47]-[48].

212 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 428 [249].

213 *Migration Act*, s 4(1).

214 (1963) 109 CLR 665.

215 *R v White; Ex parte Byrnes* (1963) 109 CLR 665 at 669.

216 *R v White; Ex parte Byrnes* (1963) 109 CLR 665 at 670.

217 (2022) 276 CLR 336.

provisions of the *Australian Citizenship Act 2007* (Cth) that empowered the Minister to determine that a person ceases to be an Australian citizen in circumstances including the Minister's satisfaction that certain conduct, that amounted to *elements of* the commission of an offence, "demonstrates that the person has repudiated their allegiance to Australia".[218] A majority of this Court held that the power for a Minister to make such a declaration was for purposes including retribution and deterrence[219] and hence the power was punitive and amounted to an invalid exercise of an exclusively judicial power.

The relevance of the harshness of the consequence

140 There will be some cases at the margins where it is difficult to identify whether a harsh consequence is imposed for the purpose of administrative regulation of some activity or for the purposes of punishment. In those cases, the harshness of the consequence may be a decisive indicator that the measure is punitive because it is imposed for purposes of punishment such as retribution or specific or general deterrence. Thus, it has been said that detention of a person by the Executive is prima facie punitive "unless justified as otherwise".[220] Similarly, a power or duty to engage in serious violations of the bodily integrity of another based upon that person's conduct may point strongly to the purpose of the power or duty being a purpose of punishment. The extreme consequences of stripping a person's citizenship as a response to circumstances including the commission of elements of specified offences were significant factors in the determination in *Alexander v Minister for Home Affairs*[221] that the measure was imposed for the purposes of punishment.

141 But the harshness of the consequence is only one factor to consider in assessing the purpose of a provision. As explained above, a traffic fine of $100 for a driving offence might be much less severe than a sentence of life imprisonment for an offence against the person but the enormous difference in severity does not deprive a traffic fine of its character as a punishment. So too, a harsh consequence cannot, by itself, convert a law which has a plainly non-punitive purpose into a law

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218 *Australian Citizenship Act 2007* (Cth), s 36B(1)(b) (as it then was).

219 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 368-369 [75], 371 [82], 398 [163], 402 [173], 429 [251].

220 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611-612 [98]. See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 25-26 [60]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 430 [53].

221 (2022) 276 CLR 336 at 367-368 [72]-[74], 401-402 [171]-[172], 427 [248].

imposing punishment.[222] Hence, in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,[223] it was held that the harshness of the conditions of immigration detention could not convert lawful non-punitive detention into unlawful punishment. As Gleeson CJ said, "there is no warrant for concluding that, if the conditions of detention are sufficiently harsh, there will come a point where the detention itself can be regarded as punitive".[224]

Lim and the fictional extension of punishment

142 An immediate objection to the discussion of punishment above might be that the concept of "punishment" as an exclusively judicial power has been used in the reasoning of this Court concerning Ch III of the *Constitution* in a much wider sense. The problem is that this use of "punishment" in this Court's jurisprudence is a fiction. The decision which effected the fictitious extension of the concept of punishment, beyond its accepted meaning in every other area of law, was *Lim*.[225]

143 The answer to this objection is that *Lim* also recognises the concept of punishment in the proper sense discussed throughout these reasons. The extension of punishment in *Lim* involves a different concept and should be described by a different label. In polite terms, the use of "punitive" in *Lim* to describe the disproportionate effect of otherwise valid laws is "novel".[226] In terms that are more frank, however, the use of "punitive" in the sense used in *Lim* has been perspicaciously described as a "fiction".[227] It is a deliberate deeming of one thing to be something that it is known not to be.[228]

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222 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 426 [245].

223 (2004) 219 CLR 486.

224 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 [21]. See also at 559 [218].

225 (1992) 176 CLR 1 at 33.

226 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1017 [52]; 415 ALR 254 at 267; *ASF17 v Commonwealth* (2024) 98 ALJR 782 at 796 [70].

227 Appleby and McDonald, "Punishment and Chapter III of the Constitution", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law* (2020) 64 at 65.

228 *Chiro v The Queen* (2017) 260 CLR 425 at 476 [122], referring to Fuller, *Legal Fictions* (1967) at 51, 71.

144 The extension of punishment by fiction in *Lim* is, however, the only way to justify the result of this Court's decision in *NZYQ*.[229] Since this special case should be decided by reference to the concept of punishment in its proper sense, it is unnecessary to consider the application of the *Lim* punishment fiction. It suffices to say that if the home detention and monitoring conditions had not been for the purposes of punishment, but had been for some purely protective purpose, then there would be much to be said for the view of Beech-Jones J that the application of the decision in *Lim* should not invalidate either the home detention condition or the monitoring condition. The phrase "reasonably capable of being seen as necessary", and the proportionality analysis it requires, must incorporate a considerable degree of latitude to Parliament in implementing its policies as embodied in the purposes of its laws.[230]

The Lim *punishment fiction and* NZYQ

145 Does a law become a law for the purposes of punishment rather than for the purposes of public health if it permits a person with an infectious disease to be held in quarantine by the Executive for longer than is reasonably capable of being seen as necessary? Does a law which permits detention by executive warrant become a law for the purposes of punishment rather than for the purpose of ensuring that people are available to be dealt with by the courts if the law allows for some of those people to be detained for longer than is reasonably capable of being seen as necessary? Does a law which permits detention of those whose psychiatric illnesses make them unable to make medical decisions for themselves and a danger to themselves become a law for the purposes of punishment rather than a law for the provision of care and protection of the mentally ill if it permits detention by the Executive for longer than is reasonably capable of being seen as necessary?

146 No. No. No. Nevertheless, in *Lim*,[231] Brennan, Deane and Dawson JJ (on a point with which Gaudron J relevantly agreed[232] and about which McHugh J reasoned to similar effect[233]) held that a law conferring executive powers to "deport an alien" will be "of a punitive nature" and contrary to the exclusively judicial

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229 (2023) 97 ALJR 1005 at 1017 [51]-[52]; 415 ALR 254 at 267.

230 *Jones v Commonwealth* (2023) 97 ALJR 936 at 968 [152]; 415 ALR 46 at 85. See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 164 [216], 169 [226].

231 (1992) 176 CLR 1 at 33.

232 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 53.

233 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 65-66, 71.

power in Ch III if the law is not "limited to what is reasonably capable of being seen as necessary for the purposes of deportation".

147 For this reason, I agree with the prescient observations of Professor Appleby and Mr McDonald SC,[234] and I have previously acknowledged,[235] that it was an error for Kiefel CJ, Bell, Keane and Edelman JJ to say in *Falzon v Minister for Immigration and Border Protection*[236] that "[q]uestions of proportionality cannot arise under Ch III". That error was the consequence of an earlier erroneous conclusion that if a legislative power for removal goes further than necessary to achieve the purpose of facilitating or effecting removal of an alien then "it may be inferred that the law has a purpose of its own, a purpose to effect punishment".[237] The suggested inference of punishment is not an inference at all. It is a fiction.

148 The lack of proportionality, in some cases, between the purpose of detention of classes of aliens under ss 189(1) and 196(1) of the *Migration Act* and the means by which that detention is achieved is, however, the only way of justifying the decision of this Court in *NZYQ*.[238] The relevant purpose of detention of classes of aliens under ss 189(1) and 196(1) of the *Migration Act* is to enable their removal from Australia. That general purpose does not cease to exist, is not "refute[d]",[239] and does not lead to an inference or characterisation that the power is "punitive" in any real sense,[240] just because, in some particular cases, there are aliens for whom removal is not practicable in the reasonably foreseeable future. Instead, the partial disapplication of ss 189(1) and 196(1) of the *Migration Act* in *NZYQ* can be justified on the present state of the law only on the basis that those provisions have disproportionate application to a small number of aliens for whom the detention

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234 Appleby and McDonald, "Punishment and Chapter III of the Constitution", in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law* (2020) 64 at 77.

235 *Jones v Commonwealth* (2023) 97 ALJR 936 at 968-969 [154]; 415 ALR 46 at 86.

236 (2018) 262 CLR 333 at 344 [32].

237 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343-344 [29].

238 (2023) 97 ALJR 1005 at 1018 [55]; 415 ALR 254 at 268; see also at 1017-1018 [51]-[54]; 415 ALR 254 at 267-268.

239 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [46]; 415 ALR 254 at 266.

240 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [44]; 415 ALR 254 at 265.

that the provisions require is not reasonably capable of being seen as necessary for the purpose of removal.

Reconceptualising the Lim *punishment fiction*

149 On numerous occasions members of this Court have recognised or applied the *Lim* punishment fiction to support reasoning that disproportionate executive detention (in the sense of detention that is not reasonably capable of being seen as necessary for legitimate purposes such as admission or removal of an alien) is invalid.[241] But since laws enacted for a non-punitive purpose and which impose detention by disproportionate means are not truly "punitive", the *Lim* punishment fiction must be reconceptualised if it is to be retained.

150 One reconceptualisation of the *Lim* punishment fiction, which may reflect the true underlying basis for it, can be seen in the views expressed by Hayne J (with whom Heydon J agreed[242]) in *Al-Kateb v Godwin*.[243] His Honour suggested that the question of whether a law providing for detention for the purpose of removal of an alien was reasonably capable of being seen as necessary for a legitimate purpose "may be thought to be a test more apposite to the identification of whether the law is a law with respect to aliens or with respect to immigration". A similar approach had earlier been suggested by Gaudron J in *Kruger v The Commonwealth*.[244] That approach aligns with the express recognition by numerous members of this Court,[245] and possibly the hidden premise in the reasons of

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241 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 161-162; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 154-155 [402]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 131 [264]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 360 [96]; *Jones v Commonwealth* (2023) 97 ALJR 936 at 949-950 [63]; 415 ALR 46 at 60; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1013-1014 [30]; 415 ALR 254 at 262.

242 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 662-663 [303].

243 (2004) 219 CLR 562 at 647 [253].

244 (1997) 190 CLR 1 at 110-111.

245 For instance, *Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311 at 338; *R v Sweeney; Ex parte Northwest Exports Pty Ltd* (1981) 147 CLR 259 at 275; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 259-260, 278; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289, 303, 311-312, 324, 346; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29, 93-94, 101; *Leask v The Commonwealth* (1996) 187 CLR 579 at 616, 638.

others,[246] that there is a role for proportionality in a variety of cases in establishing whether a law is "with respect to" a constitutional head of power. The relevant role for proportionality that may reflect the true basis for the *Lim* punishment fiction may be as follows: a law that effects a large imposition or constraint, at least upon a person's bodily integrity or liberty, such as a serious violation of their liberty by custodial detention, may not be a law with respect to the relevant head of power to the extent that the imposition or constraint is not reasonably capable of being seen as necessary for the purpose of the law. Expressed in these terms, the issue is one of the scope or boundaries of a head of power. Every head of power has boundaries.

151 As McHugh J recognised in *Re Woolley; Ex parte Applicants M276/2003*,[247] other than the powers relating to naturalisation and aliens, race, marriage, divorce, bankruptcy and the influx of criminals, the subject matters of Commonwealth legislative power set out in s 51 of the *Constitution* are not intrinsically concerned with human beings and therefore not intrinsically concerned with impositions and constraints on human beings such as detention. His Honour considered that, with the exception of the defence and quarantine powers, "justifying such laws [for the detention of human beings] as being incidental to a s 51 grant of power [may] prove difficult".[248] The difficulty may be acute if, in the incidental application of the law to human beings, the law effects a large imposition or constraint upon bodily integrity or liberty, such as detention. As explained below, justification of such an incidental effect relies on principles of proportionality.

152 Although a law with respect to aliens is intrinsically one concerned with human beings, a reconceptualisation of the *Lim* punishment fiction would treat detention of aliens that is not reasonably capable of being seen as necessary for the processing of an entry application[249] or removal as not being a law with respect to aliens. This is not to create a new constitutional implication for the protection of liberty that is capable of direct and independent application. Rather, as a matter of construction of the aliens power, it is to treat extreme and disproportionate impositions or constraints as lying outside the scope of that power to the extent that they are disproportionate to the purpose of the law (with that concept being used in a manner that affords a wide range of latitude to Parliament). On this view, the same concern for the protection of fundamental individual rights that is part of

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246 *Spence v Queensland* (2019) 268 CLR 355 at 412-413 [80]-[83].

247 (2004) 225 CLR 1 at 27 [63].

248 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 27 [63].

249 To "receive, investigate and determine an application by that alien for an entry permit": *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 32.

the support for the constitutional separation of powers[250] also affects the scope of constitutional heads of power.

153 This potential reconceptualisation, and the proper role of proportionality in the exercise of characterisation of a law, need not be considered further in this case other than to develop two points. First, the approach is not inconsistent with the controversial, but commonly recognised, distinction between the core and incidental applications of a head of power. Secondly, the use of proportionality in this respect is not an application of the principle of the separation of powers.

154 In *Cunliffe v The Commonwealth*,[251] different views were expressed about the distinction between the core and incidental applications of the aliens power and the role of proportionality with respect to them. One issue in that case was the validity of provisions that regulated the conduct of people who provided immigration assistance to aliens. Mason CJ held that the law fell within the "core or heart of the subject matter of the [aliens] power" so that questions of proportionality did not arise.[252] His Honour accepted that if the law had only been incidental to the subject matter of aliens then it may have been "material to ascertain whether the law is capable of being 'reasonably considered to be appropriate and adapted'" to the incidental purpose or object to which the law is directed.[253] But his Honour did not identify how he discriminated between the core and the incidental aspects of the subject matter of a power.

155 By contrast, Toohey J rejected the utility of any rigid distinction between the core and incidental aspects of a "single grant" of power.[254] His Honour recognised a generally applicable test of proportionality that asks whether a law is reasonably and appropriately adapted to achieve ends within the limits of constitutional power. His Honour applied that test, concluding that the law in question was within the aliens power as it was "reasonably considered to be appropriate and adapted to achieving the regulation of the migration advice industry and the protection of aliens seeking entry to this country".[255] Gaudron J reaffirmed her Honour's earlier view that a law which was not reasonably capable

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250 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 606; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 919 [86]; 415 ALR 1 at 23-24.

251 (1994) 182 CLR 272.

252 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295-296.

253 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 296.

254 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 375. See also Brennan J at 317.

255 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 375-376, 377-378.

of being considered to be appropriate and adapted to achieving a purpose within a head of constitutional power "can be taken", or deemed, not to have that purpose.[256]

156 Brennan J, taking an approach which his Honour later repeated,[257] also recognised that disproportionate means would prevent a law being characterised as a law with respect to the subject matter of at least (i) a purposive or partly purposive power or (ii) a power that is restricted by a limitation.[258] But Brennan J considered that disproportionate means adopted by a law in achieving its purpose were not relevant to characterising whether a law was within the aliens power if (as he considered to be the case in *Cunliffe*) the connection with the aliens power was revealed by the effect and operation of the law.[259] It may be that the limits of Brennan J's recognition of the role of proportionality in analysis of the scope of a head of power were the impetus for his Honour joining in the fictional extension of punishment in *Lim*. In other words, the conundrum facing Brennan J in *Lim* was that he recognised the need for a proportionality analysis in assessing the validity of a law imposing detention on aliens but his approach to the aliens power meant that a proportionality analysis could only apply if the law infringed a limitation upon the aliens power, which would include a limitation upon laws that permit or require executive punishment. The resolution to that conundrum, for Brennan J, may have been the fictional extension of the concept of punishment.

157 The decision in *Cunliffe v The Commonwealth* demonstrates significant support for the role of proportionality in assessing whether a law is with respect to the aliens power, at least where the law is said to be "incidental" to the subject matter of the aliens power. For instance, consider a law with a purpose, expressed at the proper level of generality, which was solely to avoid littering. Suppose that purpose was implemented by the creation of littering offences by aliens with extreme and disproportionate punishments imposed for contraventions of the law. Such a law would only be incidental to the aliens power because the purpose, or core, of the law, expressed at the proper level of generality, is not concerned with aliens. Although the law is not expressed as applying generally,[260] the purpose is properly characterised as the prevention of littering. And if the means of achieving that purpose through the application of the law to aliens was not reasonably capable of being seen as necessary for the purpose of avoiding littering, then the law would

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256 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 387-388, referring to *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 93-94.

257 *Leask v The Commonwealth* (1996) 187 CLR 579 at 593-594.

258 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 317-318, 322-324.

259 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 317.

260 See *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 186.

be outside the scope of the aliens power. Aliens would not be part of the end (purpose) of the law and thus not part of its core. Nor would the means of achieving that purpose, through the application of the law to aliens, be reasonably capable of being seen as necessary. The law would be with respect to littering only, not with respect to aliens.

158 The hidden premise of the *Lim* punishment fiction may be the application of such a proportionality analysis in a similar way. In other words, even assuming a relevant distinction generally between the "core" and the "incidental" aspects of a law, it may be that a law with a purpose concerning aliens will nevertheless be required to achieve that purpose by proportionate means where the law imposes an extreme intrusion into, or constraint upon, a person's fundamental rights. The emphasis on the importance of liberty in the joint judgment in *Lim*[261] might be thought to provide support for treating the underlying foundation for the *Lim* punishment fiction in this way: the serious interference with fundamental rights of aliens as part of the core of the law requires proportionate treatment of aliens in the same way that it would if aliens were only an incidental subject matter in the law. There are more than hints of this hidden premise in *Lim* that emerge when a central passage concerning proportionality is read in the context of earlier discussion concerning the "extent" or scope of the power of the Parliament to make laws with respect to aliens:[262]

> "the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorizing the Executive to restrain an alien in custody to the extent necessary to make the deportation effective.
>
> ...
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> In the light of what has been said above, the two sections will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered."

159 The recognition that a proportionality analysis can apply to the characterisation of laws that have a purpose or core concerning aliens, at least in instances of extreme constraints upon liberty, is not inconsistent with the reasoning

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261 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 23, 31. See also at 12, 51-52, 56.

262 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 30-31, 33.

of Dixon J, relied upon by this Court in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*,[263] that if a "law operates directly upon a matter forming an actual part of a subject enumerated among the federal legislative powers, its validity could hardly be denied on the simple ground of irrelevance to a head of power".[264] The validity of the law with a purpose concerning aliens would not be denied on that simple ground of irrelevance but would instead be denied only to the extent that the extreme and disproportionate constraint upon the liberty of aliens imposed by the law made its purpose concerning aliens too remote from the head of power.

160 It is unnecessary to decide in this case whether this is the true underlying basis for the *Lim* punishment fiction and whether, if reconceptualised in this way, the *Lim* punishment fiction should continue to be recognised. The simple point is that the extended constraint upon executive power recognised in *Lim* cannot be conceptualised through a fictional extension of punishment and is not an application of the separation of powers principle.

161 The consequence of this reconceptualisation, therefore, would be that it is not an exclusively judicial power to impose the disproportionate aspect of detention for a legitimate purpose such as removal of classes of aliens from Australia. Instead, there would be no head of power to impose detention to the extent that the detention is not reasonably capable of being seen as necessary for a legitimate purpose. That consequence seems far more consistent with rational constitutional design than the result reached through a separation of powers analysis. The judiciary enjoys no advantage over the Executive concerning the imposition of disproportionate detention in furtherance of a non-punitive legislative purpose. A rational constitutional design might empower the Parliament to make laws providing for executive detention for a legitimate purpose such as removal of aliens but subject Parliament's authority to a judicial power to disapply the laws to the extent that they provide for a period of detention that is longer than reasonably capable of being seen as necessary. But it is hard to see how a rational constitutional design could require the Executive to detain aliens for a period of time that is limited to what is reasonably capable of being seen as necessary for a legitimate purpose, such as removal, yet empower the judiciary to detain those aliens for a further period that is not reasonably capable of being seen as necessary for that legitimate purpose. It borders on the absurd to describe the latter as an exclusively judicial power. It is not judicial at all.

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263 (2014) 254 CLR 28 at 42 [24].

264 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79.

The home detention and monitoring conditions are punitive and contrary to Ch III

162 The Solicitor-General of the Commonwealth properly conceded that if the visa conditions had been imposed as a consequence for offending that happened in the past then the defendants "would lose". Chapter III treats a harsh or unpleasant consequence based upon past offending as punishment that is within the exclusive power of the judiciary. As explained above,[265] however, it will often be mere sophistry to deny the same character to harsh or unpleasant consequences based on past offending but which also look forward to the possibility of future offending. To reiterate, it is a basic category error to attempt to draw a rigid separation between punishment and prevention or protection of the community. As Blackstone observed, "if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes".[266]

163 Although the home detention and monitoring conditions look forward to the prevention of future offending, the conditions have a punitive character. The conditions are harsh or unpleasant consequences that are imposed based on past offending. There are four reasons that the conditions cannot be characterised as regulatory conditions subsequent that are imposed upon persons in the position of the plaintiff (the cohort of people affected by the decision in *NZYQ*).

164 First, the effect of the decision in *NZYQ* is that aliens such as the plaintiff are entitled to be released into the Australian community because they presently cannot be detained. The release of the plaintiff and others in that position was not akin to the ordinary grant of a visa upon which conditions might be attached, such as a condition that offences would not be committed.

165 Secondly, as explained above, the purpose of the home detention and monitoring conditions was not, and certainly was not merely, to monitor the movements of this cohort of aliens. Rather, as the extrinsic materials confirm, the purpose of the conditions was the same as that of the concurrently introduced regime for judicial orders to restrain the liberty of people who had been "convicted of a serious violent or sexual offence".[267] That purpose was the deterrence of crime. That purpose was based on past criminal activity. It is a punitive purpose.

166 Thirdly, and also as explained above,[268] the proper interpretation of the conditions is that they are not merely forward-looking. The forward-looking

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265 At [125]-[127], [130]-[132].

266 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 18 at 249.

267 *Criminal Code*, s 395.5(1)(a).

268 See [120], [122]-[123].

requirement that the Minister must assess whether there is a real or significant risk to the Australian community arising from the future commission of offences by the visa holder is assessed by reference to the commission of past offences by the visa holder. As explained above, the conditions are "protective punishment"[269] in that it would be a semantic distinction to characterise as punishment any conditions imposed directly for the past commission of an offence but to deny the same characterisation to conditions that are imposed indirectly for the future commission of an offence because the past offences support the likelihood of future offences.

167 Fourthly, the harshness of the consequence of home detention, sanctioned by mandatory imprisonment for breach of the condition, further supports the conclusion that the home detention condition is not merely administrative regulation of the liberty of a person such as the plaintiff. As explained above, in cases at the boundaries of punishment, the harsh effect of detention has been relied upon as a "prima facie" indicator that a consequence is imposed for the purposes of punishment.[270]

168 Although there was dispute in oral argument about the extent to which an on-body charging attachment to the monitoring device could be concealed and the degree of public humiliation a visa holder with an exposed ankle monitoring device would experience, the legislative purpose for the imposition of the home detention condition and the monitoring condition is the same. The legislative purpose for all the conditions in cl 070.612A is the protection of the community from the risk of harm arising from future criminal offending, with the assessment of whether the conditions are to be imposed conducted by reference to past offending. That legislative purpose is either punitive or it is not. The harshness of the home detention condition provides some support for the conclusion that the condition was made for the purposes of punishment, even if some or all of the other conditions might not be regarded as being as harsh.

169 It is true that, as the defendants submitted, the home detention and monitoring conditions generally followed the model of the orders that were recognised as valid by this Court in *Vella v Commissioner of Police (NSW)*.[271] But there is a very large and significant difference between the two models. The orders in *Vella* were applied by the judiciary. The clause that permits the imposition of the home detention and monitoring conditions in the present special case is applied by the Executive.

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269 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 148-149 [182], 157-159 [200]-[204]. See also above at [126].

270 At [140].

271 (2019) 269 CLR 219.

Conclusion

170 The argument on this special case concerned questions of constitutional validity. Such questions arise at the level of primary legislation, here the legislation that amended the *Migration Regulations* to permit the imposition of these conditions upon the relevant cohort of aliens.[272] If there had been no amendment of the relevant clause (cl 070.612A) by substitution of sub-cll (1), (2) and (2A), then it would not have been difficult to understand the questions posed in the special case. The constitutional prohibition in Ch III would have operated directly upon the legislation that inserted the relevant clause and the applicable conditions into the *Migration Regulations*. The difficulty with the questions in this special case arises because the relevant parts of the clause that was challenged were repealed and substituted by the exercise of a regulation making power rather than by legislation.[273] As the parties all accepted, the constitutional prohibition upon executive punishment does not invalidate these substituted sub-clauses directly. Instead, the legislative power by which the executive substitution of the punitive paragraphs (cll 070.612A(1)(a) and 070.612A(1)(d)) in the *Migration Regulations* took place[274] should be partially disapplied under s 3A of the *Migration Act* with the effect that the relevant substituted paragraphs are invalid because they are ultra vires rather than because they directly infringe Ch III of the *Constitution*.[275]

171 For these reasons, although the questions of law were imprecisely expressed as raising the question of invalidity of cll 070.612A(1)(a) and 070.612A(1)(d) on the basis of infringement of (by which is meant "inconsistency with") Ch III of the *Constitution*, the questions and answers given below, like those given in the joint reasons of Gageler CJ, Gordon, Gleeson and Jagot JJ, must be understood on the basis explained above and accepted by the parties.

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272 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth), Sch 2, items 8, 13.

273 *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth), Sch 1, item 17. See also *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth), Sch 1, item 33, replacing para (a) of cl 8620(3) of Sch 8 to the *Migration Regulations*.

274 *Migration Act*, ss 41, 504.

275 *Comcare v Banerji* (2019) 267 CLR 373 at 458-459 [209]-[211]. See Thomson and Taylor, "Examining the Intersection of Constitutional and Administrative Review under the Wotton Approach" (2023) 33 *Public Law Review* 315 at 324, 328-329.

1. Is cl 070.612A(1)(a) of Sch 2 to the *Migration Regulations* invalid because it infringes Ch III of the *Constitution*, either alone or in its operation with cl 070.612A(1)(d)?

Yes.

2. Is cl 070.612A(1)(d) of Sch 2 to the *Migration Regulations* invalid because it infringes Ch III of the *Constitution*, either alone or in its operation with cl 070.612A(1)(a)?

Yes.

3. What, if any, relief should be granted to the Plaintiff?

Declare that cl 070.612A(1)(a) and cl 070.612A(1)(d) of Sch 2 to the *Migration Regulations 1994* (Cth) are invalid.

4. Who should pay the costs of the Special Case?

The defendants.

172 STEWARD J. Regrettably, I am unable to agree with the reasons of my colleagues. With very great respect, I would answer the questions in the special case differently.

173 It has long been supposed by some that the compartmentalisation of power aids good government. The Romans thought so, although this idea could not save their republic from civil war, nor their republican style of governing from failing and then falling. The idea was elevated by Montesquieu in the 18th century to a persuadable, and ultimately popular, theory of government.[276] And it inspired the founders of both the American republic and this Commonwealth. It is thus reflected in the structure of the *Constitution*.

174 The *Constitution*'s structure led, in *R v Kirby; Ex parte Boilermakers' Society of Australia*, to Dixon CJ, McTiernan, Fullagar and Kitto JJ observing:[277]

> "[W]hen an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap. III. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to s. 71 and constituted in accordance with s. 72 or a court brought into existence by a State."

175 This Court has long jealously guarded its jurisdiction and function, and the jurisdiction and function of other courts, as a compartment of government. In doing so, this Court developed two propositions to protect the work of the courts under the *Constitution*. One, which has inspired the outcome of this case, is often called the "*Lim* principle". This principle provides that "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[278] This proposition is an orthodox recognition of judicial heritage. It reflects an acceptance that State-enforced detention, as a form of punishment, can only be imposed by a court of law. Another, known as the "*Kable* doctrine", prevents the conferral of non-judicial functions on a court which exercises federal jurisdiction, if to do so would substantially impair the institutional integrity of that court.[279] In each instance, the

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276 Montesquieu, *The Spirit of the Laws* (1748).

277 (1956) 94 CLR 254 at 270.

278 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

279 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

intention is to throw a protective wall around the exercise of judicial power by judges.

176 However, more recently the *Lim* principle has been extended. The extension is manifest in the reasons of the majority, which, amongst other things, seek support from dissenting reasons in recent decisions of this Court.[280] From preserving to a court, and only to a court, a function which is clearly and exclusively judicial, the principle has, with respect, been used to strike down laws passed validly by Parliament concerning matters which have not ever, historically or otherwise, been the exclusive preserve of the courts. *Alexander v Minister for Home Affairs*[281] and *Benbrika v Minister for Home Affairs*[282] are good examples of this new development. In each of *Alexander* and *Benbrika*, legislation for the cancellation of a person's citizenship by the executive branch of government was declared by a majority of this Court to be invalid because of the *Lim* principle. Yet no Australian court had ever before exercised such a power. There was, with respect, no judicial function that needed preserving and protecting. Upon reflection, it is now clear that the *Lim* principle has slipped away, indeed has become entirely uncoupled, from established and basal principle as implied from the structure of the *Constitution*.

177 That slipping away or uncoupling arises from the concept of punishment and who may punish. Whilst it is clearly the case that only judges may punish a person with State detention upon that person being found guilty of an offence, it does not follow from this that any law which may be characterised as punitive, in some way, can only ever be enforced as an exercise of judicial power. As Gleeson CJ recognised in *Re Woolley; Ex parte Applicants M276/2003*:[283]

> "Punishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function."

178 In *Falzon v Minister for Immigration and Border Protection*, Nettle J correctly delimited the type of punishment – "punishment in the relevant sense" – which is exclusively reserved to the courts in the following terms:[284]

> "Punishment in the relevant sense consists of the measures taken in the name of society to exact just retribution on those who have offended

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280 See, for example, at [14] and footnote 27, [81] and footnote 101.

281 (2022) 276 CLR 336.

282 (2023) 97 ALJR 899; 415 ALR 1.

283 (2004) 225 CLR 1 at 12 [17].

284 (2018) 262 CLR 333 at 359 [94] (footnote omitted).

> against the laws of society and thus, it is hoped, to facilitate their rehabilitation."

179 Consistent with the foregoing is the dissenting opinion of Frankfurter J (with whom Reed J joined) in *United States v Lovett*.[285] This was the opinion preferred by Sir Douglas Menzies, writing for the Privy Council, in *Kariapper v Wijesinha*,[286] and which is cited with approval by the plurality.[287] Frankfurter J wrote:[288]

> "Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment."

180 This concept of "punishment in the relevant sense" can only be imposed by the judicial branch because it is a fundamental historical truth that it is a function undertaken only by the judiciary, in accordance with applicable sentencing principles, as applied to particular offending.

181 But, upon further reflection, and as observed above, the *Lim* principle is now seemingly not so confined. It has been detached from its legal heritage, which was the very thing which justified its existence. It now applies whenever a law entrusting power to the executive may be characterised as "punitive", regardless of whether judges in the past had ever enforced such a power and had done so exclusively from the executive. Once such a law is characterised as "'punitive', and therefore as contrary to Ch III" it will be invalid "unless the law is reasonably capable of being seen as necessary for a legitimate non-punitive purpose".[289]

182 As Kiefel CJ, Gageler, Gleeson and Jagot JJ said in *Benbrika v Minister for Home Affairs*, the *Lim* principle has now become more broadly concerned with assigning "the power to impose a measure that is properly characterised as penal or punitive to the exclusively judicial function of adjudging and punishing criminal guilt".[290] In other words, the concern is now with whether a law permits the executive branch to impose any punishment or harm, *simpliciter*. If it does, it must

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285 (1946) 328 US 303.

286 [1968] AC 717 at 735.

287 Reasons of Gageler CJ, Gordon, Gleeson and Jagot JJ at [14].

288 *United States v Lovett* (1946) 328 US 303 at 324.

289 *Jones v The Commonwealth* (2023) 97 ALJR 936 at 946 [39]; 415 ALR 46 at 55.

290 (2023) 97 ALJR 899 at 909 [35]; 415 ALR 1 at 10.

be justified in some way by the judicial branch. This development is accurately reflected in the following issues for determination as expressed by the defendants in their written submissions:

> "The first issue is whether the power to impose a detriment is *prima facie* punitive. For some kinds of detriment, that question will be answered by a 'default characterisation' (Step 1(a)). In all other cases, whether the power is *prima facie* punitive must be proved by reference to all the relevant circumstances (Step 1(b)).
>
> If the power to impose a detriment is *prima facie* punitive, the second issue is whether the power is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. If it is, the power will not be properly characterised as punitive, because its *prima facie* status will have been displaced. This step depends on 'an assessment of both means and ends, and the relationship between the two' (Step 2)."

183 A difficulty with this new expression of the *Lim* principle, if it may still be called the *Lim* principle, is its potential, as observed by the Solicitor-General of the Commonwealth, to introduce incrementally into our *Constitution* a judge-made form of a Bill of Rights whenever a law of the Commonwealth in some way relevantly harms, or infringes upon, the liberty of a person.[291] With each such increment the executive branch will be denied more and more power. That is because such a law, if it is to be valid and pass muster, must, on this view, satisfy the opinion of the judiciary that it pursues a "legitimate and non-punitive purpose", a concept which has yet to be clearly defined. This expression of principle does not, as it should, properly inquire into what, having regard to history, may correctly be seen as exclusively judicial functions.[292] Instead, there is now a seemingly free-ranging investigation into whether a law is punitive or harmful, and, if so, whether it can otherwise be justified in some way as "legitimate" without a delineation of the principles or values by which this judicial conclusion is to be reached.

184 Moreover, this approach is unable to identify a principled basis for delineating between those forms of harm that are reserved to the judicial branch for imposition and those that are not. Nor are these concerns cured by observing that Ch III is concerned with limitations on legislative and executive power, as distinct from the conferral of individual rights. In the real world, the distinction

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291 cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135-136.

292 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374-375; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 67.

has no substance and leads to the same outcome: the striking down of laws passed by the Parliament of the Commonwealth. Nor can the expansion of the *Lim* principle to interferences with liberty (other than by State detention in custody) or bodily integrity be justified by some appeal to things called the "underlying compact"[293] or indeed "basic rights"[294]; with great respect, there is a real danger in reasoning from highly generalised, undefined and abstract concepts, or perhaps aspirations, which will inevitably mean very different things to very different people and judges.

185 Another problem is that because of the need to ensure that federal courts are invested with judicial power, and nothing else (save that which is incidental to judicial power), and because of the *Kable* doctrine, it was accepted by the plaintiff that the regulations in issue here could not otherwise be enforced by any court of law. That is because such laws are, it is said, so divorced from the adjudgment or punishment of criminal guilt, as well as from any sufficiently distinct protective purpose, that their application could not, thereby, constitute an exercise of judicial power.[295] The result is a vacuum in which there is no possibility for the enforcement of these laws even though they have been validly passed by Parliament. That is a striking result given that it rests only upon a structural constitutional implication confined to protecting and preserving the functions and powers *exclusively* conferred on the judicial branch of government, and no more. And it is a long way from Montesquieu.

186 The recent decision of this Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[296] compels no contrary conclusion. That case was confined to an explanation of the outer limits of the exception from the *Lim* principle for the detention of an alien for the purpose of their removal or deportation.

187 In so concluding, it may be accepted that the characteristics of judicial power are not "frozen in time".[297] But they must be anchored in our legal heritage, either as historical fact, or as a permitted analogy to that legacy. The importance

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293 Reasons of Gageler CJ, Gordon, Gleeson and Jagot JJ at [13].

294 Reasons of Gageler CJ, Gordon, Gleeson and Jagot JJ at [14].

295 cf *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219.

296 (2023) 97 ALJR 1005; 415 ALR 254.

297 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 276 [141].

of that heritage in delimiting judicial power cannot be overstated and is well reflected in the following expression of principle by Kitto J in *R v Davison*:[298]

> "[I]t seems to me that where the Parliament makes a general law which needs specified action to be taken to bring about its application in particular cases, and the question arises whether the Constitution requires that the power to take that action shall be committed to the judiciary to the exclusion of the executive, or to the executive to the exclusion of the judiciary, the answer may often be found by considering how similar or comparable powers were in fact treated in this country at the time when the Constitution was prepared. Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it."

188 But otherwise, as Frankfurter J famously warned so long ago: "Courts ought not to enter this political thicket."[299] We are on a very slippery slope. What follows is not a judgment concerning the merits of the law in question; rather it is about power and where, in our system of government, power reposes. As Frankfurter J so wisely said in *United States v Lovett*:[300]

> "It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being. Although it was proposed at the Constitutional Convention to have this Court share in the legislative process, the Framers saw fit to exclude it. And so 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 267, 270. This admonition was uttered by Mr. Justice Holmes in one of his earliest opinions and it needs to be recalled whenever an exceptionally offensive enactment tempts the Court beyond its strict confinements."

189 But Frankfurter J was too nice. This Court's jurisprudence could lead it into dangerous waters.

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298 (1954) 90 CLR 353 at 382.

299 *Colegrove v Green* (1946) 328 US 549 at 556.

300 (1946) 328 US 303 at 319.

The circumstances of the plaintiff and relevant context

190 The plaintiff is an unlawful non-citizen. He is stateless. Prior to the decision of this Court in *NZYQ*,[301] he was being held in detention. Following that decision he was released. He was issued with a series of Bridging R (Class WR; Subclass 070) visas ("bridging visas"). The last three were issued subject to two relevant conditions. One imposes a curfew on the plaintiff ("condition 8620"); the other requires him to wear an electronic monitoring device, shaped as an ankle bracelet ("condition 8621").

191 The circumstances of the plaintiff, and the context in which Parliament passed laws which provided for the imposition of these conditions, are important. The plaintiff was convicted of a series of criminal offences from 2005 to 2017. Those offences included the following. In 2006, he was convicted of maliciously inflicting grievous bodily harm and malicious wounding. He was sentenced to terms of imprisonment of three years and two and a half years respectively. In 2011, he was convicted of, among other things, the offences of criminal damage and making a threat to kill. He was sentenced to an aggregate term of imprisonment of 18 months. In 2017, he was convicted of the offences of burglary and recklessly causing injury. He was sentenced to an aggregate term of imprisonment of 18 months. His refugee visa was then cancelled pursuant to s 501(3A) of the *Migration Act 1958* (Cth) ("the Act") and he was placed into immigration detention.

192 Because the plaintiff is a stateless person it is accepted that there is no real prospect of his removal in the reasonably foreseeable future. Following the decision of this Court in *NZYQ*,[302] he was thus released into the community and issued with the series of visas described above. It is an agreed fact in the special case that the plaintiff was amongst 153 detainees who had been so released. In the special case they are called the "*NZYQ* cohort" although it is better simply to call them the "*NZYQ* group". Of this group, only four had no criminal convictions; four had a relevant charge proved but no conviction entered; and one was convicted but no sentence was imposed. The balance of the group comprised individuals who had been convicted of a crime or crimes and sentenced. The crimes included murder, sexually based offences such as rape, serious drug offending, and armed robbery. Of the four individuals with no criminal convictions, two were refused visas on the basis that the Minister had serious reasons to consider that each had committed a crime against peace, a war crime, or a crime against humanity for the purposes of s 5H(2)(a) or s 36(2C)(a)(i) of the Act.

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301 (2023) 97 ALJR 1005; 415 ALR 254.

302 (2023) 97 ALJR 1005; 415 ALR 254.

193 The Government reacted to the release of the *NZYQ* group by amending the *Migration Regulations 1994* (Cth) ("the regulations"). This was done by an Act of Parliament: the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) ("the Amending Act"). Regulation 2.25AA confers a power on the Minister to grant a "Bridging R (Class WR) visa" to an "eligible non-citizen" if the Minister is satisfied that the person's removal from Australia is not "reasonably practicable". Relevantly, an "eligible non-citizen" is defined in s 72 of the Act and includes, by reason of reg 2.20(18), a "non-citizen if there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future". That is the language of the test propounded by this Court in *NZYQ*.[303]

194 Relevantly, if a visa is granted under reg 2.25AA conditions 8621, 8617, 8618 and 8620 must be imposed "unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community".[304] Here, conditions 8620 and 8621 were imposed on the plaintiff's visa. Condition 8620 is in these terms:[305]

> "(1) The holder must, between 10 pm on one day and 6 am the next day or between such other times as are specified in writing by the Minister, remain at a notified address for the holder for those days.
>
> (2) If the Minister specifies other times for the purposes of subclause (1), the times must not be more than 8 hours apart.
>
> (3) In this clause:
>
> ***notified address*** for a holder for a particular day or days means any of the following:
>
> (a) either:
>
> (i) the address notified by the holder under condition 8513; or
>
> (ii) if the holder has notified another address under condition 8625—the last address so notified by the holder;
>
> (b) an address at which the holder stays regularly because of a close personal relationship with a person at that address, and

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303 (2023) 97 ALJR 1005 at 1018 [55]; 415 ALR 254 at 268.

304 *Migration Regulations 1994* (Cth), Sch 2, cl 070.612A(1).

305 *Migration Regulations 1994* (Cth), Sch 8.

which the holder has notified to Immigration for the purposes of this paragraph;

(c) if, for the purposes of this paragraph, the holder notifies Immigration of an address for that day or those days no later than 12 pm on the day before that day or the earliest day of those days (as the case may be)—that address."

195 Condition 8621 is in these terms:[306]

"(1) The holder must wear a monitoring device at all times.

(2) The holder must allow an authorised officer to fit, install, repair or remove the following:

(a) the holder's monitoring device;

(b) any related monitoring equipment for the holder's monitoring device.

(3) The holder must take any steps specified in writing by the Minister, and any other reasonable steps, to ensure that the following remain in good working order:

(a) the holder's monitoring device;

(b) any related monitoring equipment for the holder's monitoring device.

(4) If the holder becomes aware that either of the following is not in good working order:

(a) the holder's monitoring device;

(b) any related monitoring equipment for the holder's monitoring device;

the holder must notify an authorised officer of that as soon as practicable.

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306 *Migration Regulations 1994* (Cth), Sch 8.

(5) In this clause:

monitoring device means any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object.

related monitoring equipment, for a monitoring device, means any electronic equipment necessary for operating the monitoring device."

196 The purpose of these visa conditions, and others like them, is very clear. As the Supplementary Explanatory Memorandum which accompanied the Amending Act states, these conditions have been legislated for the purpose of protecting the Australian community. The Supplementary Explanatory Memorandum thus states:[307]

> "The Migration Amendment (Bridging Visa Conditions) Bill 2023 (the Bill) amends the *Migration Act 1958* (the Migration Act) and the Migration Regulations 1994 (the Regulations) to ensure that members of the NZYQ-affected cohort are managed in the community in a way that supports community safety objectives and enables the management of the cohort to a removal outcome once removal becomes reasonably practicable."

197 The regulations were subsequently amended. This included introducing 12-month term limits on conditions 8620 and 8621. The Explanatory Statement to the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth) ("the BVR regulations") relevantly states:[308]

> "These amendments ensure that conditions can be attached to [Bridging (Removal Pending) visas] granted to the NZYQ-affected cohort in a focussed way that takes into account the individual circumstances of the visa holder, and the community protection needs, based on a risk assessment to be undertaken on an annual (or earlier) basis. ...
>
> Members of the NZYQ-affected cohort have no substantive visa to remain in Australia, having had their visa applications refused, or a visa cancelled, in most cases on character grounds, and who have not previously

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307 Australia, Senate, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Supplementary Explanatory Memorandum at 6.

308 Australia, Minister for Immigration, Citizenship and Multicultural Affairs, *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth), Explanatory Statement at 9.

> been granted a bridging visa due to safety risks they may pose to the Australian community. Consequently, the Government considers these measures to be proportionate to the particular circumstances of the NZYQ-affected cohort and aimed at the legitimate objective of protecting community safety."

198 The purpose of protection is strongly reflected in the express requirement that a condition of the kind set out above will not be imposed if the Minister is satisfied that it is not reasonably necessary to impose it for the protection of any part of the Australian community. It is true that the power to impose conditions is not limited by reference to identified crimes or the existence of particular types of risks of harm. Given the variety of crimes that could be committed that might harm the community, it is unsurprising that the power has been drafted in general terms. This gives the Minister flexibility in dealing with the terms upon which a bridging visa may be granted.

199 That the *NZYQ* group might reasonably be perceived as a collection of aliens who may be more likely to constitute, on an individual or collective basis, a threat to the community is also unsurprising. The composition of that group overwhelmingly comprises previous criminal offenders. Whether, and the extent to which, conditions should be imposed on a bridging visa issued to a member of this group would, of course, depend upon an assessment of the particular individual. In that respect, the decision of the Minister would be subject to judicial oversight in the form of judicial review. In addition, and relevantly in the circumstances here, pursuant to s 76E(3) and (4) of the Act the Minister must give the holder of a bridging visa, who is subject to one or more of the prescribed conditions, notice of the Minister's decision and invite that person to make representations as to why the visa should not be subject to one or more of those conditions. If the person makes representations in accordance with the invitation, and the Minister is satisfied that one or more of the conditions are not reasonably necessary for the protection of any part of the Australian community, the Minister must issue another visa without any one or more of those conditions. That process was followed in this matter.

200 Consistent with the protective purpose of the BVR regulations, the Commonwealth Government established in December 2023 a "Community Protection Board". The Board performs an advisory function concerning the imposition of conditions on bridging visas "[w]ith an emphasis on prioritising community safety". It has developed "guiding principles" which it applies when making recommendations about visa conditions but only when it is satisfied that imposing such conditions is "reasonably necessary for the protection of the Australian community and whether visa conditions need to be imposed to give effect to that purpose". The guidelines state:

> "When considering what level of risk an individual may pose to the Australian community, and whether it is not reasonably necessary for the

protection of any part of the Australian community to recommend imposition of a visa condition, the Board should use its collective skills, knowledge and experience and attempt to come to a collective view. The Board must have regard to all relevant factors, which may include the following:

- Immigration history;
- criminality;
- Behaviour in criminal custody and/or immigration detention;
- Behaviour and compliance with visa condition while in the community;
- Medical and health information (inclusive of psychological);
- Identity information;
- Security information; and
- Whether there are any other circumstances that are likely to increase the risk the individual may pose to the Australian community; and
- Other information relevant to the person's circumstances or conduct that is available to the Department".

201 Also consistent with the tailored nature of the BVR regulations, the special case records that the Board recommended that bridging visas be issued to 59 individuals within the *NZYQ* group without conditions 8620 or 8621; it recommended that bridging visas be issued to 10 individuals subject to condition 8620 but not 8621; and it recommended that bridging visas be issued to 23 individuals subject to condition 8621 but not 8620.

202 In the case of the plaintiff, the Board assessed that the imposition of conditions 8620 and 8621 was reasonably necessary for the protection of the Australian community. In the case of condition 8621, the Board noted "in light of the individual's extensive and continued criminal history, ... and his lack of insight into his offending, ... he still poses a significant risk to the Australian community". In the case of condition 8620, the Board advised that a curfew was needed to "ensure the protection of the Australian community" given that the plaintiff's "previous offending was often after hours". It also recommended that the plaintiff's case be reviewed within three months. It further recommended that condition 8617 (which deals with certain financial transactions) and condition 8618 (which addresses debt or financial hardship) should not be imposed on the plaintiff.

203 The existence of the Board, and the manner in which it makes recommendations, highlights the essentially executive nature of the power being exercised in granting a visa subject to conditions.

204 As it happens, the plaintiff's bridging visa was ultimately issued with a great many other conditions. They are, or have been (in relation to earlier versions of the bridging visa), in general terms as follows: that the plaintiff must not become involved in activities which are disruptive to, "or violence threatening harm to", the Australian community; that the plaintiff must notify the Department of his residential address within five working days of the grant of his visa; that there must be no material change in the circumstances upon which the visa was granted; that the plaintiff must do everything possible to facilitate his removal from Australia and must not attempt to obstruct efforts to arrange and effect his removal from Australia; that the plaintiff must report in person for removal from Australia in accordance with instructions given, orally or in writing, by the Minister; that the plaintiff must attend at a place, date and time specified, orally or in writing, by the Minister in order to facilitate efforts to arrange and effect his removal from Australia; that the plaintiff must obtain the Minister's approval before taking up employment in a number of occupations, such as, for example, those that involve the use of, or access to, chemicals of security concern; that the plaintiff must notify the Minister of any changes in his employment details, not less than two working days before the change is to occur; that the plaintiff must not become involved in activities that are prejudicial to security; that the plaintiff must not acquire specified goods, such as weapons or explosives; that the plaintiff must obtain the Minister's approval before undertaking a number of activities, such as flight training; that the plaintiff cannot communicate or associate with certain organisations relating to terrorism; that the plaintiff must obtain the Minister's approval before acquiring chemicals of security concern; that the plaintiff, if directed, orally or in writing, by the Minister, to attend an interview that relates to his visa (including an interview with the Australian Security Intelligence Organisation), must comply with that direction; that the plaintiff must not take up employment in certain occupations, including those that involve the use of, or access to, weapons or explosives; that the plaintiff must notify the Department of any travel interstate or overseas by him at least seven working days before undertaking the travel; that the plaintiff must notify the Department of the details of any contact with any individual who is known by him to have been charged with, or convicted of, a criminal offence; and that the plaintiff must notify the Minister of any change in his name, address, phone number or email address.

205 A great many of the foregoing conditions might be characterised as harmful, or as infringements on liberty, or even as punitive, in the broader sense of that word. They are noteworthy because none of them are said to be invalid.

Punishment and protection

206 Parliament may pass laws for the protection of the Australian community from unlawful non-citizens or aliens who may pose a threat of harm. Such laws do not in any way confer on the executive any part of the exclusive judicial power exercisable in this country by judges alone. In that respect, no authority was cited for the proposition that, as a matter of implication arising from the structure of the *Constitution*, judges, and only judges, may order curfews or the wearing of electronic monitoring devices as conditions for the issue of a visa. Instead, the power to issue visas with conditions is one that is validly exercised by the executive branch of government, and that has always been so. And it is for that branch to determine what conditions, as specified by Parliament, it may impose for the grant of a visa. Save in very limited circumstances, as illustrated by this Court's judgment in *NZYQ*,[309] the following observation made by Nettle J in *Falzon* is entirely correct:[310]

> "It is not the role of this Court to say that the criteria of deportation are overly harsh or unduly burdensome or otherwise disproportionate to the risk to the safety and welfare of the nation posed by the subject non-citizen remaining in this country."

207 The same proposition, save in limited circumstances, applies to the power to issue visas with specified conditions for the reasons expressed below.

208 In that respect, and as mentioned above, it is important to bear in mind that the infliction of punishment, in a constitutional sense, is not to be equated with just any act of harm. It is not a free-ranging inquiry into whether a law, or an exercise of power by the executive, constitutes some form of deprivation or infringement of liberty. Punishment, which is the subject of the *Lim* principle, is that form of punishment exclusively reserved to the judicial branch to exercise.

209 *Falzon*[311] is an example of an application of the *Lim* principle in its original form. In that case, the plaintiff contended that s 501(3A) of the Act purported to confer judicial power on the Minister. The plaintiff's visa had been cancelled pursuant to that provision because he failed the "character test" by reason of his criminal offending. The plaintiff submitted that because the cancellation of his visa resulted in his further detention, and would also result in his deportation, it operated as a further punishment for his past criminal offending.

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309 (2023) 97 ALJR 1005; 415 ALR 254.

310 (2018) 262 CLR 333 at 359 [95].

311 (2018) 262 CLR 333.

210 Nettle J recognised that Parliament has the right "to rid the nation of persons who, in the judgment of the Parliament, have shown by their offending that their continued presence here would be opposed to the safety and welfare of the nation".[312] In that respect, Nettle J expressly agreed that deportation could be "burdensome and severe" but said that this did not make it "punishment" for the purposes of the *Lim* principle.[313] Nor was the plaintiff's detention a form of punishment. Nettle J said:[314]

> "Detention derives its character from its purpose, and, in light of the decision of this Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, there can be no doubt that immigration detention under s 189 is valid as reasonably capable of being seen as necessary for the purpose of removing a non-citizen from Australia. It is not punitive and it involves no exercise of judicial power."

211 Nettle J was not alone in *Falzon*. Kiefel CJ, Bell, Keane and Edelman JJ also recognised that the "deportation of a convicted immigrant as a measure of protection of the community" is not punishment for any offence.[315] Of the power to cancel a visa, their Honours said:[316]

> "The defendant submits that, consistently with s 501, of which it forms part, [s 501(3A)'s] purpose is to exclude from the Australian community, by means of visa cancellation, a category of aliens which the Parliament has determined should not be part of the community due to their record of criminal offending. The criteria of which the Minister must be satisfied are those upon which a sovereign State may properly decide to exclude non-citizens in the interest of protecting the peace, order and good government of the Commonwealth. That submission should be accepted."

212 Their Honours also made it clear in *Falzon* that the *Constitution*, and the laws made under it, do not offer the same protection to an alien as they do to a citizen. They said:[317]

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312 (2018) 262 CLR 333 at 359 [94].

313 (2018) 262 CLR 333 at 358 [93].

314 (2018) 262 CLR 333 at 360 [96] (footnotes omitted).

315 (2018) 262 CLR 333 at 347-348 [47]; see also *O'Keefe v Calwell* (1949) 77 CLR 261 at 278.

316 (2018) 262 CLR 333 at 349 [52].

317 (2018) 262 CLR 333 at 346 [39] (footnotes omitted).

> "The joint judgment [in *Lim*] pointed out that, whilst an alien present in this country enjoys the protection of our law, his or her status, rights and immunities under the law differ from those of an Australian citizen in a number of important respects. Relevantly, the most important difference lies in the vulnerability, arising under the common law and provisions of the *Constitution*, of an alien to exclusion or deportation. The effect is significantly to diminish the protection which Ch III provides a citizen against detention otherwise than pursuant to judicial power. The sovereign power to make laws providing for the expulsion and deportation of aliens extends to authorising the Executive to restrain them in custody to the extent necessary to make their deportation effective."

213 The confined constitutional sense of the word "punishment", as expressed in the *Lim* principle, explains why so many forms of harm and deprivations of liberty imposed by the executive and legislative branches are entirely valid. The examples given by the defendants included laws imposing taxation, laws concerning the arrest and search functions of law enforcement, laws authorising telecommunication intercepts, laws permitting the tracking and surveillance of suspects, and laws for the making of biosecurity orders. If the plaintiff is right, for these laws to be valid a court would need to be satisfied that the particular power in question is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. Such a proposition finds no sensible basis in, or support from, the *Constitution*'s division of power. As Nettle J said in *Falzon*:[318]

> "[T]here is no constitutionally guaranteed freedom from executive detention".

214 Equally, there is no constitutionally guaranteed freedom from the infliction of harm of any kind by the executive.

Not prima facie punitive or otherwise punitive

215 The visa conditions imposing a curfew and electronic monitoring are not prima facie punitive, in the broader sense of that word.

216 The imposition of a curfew was said to be a form of detention of a kind that can only be imposed by a judge. No court in this country has ever before equated compulsory detention with a limited curfew at a nominated address. The two conditions are distinctly different, as was recognised by the majority in *Vella v Commissioner of Police (NSW)*.[319] Whilst in detention the liberty of a person is very greatly constrained; they are in a foreign location, which is guarded, in

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318 (2018) 262 CLR 333 at 359 [95].

319 (2019) 269 CLR 219 at 245 [53].

circumstances where each day is largely controlled by the State. Inferentially, the architecture of a place of detention will incline to a degree of utilitarianism. In contrast, the plaintiff's curfew may take place at his home, with all the comforts that he may wish to avail himself of, many of which would be denied to him in State detention. He is not guarded. Within the confines of his nominated address, he may do as he pleases. And the hours of curfew are limited to when a reasonable person might be in bed asleep. For the balance of the day (16 hours) the plaintiff has his full liberty (subject to the conditions set out above). With respect, there is a world of difference between the two types of confinement.

217 The curfew here is not a punishment more generally nor is it anything like the type of detention that only a judge may order in accordance with the *Lim* principle. Nor is the curfew analogous to this type of punishment; it is not a form of "just retribution" for past offending.

218 Neither the decision of this Court in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,[320] nor that of the Supreme Court of the United Kingdom in *R (Jalloh) v Secretary of State for the Home Department*,[321] relied upon by the plaintiff, justifies any contrary conclusion. Neither case was concerned with the issue as to whether a curfew of the kind imposed here was unconstitutional by reason of the separation of powers implicitly found in the *Constitution*. In *Behrooz*, the contention was that the conditions of the appellant's immigration detention were so harsh as to constitute punishment, and thus to infringe the *Lim* principle. This was rejected because the conditions of detention could not invalidate the grant and exercise of the power to detain under the Act.[322] The State otherwise conceded that, properly construed, the Act does not authorise detention in inhuman or intolerable conditions.[323] In *Jalloh*, the claimant's curfew had earlier been found to have been illegal.[324] In those circumstances, the issue for determination was whether this constituted imprisonment for the purposes of the tort of false imprisonment. No such issue arises here.

219 The plaintiff contended that the electronic monitoring device was prima facie punitive because it interfered with the right to "bodily integrity" and because it was an invasion of privacy. So much may be accepted. But, with respect, the

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320 (2004) 219 CLR 486.

321 [2021] AC 262.

322 (2004) 219 CLR 486 at 507 [53], 561 [223].

323 (2004) 219 CLR 486 at 512-513 [75].

324 [2021] AC 262 at 268 [9]. See *R (Gedi) v Secretary of State for the Home Department* [2016] 4 WLR 93.

purpose of the device is not to punish the plaintiff but to protect the community. Indeed, if it were otherwise, as the defendants submitted, many well-accepted intrusions by the executive branch of government might be illegal. These include the power to use force when executing a warrant or in making an arrest,[325] to conduct forced searches,[326] to take fingerprints,[327] and to direct compulsory medical treatments.[328]

220 Moreover, and in any event, these intrusions are not species of punishment reserved to the judiciary alone to authorise. No case supports any such conclusion. Indeed, no case was cited where an electronic monitoring device had been issued by a judge as an exercise of judicial power. Nor, again, is the wearing of the device analogous to punishment in accordance with the *Lim* principle; the requirement to wear it is not the exaction of a just retribution for past offending. It is a means of enabling the State to be aware at all times of the whereabouts of an alien who has been assessed as posing a risk to the Australian community, and who may ultimately be removed from this country.

221 The plaintiff also claimed that wearing the device stigmatised him; that it publicly marked him as an offender. This was not an agreed fact; indeed, there was no agreed fact about whether wearing the device caused any pain or suffering. Nonetheless, it may be inferred that wearing the device is, to an extent, stigmatising for the plaintiff. But again, with respect, that is not a form of punishment. The State is not seeking further retribution against the plaintiff for the crimes he has committed in the past. Any stigmatisation is a by-product of a step designed to protect the community. It is far less burdensome than the ongoing detention found by Nettle J in *Falzon* not to constitute punishment.[329]

222 And again, no authority was cited for the proposition that the stigmatisation of a criminal offender is a punishment exclusively reserved to the judicial branch in accordance with the *Lim* principle.

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325 See, eg, *Crimes Act 1914* (Cth), ss 3G(b)-(c), 3ZZKG(2), 3ZZLD(2) and Pt IAA, Div 4 noting s 3ZC.

326 See, eg, *Migration Act 1958* (Cth), ss 252AA-252B; *Crimes Act 1914* (Cth), ss 3F(1)(f), (2), 3UD(1)(b)(i), 3ZE-3ZF, 3ZH; *Customs Act 1901* (Cth), ss 211-211A, 219ZJD, 219ZJG(1); *Defence Act 1903* (Cth), ss 71R(2) and 71T(3).

327 See, eg, *Migration Act 1958* (Cth), ss 5, 5A, 257A and Pt 2, Div 13AA; *Crimes Act 1914* (Cth), s 3ZJ(3)(b)-(c), (4).

328 See, eg, *Migration Regulations 1994* (Cth), reg 5.35; *Customs Act 1901* (Cth), s 219ZG; *Biosecurity Act 2015* (Cth), Ch 2, Pt 3, Div 3.

329 (2018) 262 CLR 333 at 360 [96].

Conditions 8620 and 8621 are valid

223 Even if conditions 8620 and 8621 are rightly considered to be punitive in the broader sense, the decision of this Court in *Falzon* nonetheless governs the outcome of this case.[330] The protective purpose of the law pursuant to which the visa was cancelled in that case, leading as it did to immediate detention and then removal, is equally evident here. If convicted aliens can be detained (within the limits described in *NZYQ*[331]), and that is entirely valid, it beggars belief that laws which for 12 months require an alien to undergo a curfew, and to wear an electronic monitoring device, are invalid. Such inconsistency in results would, if upheld, be difficult to justify.

224 Like the law upheld in *Falzon*,[332] for the reasons expressed above, the purpose of the BVR regulations is to protect the community from a group, or *cohort* if you will, of aliens, who by reason of their criminal background may constitute a threat once released into the community. Critically, the BVR regulations do not mandate the imposition of harmful conditions in all cases. For example, two of the four members of the *NZYQ* group who did not have any criminal convictions are, one assumes, unlikely to have any conditions imposed upon their bridging visas, unless there are particular circumstances which justify such a course. Presumably, the members of the group who pose the greatest risk will merit the harshest of conditions, whilst those who pose a lesser risk will be treated more leniently. In all cases, the legality of the decision of the Minister is amenable to judicial review. And in all cases, the BVR regulations are sufficiently flexible to enable tailored conditions to be imposed to meet the particular circumstances of a given member of the *NZYQ* group. None of this offends Ch III of the *Constitution* or the structure of that foundational document.

225 Moreover, as raised in oral argument, the fact that the bridging visa is issued without the consent of the plaintiff is of no moment, and no basis for distinguishing *Falzon*. The visa is the means of securing, consistently with the reasoning in *NZYQ*,[333] the release of the plaintiff from enduring detention and to enable him to remain in the community as a lawful non-citizen. He otherwise would be an unlawful non-citizen and liable to be re-detained pursuant to s 189 of the Act. It is doubtful whether the plaintiff would prefer continuing detention over his conditional release.

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330 (2018) 262 CLR 333.

331 (2023) 97 ALJR 1005; 415 ALR 254.

332 (2018) 262 CLR 333.

333 (2023) 97 ALJR 1005; 415 ALR 254.

226 The questions in the special case should be answered:

(1) No.

(2) No.

(3) None.

(4) The plaintiff.

227 BEECH-JONES J. In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[334] this Court unanimously held that Ch III of the *Constitution* precludes executive detention of an alien refused permission to remain in Australia where there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future. The holding in *NZYQ* is a particular instance of a broader principle to the effect that Ch III precludes the conferral on the executive of a power to impose a detriment or burden which is properly characterised as punitive.[335]

228 The agreed questions of law submitted for the opinion of the Full Court concern the validity of parts of a regulation made under the *Migration Act 1958* (Cth) that purport to confer power on the Minister for Immigration, Citizenship and Multicultural Affairs ("the Minister") to impose two conditions on bridging visas granted to persons released into the community as a consequence of the decision in *NZYQ*. The first condition requires the visa holder to be fitted with an electronic monitoring device. The second condition requires the visa holder to be confined to a specified address (or addresses) for eight hours a day. As the exercise of the power to make regulations under the *Migration Act* must conform with Ch III of the *Constitution*, it follows that the validity of that part of the impugned regulation which confers power on the executive to impose each condition depends on whether that power is properly characterised as punitive. For the reasons that follow, neither of the powers can be so characterised. Accordingly, neither part of the regulation is invalid.

Background

229 By an order of this Court, the plaintiff has been given the pseudonym "YBFZ". He was born in Eritrea in 1987. His Eritrean citizenship was revoked in 1994 because his family were Jehovah's Witnesses. The plaintiff and his family fled Eritrea for Ethiopia in 1997. He arrived in Australia in 2002 as the holder of a refugee visa. Other members of his family came to Australia and have become either Australian citizens or permanent residents.

230 On each of 24 October 2006, 15 February 2011 and 27 September 2017, the plaintiff was convicted of various criminal offences, many of which involved violence. He was sentenced to terms of imprisonment for each set of offences. On 6 December 2017, the plaintiff's refugee visa was cancelled under s 501(3A) of the *Migration Act*. On 12 April 2018, following his release from criminal custody, the plaintiff was detained in immigration detention pursuant to s 189 of the *Migration Act*. He has since applied for a protection visa. A delegate of the Minister for Home

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334 (2023) 97 ALJR 1005; 415 ALR 254.

335 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [44]; 415 ALR 254 at 265.

Affairs refused his application. An application for review by the Administrative Appeals Tribunal remains outstanding.

231 Other than for a period in February 2019 when he was admitted to a hospital under the *Mental Health Act 2014* (WA), the plaintiff remained in immigration detention until 23 November 2023. He was released on that day because it was accepted by the Commonwealth that, in light of this Court's orders in *NZYQ*, he could no longer be detained as there was no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future.

232 On the day of his release, the Minister purported to grant the plaintiff a Bridging R (Class WR) visa ("BVR").[336] The BVR was subject to, inter alia, condition 8621 which mandates electronic monitoring of the visa holder[337] ("the monitoring condition"), and condition 8620 which imposes an eight-hour curfew on the visa holder[338] ("the curfew condition"). From that date until 16 February 2024, the Minister purported to grant the plaintiff a further three such visas,[339] but they were said to have had no legal effect. On 12 March 2024, the plaintiff was granted another BVR subject to the monitoring condition and the curfew condition, as well as other conditions.[340] It is not suggested that the grant of that visa was invalid.

233 On 13 March 2024, the plaintiff was fitted with an electronic monitoring device in the form of an ankle bracelet. The plaintiff was granted a further BVR subject to the monitoring condition and the curfew condition on each of 22 March 2024, 2 April 2024 and 11 July 2024.

234 On or about 22 February 2024, the plaintiff filed a writ of summons in this Court seeking declarations to the effect that the power to impose the monitoring condition and the power to impose the curfew condition, as attached to the BVRs

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336 Under reg 2.25AA(2) of the *Migration Regulations 1994* (Cth). The Bridging R (Class WR) visa, per *Migration Regulations*, reg 1.07, Sch 1, cl 1307 has one subclass: 070 (Bridging (Removal Pending)).

337 *Migration Regulations*, Sch 8, condition 8621.

338 *Migration Regulations*, Sch 8, condition 8620.

339 The plaintiff was granted BVRs on 13 December 2023 under reg 2.25AB(2) of the *Migration Regulations*; on 4 January 2024 under reg 2.25AB(2) of the *Migration Regulations*; and on 16 February 2024 under reg 2.25AB(2) of the *Migration Regulations*.

340 Under reg 2.25AA(2) of the *Migration Regulations*.

that had been granted to him since November 2023, infringed Ch III of the *Constitution* and are therefore invalid.

235 Pursuant to a grant of leave given on 22 May 2024, the plaintiff and the defendants, the Minister and the Commonwealth of Australia (collectively, "the Commonwealth"), agreed to state questions of law arising in the proceedings in the form of a special case for the opinion of the Full Court.[341] The full text of the questions is set out at the end of this judgment. The substantive questions concern the validity of cl 070.612A(1)(a) and cl 070.612A(1)(d) of Sch 2 to the *Migration Regulations 1994* (Cth). Since 8 December 2023,[342] those provisions have been the suggested source of the power to impose the monitoring condition and the curfew condition on BVRs respectively, including the four visas granted to the plaintiff on or after 12 March 2024.

Chapter III and *NZYQ*

236 In *NZYQ* this Court adopted and applied the analysis of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[343] of the limits imposed by Ch III of the *Constitution* on the power of the executive to detain aliens.[344] *NZYQ* described the principle that emerged from *Lim* as follows:[345]

> "[T]hat a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the Constitution unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose. In other words, detention is penal or punitive unless justified as otherwise."

237 *Lim* and *NZYQ* were concerned with the circumstances in which the legislative conferral on the executive of a power to detain an alien *in custody* is contrary to Ch III. However, in *NZYQ*, six members of this Court[346] reiterated a broader principle that is not confined to the conferral of a power to detain in

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341 *High Court Rules 2004* (Cth), r 27.08.1.

342 *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth).

343 (1992) 176 CLR 1 at 29-32.

344 *NZYQ* (2023) 97 ALJR 1005 at 1015 [38]-[39]; 415 ALR 254 at 264.

345 *NZYQ* (2023) 97 ALJR 1005 at 1015 [39]; 415 ALR 254 at 264.

346 Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ.

custody, namely that a legislative attempt to confer on the executive a power to impose a detriment or burden on a person contravenes Ch III if the power is "properly characterised as punitive". This involves "a single question of characterisation", the answer to which "requires an assessment of both means and ends, and the relationship between the two".[347]

238 The parties submitted that the effect of the authorities is that answering that "single question of characterisation" requires consideration of two steps: the first being whether the power to impose a detriment is "prima facie punitive" (ie, the "means"); and the second being whether that power is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose (ie, the "ends" and the "relationship between the two").

239 The parties' submission reflects the two-stage inquiry contemplated by Kiefel CJ, Gageler, Gleeson and Jagot JJ in *Jones v Commonwealth*.[348] The submission should be accepted, although, as the two stages both address a "single question of characterisation", there will often be an overlap in the matters that bear upon whether the detriment is prima facie punitive, whether the power to impose that detriment gives effect to a legitimate and non-punitive purpose, and whether the power is reasonably capable of being seen as necessary for that purpose. Further, as submitted by the Commonwealth, these matters are interconnected in that the more severe the detriment and the more closely it is associated with punishment, the narrower the range of legitimate purposes for imposing the detriment and the more difficult it will be to characterise the power to impose it as reasonably capable of being seen as necessary for such a purpose.[349] For example, corporal punishment is a detriment that has been historically associated with criminal punishment.[350] It is difficult to conceive of a legitimate and non-punitive purpose for its infliction and just as difficult to conceive how a power to impose it could be reasonably capable of being seen as necessary for any such purpose.

Detriments that are prima facie punitive

240 The stream of the principle in *Lim* and the broader principle it has given rise to cannot rise higher than their source in Ch III. The protection of individual rights is not the object of the inquiry. Instead, any such protection that ensues is just the result of applying principles that are directed to ensuring that the function of

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347 *NZYQ* (2023) 97 ALJR 1005 at 1016 [44]; 415 ALR 254 at 265; see also *Jones v Commonwealth* (2023) 97 ALJR 936 at 946-947 [43]; 415 ALR 46 at 56.

348 (2023) 97 ALJR 936 at 946-947 [43]; 415 ALR 46 at 56.

349 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 424 [238], 436 [244].

350 *Alexander* (2022) 276 CLR 336 at 367 [72].

adjudging and punishing criminal guilt is exclusively vested in the courts referred to in Ch III. While the preservation of that function is a matter of "substance and not mere form", so that Ch III may be infringed by a law that appears to be divorced from the adjudgment and punishment of criminal guilt,[351] not every form of hardship or detriment imposed by the executive constitutes punishment.[352] Thus, Ch III is not infringed simply because Commonwealth legislation authorises the executive to interfere with common law rights, no matter how slight the interference. Neither the *Lim* principle nor the broader principle it has given rise to is a vehicle for subjecting each and every interference with rights that the executive is authorised to undertake under Commonwealth legislation to constitutional justification by the judiciary. In this way, the *Lim* principle and the broader principle respect parliamentary sovereignty, specifically the exercise of the heads of legislative power conferred by s 51 of the *Constitution*, including the power with respect to "[n]aturalization and aliens".[353]

241 Each of the power to detain a person in custody[354] and the power to deprive a person of their citizenship[355] are, without further analysis, prima facie punitive (or, to use the language of the Commonwealth, attract a "default characterisation" as punitive).

242 With other forms of detriment, two factors that have emerged from the cases as bearing on an assessment of whether the power to impose other detriments is

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351 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; *Alexander* (2022) 276 CLR 336 at 367 [72]; *Benbrika v Minister for Home Affairs* ("*Benbrika (No 2)*") (2023) 97 ALJR 899 at 909 [33], 910 [40]-[41], 913-916 [54]-[69], 920 [90]; 415 ALR 1 at 10, 11-12, 15-19, 25.

352 *Alexander* (2022) 276 CLR 336 at 398 [162]; see also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 59 [160].

353 *Constitution*, s 51(xix).

354 *Lim* (1992) 176 CLR 1 at 27.

355 *Alexander* (2022) 276 CLR 336 at 383 [120], 397 [159]; *Benbrika (No 2)* (2023) 97 ALJR 899 at 908 [27], 917 [77]; 415 ALR 1 at 8, 21; *Jones* (2023) 97 ALJR 936 at 946 [39]; 415 ALR 46 at 55.

prima facie punitive are the nature and severity of the detriment[356] and whether the detriment is of a kind that has historically been imposed as punishment.[357]

243 The Commonwealth submitted (correctly) that a third factor is whether the detriment is of a kind that is commonly imposed otherwise than by courts. For example, corporal punishment, capital punishment, exile and banishment are severe detriments historically imposed as punishments and, at least in the case of capital punishment, was commonly imposed by courts.[358] A pecuniary penalty or a fine may not necessarily be a severe detriment but fines are also commonly imposed as punishment by courts.[359] By contrast, the revocation of a licence or statutory privilege on the basis that a person who holds the licence or possesses the privilege is not fit and proper is not an exclusively judicial function.[360] Likewise, neither can the cancellation of a visa by reason of the visa holder's criminal offending, or the deportation of an alien, be considered punishment.[361]

244 Another factor relevant to an assessment of whether the power to impose a particular detriment is prima facie punitive is whether the detriment is selectively imposed on an individual or whether it is imposed on a broader section of society. Even if the confinement of a particular person to a period of house arrest[362] does not attract a default characterisation as punitive, it is more likely to be prima facie punitive than a stay-at-home order issued to members of the public during a time of civil disturbance, wartime or the outbreak of a contagious disease. Like the other factors, this is not determinative. The purported imposition of what appears to be collective punishment can engage the broader principle, such as where the detriment is directed to members of a particular race or social group.

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356 See, eg, *Alexander* (2022) 276 CLR 336 at 368 [73], 369 [77], 375 [95], 397 [159], 399-400 [166], 402 [172], 424 [238], 426 [244], 427 [248]; *Benbrika (No 2)* (2023) 97 ALJR 899 at 907 [21]-[22]; 415 ALR 1 at 7.

357 *Alexander* (2022) 276 CLR 336 at 367-368 [72], 368-369 [75], 397 [159], 428 [250].

358 *Alexander* (2022) 276 CLR 336 at 367 [72], 397 [159], 400-402 [167]-[172]; *Benbrika (No 2)* (2023) 97 ALJR 899 at 907 [22]; 415 ALR 1 at 7.

359 *Hussey v Moor* (1616) 3 Bulst 275 at 280 [81 ER 232 at 236], cited in *Alexander* (2022) 276 CLR 336 at 367-368 [72].

360 *Alexander* (2022) 276 CLR 336 at 369 [77].

361 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 347-348 [47]-[48], 357 [88], 358 [93].

362 See, eg, *Secretary of State for the Home Department v JJ* [2008] AC 385 at 409-410 [14]-[15].

Protection of the community as a legitimate and non-punitive purpose

245 The purpose of a law, that is, the "public interest sought to be protected and enhanced"[363] by a law, can be identified at different levels of generality. However, in this context the relevant legislative purpose broadly corresponds to the "mischief" the law seeks to address.[364] That purpose is to be ascertained from the "terms of the law, the surrounding circumstances, the mischief at which the law is aimed and sometimes the parliamentary debates preceding its enactment".[365]

246 In *Alexander v Minister for Home Affairs* the relevant provisions of the *Australian Citizenship Act 2007* (Cth) empowered the Minister for Home Affairs to remove a person's citizenship if they were satisfied, inter alia, that the citizen had engaged in foreign incursions and recruitment, and that their conduct had demonstrated that they had repudiated their allegiance to Australia.[366] While these provisions were said to be capable of being construed as protecting the Australian community from the risk to security posed by returning foreign fighters,[367] when read in context, they were characterised as punitive because the removal of citizenship was a "response to conduct that [was] conceived of as being so reprehensible that it [was] radically incompatible with the values of the community".[368] This conclusion was in part drawn from a legislative statement which made it clear that the purpose of the provisions was to denounce and exclude the person from formal membership of the Australian community solely on the basis of their past criminal conduct.[369]

247 Although the conclusion in *Alexander* that the relevant provision was punitive also appears to have been drawn from a comparison of the impugned provision with a similar power in s 36D of the *Australian Citizenship Act* enabling

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363 *Jones* (2023) 97 ALJR 936 at 943 [19]; 415 ALR 46 at 51, citing *Alexander* (2022) 276 CLR 336 at 378 [102].

364 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178].

365 *Re Woolley* (2004) 225 CLR 1 at 26 [60], cited in *Falzon* (2018) 262 CLR 333 at 341 [20].

366 Section 36B of the *Australian Citizenship Act 2007* (Cth), which was inserted by Sch 1, item 9 of the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth).

367 *Alexander* (2022) 276 CLR 336 at 368 [75].

368 *Alexander* (2022) 276 CLR 336 at 371 [82].

369 *Australian Citizenship Act 2007* (Cth), s 36A; *Alexander* (2022) 276 CLR 336 at 383 [120]; see also at 371-372 [83]-[84], 429 [251].

the Minister for Home Affairs to remove a person's citizenship based on a criminal conviction for the same or similar conduct,[370] the differences between the two provisions did not save s 36D from later being characterised as punitive and thus invalid in *Benbrika v Minister for Home Affairs* ("*Benbrika (No 2)*").[371] By contrast, in *Jones* the power to remove a person's citizenship because they were convicted of certain offences prior to being granted citizenship was reasonably capable of being seen as necessary to protect the integrity of the naturalisation process and was therefore characterised as non-punitive.[372]

248 A legitimate and non-punitive purpose for the imposition of a law that is prima facie punitive can be the "protection" of the community or a part of it.[373] However, the concept of "protection" in this context is ambiguous.[374] One of the objects of criminal punishment is the protection of the community via the deterrence of both the offender and others from committing similar crimes, or by removing the offender from the community.[375] In those cases, the community is sought to be protected by the imposition of punishment. A legislative scheme that pursues that form of "protection" has a punitive purpose. By contrast, a statutory regime that enables the suspension or revocation of a licence or a person's professional status effects a form of "protection" that may be "legitimate [and] non-punitive";[376] such schemes are "purely protective".[377] Even detention can be

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370 *Australian Citizenship Act 2007* (Cth), s 36D; *Alexander* (2022) 276 CLR 336 at 367 [70], 373 [87].

371 See *Benbrika (No 2)* (2023) 97 ALJR 899 at 924-925 [107]-[114]; 415 ALR 1 at 29-31.

372 *Jones* (2023) 97 ALJR 936 at 947-948 [49]-[50], 959 [106]-[107]; 415 ALR 46 at 57-58, 73.

373 *Re Woolley* (2004) 225 CLR 1 at 25-26 [60]-[61]; *Minister for Home Affairs v Benbrika* ("*Benbrika (No 1)*") (2021) 272 CLR 68 at 98-100 [39]-[40].

374 *Alexander* (2022) 276 CLR 336 at 380 [111]; see also at 425 [242]; *Benbrika (No 1)* (2021) 272 CLR 68 at 149-150 [183]-[185].

375 *Alexander* (2022) 276 CLR 336 at 381 [113]; *Benbrika (No 1)* (2021) 272 CLR 68 at 157-158 [202].

376 *Alexander* (2022) 276 CLR 336 at 380 [109]-[110], 425-426 [243], 460 [337]; see also cases cited at fn 373.

377 *Re Woolley* (2004) 225 CLR 1 at 26 [61]; *Benbrika (No 1)* (2021) 272 CLR 68 at 155 [197].

"purely protective" if, for example, it is undertaken to treat a person's physical or mental illness[378] or to prevent them communicating a contagious disease.[379]

249 Ultimately, the question of whether a particular statutory regime that expressly or impliedly promotes the "protection" of the community through deterrence in fact pursues a "non-punitive purpose" turns on how the scheme seeks to effect that protection. If that "protection" is sought to be achieved by imposing a detriment on one person to deter or dissuade others from engaging in criminal conduct, then it is punitive. If the protection is sought to be achieved by imposing a detriment on a person who previously engaged in anti-social conduct to deter or dissuade them simpliciter from repeating that conduct, then it is also punitive. However, if a detriment is imposed on a person as a means of deterring or dissuading them from engaging in anti-social conduct simply because it increases their risk of detection or minimises their opportunity to offend, then that is, or at least may be, a legitimate and non-punitive form of protection.

250 Thus, a statutory regime may authorise the surveillance of a person by intrusive means and, in doing so, seek to "deter" a person from offending because it enhances their risk of detection. Such a statutory regime, which authorises surveillance for the purpose of deterring offending only through ensuring the person is aware that, if they offend, then they risk detection, is pursuing a legitimate and non-punitive form of protection. That conclusion will not necessarily change if the scheme selects the person for surveillance by reference to a previous finding that the person committed an offence or offences.

Reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose

251 The single question of characterisation posed by the broader principle is not completely answered by asking whether the statutory scheme authorises the imposition of a detriment that is prima facie punitive and, if so, then asking whether the scheme could be characterised as authorising the imposition of that detriment to pursue a legitimate and non-punitive purpose. The single question of characterisation does not just involve a consideration of the means employed or the ends that appear to be sought to be achieved, but also "the relationship between the two".[380] Thus, the relevant law must be reasonably capable of being seen as

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378 *Alexander* (2022) 276 CLR 336 at 426 [245], citing *Benbrika (No 1)* (2021) 272 CLR 68 at 155-159 [197]-[204].

379 *Lim* (1992) 176 CLR 1 at 28.

380 *NZYQ* (2023) 97 ALJR 1005 at 1016 [44]; 415 ALR 254 at 265.

necessary to achieve the alleged legitimate and non-punitive purpose.[381] In this context, "necessary" does not mean "essential" or "indispensable", but instead means "reasonably appropriate and adapted".[382]

252 This aspect of addressing the single question of characterisation has been held not to involve any process analogous to "proportionality testing" which applies to constitutionally guaranteed freedoms.[383] With proportionality testing, the relevant inquiry involves considering whether there are other equally practicable means of achieving a legitimate legislative purpose compared to the challenged measure which impinges upon the constitutional freedom.[384] However, in this context, whether or not the alleged purpose or object of the legislation or power could be achieved by some other reasonably practicable but less intrusive means is only relevant to the extent it bears upon answering the single question of characterisation as to whether the true purpose of the power or law is punitive.[385]

253 For example, a law might provide for the detention of persons affected by an infectious and serious disease, but the legislative scheme for that detention might extend the detention well beyond the period during which the individual is infectious. Such detention would be greater than what the reasonable protection of the public requires.[386] In that case, the power of detention could not be seen as necessary to achieve the legitimate and non-punitive purpose of preventing the spread of a deadly disease and, therefore, it may be inferred that the purpose of the detention is punitive. Leaving aside the duration of the detention, the fact that there may be other less draconian means of addressing the spread of such a disease would only be relevant to the extent that it bore upon an assessment of whether the true purpose of the law was to authorise the infliction of punishment.

254 One factor bearing on the answer to the single question of characterisation is how the statutory scheme ensures that the power to impose the detriment is only

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381 *Lim* (1992) 176 CLR 1 at 33, cited in *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162; *Falzon* (2018) 262 CLR 333 at 343 [26].

382 *Jones* (2023) 97 ALJR 936 at 946 [42]; 415 ALR 46 at 56.

383 *Falzon* (2018) 262 CLR 333 at 343-344 [29]-[33].

384 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568, where the Court referred to the example of *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; see also *Monis v The Queen* (2013) 249 CLR 92 at 193 [280], 214 [347]; *Maloney v The Queen* (2013) 252 CLR 168 at 236-237 [182].

385 *Falzon* (2018) 262 CLR 333 at 344 [30]-[32].

386 *Thomas v Mowbray* (2007) 233 CLR 307 at 332 [22].

exercised to pursue the relevant legitimate and non-punitive purpose. In *Alexander*, Kiefel CJ, Keane and Gleeson JJ noted the absence of "procedural safeguards" on the formation of the Minister for Home Affairs' opinion that the citizen had engaged in foreign incursions and recruitment compared to those safeguards afforded in a criminal prosecution.[387]

255 In *Minister for Home Affairs v Benbrika* ("*Benbrika (No 1)*") a majority of this Court concluded that a legislative scheme empowering a court created by the Commonwealth Parliament under Ch III to order the preventative detention of those who posed an unacceptable risk of committing a terrorist offence validly conferred the judicial power of the Commonwealth on the Supreme Courts of the States and Territories.[388] Thus, that power could also be conferred on a court created by the Commonwealth Parliament under Ch III. The power to order detention that was conferred by the legislation considered in *Benbrika (No 1)* was characterised as protective and not punitive.[389]

256 In *Benbrika (No 1)*,[390] the Commonwealth submitted that the power to detain persons who posed an unacceptable risk of committing a terrorist offence could also be conferred on the executive as the relevant power is "non-punitive". However, again highlighting the interconnected nature of the inquiry into the "single question of characterisation", to validly impose the very grave detriment of preventative detention on a citizen would require a high level of satisfaction that there is no risk that the citizen would not be additionally punished for past transgressions. Thus, it may be necessary to state that the only way in which a law authorising the detention of a citizen in a prison or similar facility or by way of full time house arrest on the basis that they pose a risk of committing crimes or engaging in anti-social conduct can be reasonably capable of being seen as necessary to achieve that protective purpose is if the power to detain is reposed in a Ch III court with its characteristics of independence, due process, amenability to appeal and obligation to give reasons.[391] If a court created by the Commonwealth Parliament under Ch III is invested with that power, the legislation doing so must be otherwise consistent with the requirements of that Chapter.

257 On the other hand, if the purpose of that detention is to facilitate an alien, without permission to remain, being removed from Australia, then the conferral of

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387 *Alexander* (2022) 276 CLR 336 at 372 [85].

388 *Benbrika (No 1)* (2021) 272 CLR 68 at 103 [48].

389 *Benbrika (No 1)* (2021) 272 CLR 68 at 98-99 [39].

390 (2021) 272 CLR 68 at 90 [17].

391 Edelman J reached the same conclusion by different means in *Benbrika (No 1)* (2021) 272 CLR 68 at 148-150 [182]-[185].

the power on the executive to detain, which is subject to the supervisory jurisdiction of the courts, will suffice.[392] The same position might apply to the wartime detention of aliens owing allegiance to an enemy power. There are many other possibilities, but the necessity to consider the relationship between the "means" and the "ends" spoken of in *NZYQ* calls attention to how the statutory scheme ensures the power to impose the detriment is only exercised to give effect to the relevant legitimate and non-punitive purpose.

Legislative provisions

258 The plaintiff's challenge to the provisions conferring the power to impose the monitoring condition and the curfew condition concerned the form of that power and those conditions, along with the related provisions of the *Migration Act* and *Migration Regulations* that have been in force since 8 December 2023. Those provisions are the result of various tranches of amendments made to the *Migration Act* and *Migration Regulations* between 18 November 2023 and 8 December 2023,[393] the effect of which is described by Gageler CJ, Gordon, Gleeson and Jagot JJ, which I respectfully adopt.[394]

259 The end result of those amendments is that those non-citizens who had no permission to remain in Australia and in respect of whom there was no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future (and thus could not be subject to immigration detention following *NZYQ*) are, without their consent or agreement, eligible to be granted a BVR. These visas are granted subject to conditions, and criminal sanctions are imposed for a failure to comply with some of those conditions.[395] According to the special case, 153 such persons have been granted BVRs ("the NZYQ cohort").

260 One aspect of the scheme that resulted from the amendments noted above is that, with effect from 8 December 2023, Sch 2 to the *Migration Regulations* was amended by, inter alia, inserting the form of cl 070.612A in issue in these

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392 *Lim* (1992) 176 CLR 1 at 28.

393 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) ("Bridging Visa Conditions Act") as in force from 18 November 2023; *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) as in force from 8 December 2023; *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth) as in force from 8 December 2023.

394 See reasons of Gageler CJ, Gordon, Gleeson and Jagot JJ at [33]-[36].

395 The imposition of conditions on BVRs is dealt with by Div 070.6 of Sch 2 to the *Migration Regulations*.

proceedings.[396] Clause 070.612A authorises the imposition of conditions on BVRs as follows:

> "(1) If subclause (3) applies to the visa, each of the following conditions must be imposed by the Minister unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the *protection* of any part of the Australian community (including because of any other conditions imposed by or under another provision of this Division):
>
> (a) 8621 [ie the monitoring condition];
>
> (b) 8617;
>
> (c) 8618;
>
> (d) 8620 [ie the curfew condition].
>
> ...
>
> (2) The Minister must decide whether or not to impose each of the conditions listed in subclause (1) in the order in which those conditions are listed in that subclause.
>
> (2A) Conditions imposed by or under this clause are in addition to any other condition imposed by or under another provision of this Division.
>
> (3) This subclause applies to a visa if:
>
> (a) the visa was granted under regulation 2.25AA and, at the time of grant, there was no real prospect of the removal of the holder from Australia becoming practicable in the reasonably foreseeable future; or
>
> (b) the visa was granted under regulation 2.25AB." (emphasis added)

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396 *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth), Sch 1, item 17.

261 If one or more of the conditions referred to in cl 070.612A(1) are imposed, the visa will be subject to those conditions for a period of 12 months from the date the visa was granted.[397]

262 The monitoring condition requires that the holder of the visa must: wear a monitoring device at all times; allow an authorised officer to fit, install, repair or remove the device and any related monitoring equipment; take any steps as are specified in writing by the Minister and any other reasonable steps to keep the device and any related monitoring equipment in good working order; and notify an authorised officer as soon as practicable if they become aware that the device or any related monitoring equipment is not in good working order.[398] A "monitoring device" is "any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object".[399] "Related monitoring equipment" for a monitoring device means "any electronic equipment necessary for operating the monitoring device".[400]

263 The curfew condition requires the visa holder to remain at a notified address between 10.00pm on one day and 6.00am the next day, or between such other times as are specified in writing by the Minister that are no more than eight hours apart.[401] A "notified address" is any of: an address notified by the visa holder to the Minister; an address that is notified to the Department of Home Affairs at which the visa holder stays regularly because of a close personal relationship with a person at that address; and a (temporary) address notified by the visa holder to the Department no later than 12.00pm on the day before the visa holder proposes to stay at that address.[402]

264 The monitoring and the curfew conditions were inserted into the *Migration Regulations* with effect from 18 November 2023 by the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) ("the Bridging Visa Conditions Act").[403] The Explanatory Memorandum described the overall purpose of the amendments to the regime governing BVRs as "ensur[ing] the effective management of this aspect of the migration system, including recognising that non-

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397 *Migration Regulations*, reg 2.25AE.

398 *Migration Regulations*, Sch 8, condition 8621(1)-(3).

399 *Migration Regulations*, Sch 8, condition 8621(5).

400 *Migration Regulations*, Sch 8, condition 8621(5).

401 *Migration Regulations*, Sch 8, condition 8620(1)-(2).

402 *Migration Regulations*, Sch 8, condition 8620(3).

403 Bridging Visa Conditions Act, Sch 2, items 8, 13.

citizens with a *history of serious criminal offending* ... require appropriate and proportionate management" (emphasis added).[404]

265 The purpose of the curfew condition was described in the Explanatory Memorandum as "enhanc[ing] community protection outcomes for the Australian community and [assisting] in ensuring the person is available for removal [from Australia] should that become practicable".[405] The purpose of the monitoring condition was described in the same Explanatory Memorandum as being to "*deter* the individual from committing further offences whilst holding the [BVR], *knowing they are being monitored*, and thereby keep the community safe" (emphasis added).[406] It was also stated that electronic monitoring would assist in preventing the visa holder absconding and thereby frustrating the "Government's efforts to facilitate their removal".[407] Similar statements regarding the need to facilitate the visa holder's removal were made in the second reading speech to the Bridging Visa Conditions Act[408] and in the second reading speech to the *Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023* (Cth) that became part of the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth), which came into force on 8 December 2023. The latter strengthened the authority conferred on authorised officers to collect and use information gathered by the electronic monitoring devices pursuant to the monitoring condition.[409]

266 One feature of the *Migration Act* is that a breach of visa conditions will usually render a visa liable to cancellation.[410] However, as noted, the legislative amendments concerning BVRs took a different course and made a failure, without

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404 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 2.

405 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 28 [175].

406 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 29 [178].

407 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 29 [178].

408 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8318-8319.

409 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 November 2023 at 8510; *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth), Sch 1, item 4.

410 *Migration Act*, s 116(1)(b).

reasonable excuse, to comply with the requirements of the monitoring and curfew conditions a criminal offence.[411] If a visa holder is convicted of such an offence, they must be sentenced to imprisonment for at least one year.[412]

267 The secondary materials to the various tranches of amendments justified the approach of criminalising breaches of visa conditions on the basis that cancelling a visa on account of the failure of the holder to comply with a visa condition was of no relevance to the members of the NZYQ cohort as they cannot be detained as a consequence of becoming an unlawful non-citizen through having their visa cancelled.[413] Instead, the offence provisions were said to encourage "compliance with relevant visa conditions and ongoing cooperation in arrangements relating to removal from Australia".[414]

268 Although the power to impose conditions 8617 and 8618, which are also referred to in cl 070.612A,[415] are not challenged, it is necessary to note their effect. Condition 8617 requires the visa holder to notify the Department within five working days of receiving or transferring amounts totalling $10,000 or more from or to one or more other persons within any period of 30 days.[416] Condition 8618 requires the visa holder to notify the Department within five days of: incurring a debt or debts totalling $10,000 or more; becoming bankrupt; or "any significant change in relation to the holder's debts or bankruptcy".[417] A failure to comply with these conditions without reasonable excuse is also a criminal offence.[418] If

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411 *Migration Act*, ss 76C(1), 76D(1)-(4).

412 *Migration Act*, s 76DA.

413 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 4; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 November 2023 at 8510; Australia, Senate, *Parliamentary Debates* (Hansard), 5 December 2023 at 6525.

414 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 4.

415 *Migration Regulations*, Sch 2, cl 070.612A(1)(b)-(c).

416 *Migration Regulations*, Sch 8, condition 8617.

417 *Migration Regulations*, Sch 8, condition 8618.

418 *Migration Act*, ss 76B(1), 76B(4)(a)(i).

convicted, the visa holder must be sentenced to imprisonment for at least one year.[419]

269 Like the monitoring and curfew conditions, conditions 8617 and 8618 were also introduced into the *Migration Regulations* with effect from 18 November 2023 by the Bridging Visa Conditions Act.[420] The relevant Explanatory Memorandum described the purpose of these provisions as identifying circumstances that could prejudice the Department's ability to "affect removals",[421] which presumably is a reference to affecting the removal of the visa holder from Australia should that become possible.

270 At the same time as cl 070.612A in the above form was inserted into the *Migration Regulations* (ie, 8 December 2023),[422] the current form of cl 070.612B of Sch 2 to the *Migration Regulations* was also introduced.[423] It requires the imposition of particular conditions on BVR holders who are not able to be detained in immigration detention as a consequence of *NZYQ*[424] and were either convicted of an offence involving a minor or any other vulnerable person or convicted of an offence involving violence or sexual assault. In the case of convictions for offences against minors or other vulnerable persons, the visa holder is subject to five conditions including conditions precluding the performance of work or participation in any regular organised activity involving more than incidental contact with a minor or any other vulnerable person,[425] or entering within 200 metres of a school, childcare centre or day care centre.[426] In the case of convictions for offences involving violence or sexual assault, the visa is subject to

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419 *Migration Act*, s 76DA.

420 Bridging Visa Conditions Act, Sch 2, item 7.

421 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 27 [166], 28 [168].

422 *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth), Sch 1, item 17.

423 *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth), Sch 1, item 18.

424 *Migration Regulations*, Sch 2, cl 070.612B(4).

425 *Migration Regulations*, Sch 8, condition 8622.

426 *Migration Regulations*, Sch 8, condition 8623.

a condition that the visa holder must not contact or attempt to contact the victim of the offence or a member of their family.[427]

271 These parts of the regulations were accompanied by legislative amendments to the *Migration Act*, which made it an offence to breach these conditions.[428] If convicted of those offences, the visa holder must be sentenced to imprisonment for at least one year.[429] The Explanatory Memorandum for the amendments described those *criminal sanctions* as "put[ting] beyond doubt the types of behaviours that are unacceptable for persons in this cohort to engage in whilst they reside in the Australian community, and the sanctions that will apply to any person who breaches the conditions" of the visa they are granted.[430] This was said to be "appropriate and reasonable to ensure the Australian community can continue to have confidence that the migration system is being well-managed in respect of this cohort of non-citizens".[431]

272 Section 76E of the *Migration Act* specifies that the rules of natural justice do not apply to the making of a decision to grant a BVR that is subject to one or more of the "prescribed conditions", being conditions 8617, 8618, the monitoring condition and the curfew condition,[432] in respect of a person for whom there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future. However, as soon as practicable after making the decision, the Minister must give the non-citizen a written notice that sets out the decision and must invite them to make representations as to why the visa should not be subject to one or more of those conditions.[433] The visa holder must also be given notice of "any other prescribed information",[434] but no such information has been prescribed in the *Migration Act* or *Migration Regulations*. Section 76E(4)

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427 *Migration Regulations*, Sch 8, condition 8624.

428 *Migration Act*, ss 76DAA, 76DAB, 76DAC; introduced by the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth), Sch 1, item 1.

429 *Migration Act*, s 76DA.

430 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023*, Explanatory Memorandum at 2.

431 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023*, Explanatory Memorandum at 2.

432 *Migration Regulations*, reg 2.25AD(1).

433 *Migration Act*, s 76E(3).

434 *Migration Act*, s 76E(3)(a)(ii).

provides that the Minister must grant the non-citizen another BVR that is not subject to any one or more of the prescribed conditions if the non-citizen makes representations and "the Minister is satisfied that those conditions are not reasonably necessary for the protection of any part of the Australian community".[435]

"Protection" and cl 070.612A

273 In its written submissions, the Commonwealth contended that the reference to "protection" in cl 070.612A is a reference to protection from "harm". In oral submissions, the Commonwealth revised its position by contending that the protection referred to was protection of the community from the risk of harm arising from future criminal offending by a member of the NZYQ cohort.

274 The plaintiff submitted that the vague drafting of cl 070.612A meant that this Court could not be satisfied that the provision has any non-punitive purpose. According to the plaintiff, it followed that, if the curfew condition or monitoring condition is prima facie punitive, then cl 070.612A necessarily infringes Ch III.

275 The absence of any express statement in cl 070.612A as to the risk being protected from is not the end of the inquiry. The provision must be construed. A statutory power with no purpose and no limits is a rare animal, most likely only mythical. The vague and apparently open-ended nature of the concept of protection in cl 070.612A means that in ascertaining the limits and purpose of the power that is conferred, close consideration must be given to its context, the balance of the clause and the secondary materials that bear upon its construction. If the result of that inquiry is that *a* legitimate and non-punitive purpose for the power cannot be identified, then the plaintiff's submission should be accepted. However, if at least one such purpose can be ascertained, then the next question will be whether the provision also permits of a punitive purpose. If it does, and the monitoring and curfew conditions are prima facie punitive, then cl 070.612A(1)(a) and cl 070.612A(1)(d) will be invalid unless they can be read down without altering their intended operation.[436] Otherwise, at the point of determining the validity of any part of cl 070.612A, the significance of its vague drafting is whether it is reasonably capable of being seen as necessary to achieve any identified legitimate and non-punitive purpose.

276 In support of its submission, the Commonwealth referred to the special case which notes that a substantial portion of the NZYQ cohort have been convicted of serious criminal offences. However, these parts of the special case cannot be

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435 *Migration Act*, s 76E(4)(b).

436 *Migration Act*, s 3A; see *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28].

deployed in aid of the construction of cl 070.612A, especially where there is nothing in the text of the provisions that confines the application of that clause to individuals who have been convicted of any offence. Nevertheless, the numerous references in the secondary materials to potential recipients of BVRs having criminal records (for example, "serious criminal histories",[437] "history of serious criminal offending"[438]) provide support for the proposition that the reference to "protection" in cl 070.612A at least *includes* protection from the risk to part(s) of the Australian community from the commission of criminal offences by the person in receipt of a BVR upon their release. This is further supported by the requirement in cl 070.612A to consider whether each of the conditions should be imposed having regard to the other conditions that might be imposed under the relevant Division of Sch 2 to the *Migration Regulations* that authorises the imposition of conditions on BVRs.[439] Those conditions include the conditions imposed by cl 070.612B, the operation of which is predicated on the visa holder having been convicted of an offence.[440]

277 The context in which cl 070.612A(1) operates is that, by reason of the holding in *NZYQ*, visa holders the subject of that power cannot be detained in custody pending their removal from Australia. Hence the concept of "protection" in cl 070.612A(1) posits a comparison between the visa holders remaining in the community either with or without one or more of the conditions attached to their BVRs, with each such condition being considered in successive order.[441] This focuses attention on those four conditions as the Minister must address whether it is reasonably necessary to impose them for the protection of any part of the community. What risks do those conditions protect against and how do they seek to provide that protection?

278 As noted, the relevant Explanatory Memorandum accompanying the insertion of the monitoring and curfew conditions into the *Migration Regulations* expressly referred to their role in preventing the commission of "further offences".[442] Those conditions can easily be seen as directed to providing a measure of protection against criminal behaviour. Electronic monitoring is often

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437 See, eg, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 2023 at 8318, 8328, 8396.

438 See above at [264].

439 ie, Div 070.6; see *Migration Regulations*, Sch 2, cl 070.612A(2A).

440 See above at [270].

441 *Migration Regulations*, Sch 2, cl 070.612A(3).

442 See above at [265].

imposed as a condition of bail[443] and in post-incarceration supervision regimes.[444] Consistent with the statement in the relevant Explanatory Memorandum about the monitoring condition,[445] electronic monitoring minimises offending by making the alleged offender aware that their movements are monitored, especially if they return to an area where their alleged victim or their alleged criminal associates reside or where they may have committed crimes.[446] Curfews confining a person to a known address are also common to bail and supervision regimes. They operate in a similar way and serve a similar purpose.[447]

279 Electronic monitoring and curfews are also often imposed as bail conditions to minimise the risk of the alleged offender absconding.[448] Consistent with the various statements in the secondary materials noted above,[449] that concern has an analogous counterpart in this context in that these provisions address the risk of the visa holder absconding within Australia and thereby frustrating their removal should that become possible. This suggests that the reference in cl 070.612A to the protection of any part of the Australian community includes the protection of the

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443 See, eg, *Bail Act 1980* (Qld), s 11(9B); *Bail Act 1982* (WA), Sch 1, Pt D, cl 3(4)-(5); *Bail Act 1982* (NT), s 27A(1)(iaa)-(ia); *Bail Act 1985* (SA), s 11(2aa)(a)(ii); *Youth Justice Act 1992* (Qld), s 52AA; *Bail Act 2013* (NSW), s 30A.

444 See, eg, *Criminal Code* (Cth), s 104.5A(2)(d); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 16A(2)(b)(i); *Crimes (High Risk Offenders) Act 2006* (NSW), s 11(1)(e); *Criminal Law (High Risk Offenders) Act 2015* (SA), s 11(a)(iii); *Terrorism (High Risk Offenders) Act 2017* (NSW), s 29(1)(h); *Serious Offenders Act 2018* (Vic), s 35(2); *High Risk Serious Offenders Act 2020* (WA), s 31; *Dangerous Criminals and High Risk Offenders Act 2021* (Tas), s 38(2)(b)-(c).

445 See above at [265].

446 See, eg, *State of New South Wales v Tillman* [2008] NSWSC 1293 at [77]; *State of New South Wales v Veeran* [2015] NSWSC 75 at [19]; *State of New South Wales v French (Final)* [2017] NSWSC 1475 at [257]; *State of New South Wales v JC* [2023] NSWSC 507 at [41].

447 See, eg, *Bail Act 1977* (Vic), s 5AAA(4)(c); *Bail Act 1982* (WA), Sch 1, Pt D, cl 3(2); *Bail Act 1985* (SA), s 11(ia); see also *State of New South Wales v Whaley* [2018] NSWSC 759 at [61].

448 See, eg, *R v Ebrahimi* [2015] NSWSC 335 at [34]; *R v Xi* [2015] NSWSC 1575 at [32]-[42]; *R v Ayoub* [2020] NSWSC 154 at [17]; *R v Okusitino; R v Lavulo; R v Iongi* [2024] NSWSC 143 at [101].

449 See above at [265].

integrity of Australia's immigration process in a similar way that the provisions in *Jones* protected the integrity of the naturalisation process.[450]

280 As noted, the relevant Explanatory Memorandum accompanying the inclusion of conditions 8617 and 8618 described those conditions as addressing circumstances that affect the removal of the visa holder.[451] This concern appears to relate to the creation of practical impediments and inconvenience to others that might arise from the removal from Australia of a non-citizen who has engaged in substantial financial transactions, incurred substantial debts or become bankrupt. There are restrictions imposed on bankrupt persons leaving Australia[452] and no doubt the administration of the bankruptcy of a person who has been removed from the country is rendered far more difficult. Further, these conditions can also be seen as directed to providing some protection against the risk of fraud or similar behaviour.

281 It follows that the Commonwealth's submission that cl 070.612A is confined to protection against the risk of harm from the commission of criminal offences by the visa holder upon their release should not be accepted. That said, the rejection of the Commonwealth's submission does not carry with it an acceptance of the plaintiff's submission that cl 070.612A is unbounded. Clause 070.612A operates to protect against the risk of the commission of criminal offences by the visa holder, including fraud. However, it also seeks to protect against the risk to the integrity of the immigration system that might result from the conduct of the visa holder impeding their removal from Australia should that otherwise become reasonably practicable, such as by absconding, or entering into significant financial transactions, or becoming bankrupt.

A purely protective power?

282 The text of the four conditions and the secondary materials concerning them suggest that cl 070.612A is directed to providing protection against the risk of the commission of criminal offences by the visa holder and the creation of impediments to their removal from Australia. Both are legitimate and non-punitive purposes. However, is that the limit of the power conferred by cl 070.612A? During oral argument, it was suggested that cl 070.612A is so vague in its drafting that it might be exercised to protect against the spread of disease, something that both the monitoring and curfew conditions could conceivably protect against.

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450 See above at [247].

451 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions) Bill 2023*, Explanatory Memorandum at 27 [166], 28 [168]; see above at [269].

452 See *Bankruptcy Act 1966* (Cth), s 272(1)(c).

Leaving aside that such a purpose is legitimate and non-punitive,[453] that suggestion should be rejected. Neither condition 8617 nor condition 8618 could ever address such a risk, and their imposition is connected to the concept of protection embodied in the curfew and monitoring conditions by the obligation imposed on the Minister to address the four conditions in succession.[454]

283 The real issue at this point of the analysis is whether the power conferred by cl 070.612A could be properly exercised to enable the imposition of the monitoring or curfew condition on a visa holder to deter others from offending or engaging in criminal conduct, or to bring home to that holder the consequences of their own past offending or such conduct (or to denounce the past conduct of a visa holder or exact retribution). A power that could be exercised to secure protection in any of those ways would have a punitive aspect.

284 Unlike the legislative statement in *Alexander* noted above,[455] nothing in the secondary materials provides any support for such a construction. As explained, the references in the secondary materials to deterring visa holders were references to making visa holders aware that their movements are being monitored. The statement in one of the Explanatory Memoranda that the Australian community should continue to have "confidence that the migration system is being well-managed in respect of this cohort of non-citizens"[456] was referable to the criminal sanctions introduced into the *Migration Act* for breaching the conditions imposed by cl 070.612B and not to any purported exercise of power under cl 070.612A.

285 A construction of cl 070.612A which permits the exercise of that power for one of the punitive purposes identified above would be a strained one. It is difficult to envisage how the Minister could realistically assess whether it was reasonably necessary to impose the monitoring or curfew conditions (or conditions 8617 and 8618) for the protection of the community if that assessment envisages the community being protected by either deterring others from engaging in criminal conduct or bringing home to that holder the consequences of their own such conduct if they engaged in it, much less by denouncing their past conduct. That is especially so where, unlike *Alexander*, the imposition of the conditions is not dependent on the BVR holder ever having been found to have engaged in such conduct in the past.

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453 *NZYQ* (2023) 97 ALJR 1005 at 1015 [39]; 415 ALR 254 at 264.

454 *Migration Regulations*, Sch 2, cl 070.612A(2).

455 See above at [246].

456 Australia, House of Representatives, *Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023*, Explanatory Memorandum at 2.

286 Unfortunate as its drafting is, the scheme that includes cl 070.612A is one that seeks to protect the community, including any part of it, from future conduct of the visa holder that might amount to criminal conduct or undermine their possible removal from Australia. Its object or purpose is not to protect the community by imposing punishment in the form of visa conditions but to protect the community by making the visa holder *comply* with those conditions and to punish them by criminal sanction if they fail to do so.

287 The result is that cl 070.612A is "purely protective". It authorises the imposition of conditions to protect the community against the risk of harm from criminal conduct by increasing the visa holder's knowledge of the likelihood of their detection and reducing their opportunity to offend. It also protects against risks to the integrity of the immigration system by monitoring conduct that might impede a visa holder's removal from Australia should that become possible.

288 Depending on whether or not the monitoring or curfew conditions are prima facie punitive, two further aspects of cl 070.612A relevant to its validity must be addressed, namely how the power conferred by the clause is to be exercised and the amenability of the power to scrutiny to ensure that the limits on its exercise are observed.

The application of cl 070.612A

289 The Commonwealth submitted that the assessment required by cl 070.612A should be undertaken in a manner similar to the statutory regime considered in *Vella v Commissioner of Police (NSW)*.[457] The regime considered in *Vella* authorised the Supreme Court of New South Wales to make a "serious crime prevention order" containing such "prohibitions, restrictions, requirements and other provisions" as the Court considers "appropriate" for the purpose of protecting the public by preventing, restricting or disrupting a person's involvement in serious crime related activities. The person the subject of the order must have been convicted of a serious criminal offence or be found to have been involved in serious crime related activity for which they had not been convicted.[458] These provisions were interpreted as requiring, inter alia, an initial assessment of whether there is a real or significant risk that a person would be involved in serious crime related activity,[459] the nature of that activity[460] and then the balancing of the likelihood that an order will prevent, restrict or disrupt the activity against the

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457 (2019) 269 CLR 219.

458 *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW), ss 5-6.

459 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 241 [43].

460 *Vella* (2019) 269 CLR 219 at 242 [46].

extent to which it will intrude upon the person's liberty, having regard to whether a less intrusive order will achieve the same outcome.[461]

290 One difficulty with applying this analysis is that, under the statutory provisions considered in *Vella*, the Supreme Court had the power to determine the particular prohibitions, restrictions and requirements that might be imposed on an individual, whereas in exercising the power conferred by cl 070.612A the Minister is confined to determining in successive order whether the four specified conditions are reasonably necessary. The Minister does not have the power to amend the conditions or to add others.

291 Even so, aspects of the approach in *Vella* are of some assistance. It can be accepted that the Minister must assess the risk of harm which the visa holder represents, be it engaging in criminal conduct or undermining the potential for them to be removed, the likelihood of that risk materialising and the consequences if it did so. The Minister must then address in succession whether the imposition of each of the four conditions is reasonably necessary for the protection of any part of the Australian community from the risk of harm; ie, does the condition impose a degree of restraint greater than what the reasonable protection of the public requires?[462] The test of "reasonable necessity" embraces a consideration of the likelihood that the condition may appreciably mitigate that risk and the effect of its imposition on the visa holder.

Due process and cl 070.612A

292 The effect of cl 070.612A(1) (and s 76E(4)(b) of the *Migration Act*) is that, unless the Minister forms a positive state of satisfaction that it is not reasonably necessary to impose the prescribed conditions for the protection of any part of the Australian community, they must be imposed. Four further matters should be noted regarding the manner in which a decision to impose such a condition can be made.

293 First, the conferral of the power to grant the visa and impose conditions carries with it an obligation to address cl 070.612A(1) and determine whether or not to impose the specified conditions.[463] The same applies to s 76E(4)(b) of the *Migration Act* where a visa holder makes representations in response to the invitation issued under s 76E(3)(b).[464]

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461 *Vella* (2019) 269 CLR 219 at 242 [47], 243-244 [49]-[51].

462 *Thomas v Mowbray* (2007) 233 CLR 307 at 332 [22].

463 See, eg, *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 598-599 [23]-[25].

464 See, eg, *Plaintiff M1/2021* (2022) 275 CLR 582 at 598-599 [23]-[25].

294 Second, the Minister's absence of satisfaction under cl 070.612A(1) (and s 76E(4)(b)) is reviewable by the courts on the ground that such a decision was not formed reasonably upon the material before the decision maker.[465]

295 Third, the visa holder does not have the right to be heard before the conditions are imposed but does have the right to make submissions to the contrary and have those submissions considered in addressing s 76E(4).[466] However, there is no obligation to provide the visa holder with reasons as to why the conditions were imposed.

296 Fourth, the terms of the special case indicate that, in addressing whether or not to impose the monitoring and curfew conditions, the Minister is assisted by a Community Protection Board constituted with appropriately qualified personnel. The Commonwealth sought to deploy that fact in its defence of the validity of the provisions. However, the Board has no functions or powers under the *Migration Act* or *Migration Regulations* (or any other legislation or instrument). The validity of the power to impose the monitoring and curfew conditions cannot depend on whether the Minister chooses to seek advice from a body which has no basis in the statutory regime under challenge.

The power to impose the monitoring condition is valid

297 The plaintiff contended that the power to impose the monitoring condition was prima facie punitive having regard to the degree of interference it authorises with two of his "fundamental" (or "common law") rights, namely his right to bodily integrity and his right to privacy. In oral argument, a further basis for characterising the power as prima facie punitive was raised, namely the "stigma" associated with wearing such a device and the associated equipment.

298 As noted, the monitoring condition obliges the visa holder under threat of criminal sanction including mandatory imprisonment to wear a monitoring device at all times and allow an "authorised officer"[467] to fit, install, repair or remove that monitoring device and any related monitoring equipment.[468] While there is scope for judgment by the Minister as to the type of devices that can be used, such devices

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465 See, eg, *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; see also *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, 432; *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650-657 [127]-[146].

466 *Migration Act*, s 76E(3)-(4).

467 *Migration Act*, s 76F.

468 *Migration Regulations*, Sch 8, condition 8621(2).

can only monitor movement and cannot substantially prevent or restrict bodily movement. The provisions do not authorise the use of shackles, and the monitoring equipment cannot operate as such.

299 In the plaintiff's case, his monitoring equipment consists of a "smart tag" fitted to his ankle which transmits data concerning his location and movement. The smart tag's dimensions are 93mm x 53mm x 22.5mm and it weighs 135 grams. It is recharged by attaching an on-body charger while the tag remains attached to the visa holder. When the on-body charger is attached to the smart tag, the total dimensions of the two objects are 93mm x 60mm x 59mm and the combined weight is 175 grams.

300 To charge the smart tag, the on-body charger must be connected to the smart tag for at least three hours a day. Visa holders are advised that the preferred charging method is that the smart tag be charged for 90 minutes in the morning and 90 minutes in the evening. The visa holder is fully mobile while the on-body charger is connected to the smart tag. A photograph attached to the special case shows an ankle monitor and charger visible on the outside of the wearer's clothing. Depending on the clothing worn by the visa holder, the smart tag without the on-body charger may or may not be visible. It is likely to be visible when the on-body charger is attached.

301 The smart tag transmits information concerning the location and movement of the visa holder using location technology, such as global position systems ("GPS") and motion sensing. When using the GPS technology it can detect the location of the visa holder within a range of 7 to 35 metres. The transmitted data is stored on a computer server for at least 15 years.[469]

302 While the validity of so much of cl 070.612A that authorises the imposition of the monitoring condition does not depend on the particular device utilised, this description can be taken as typical of the type of device that cl 070.612A purports to authorise be fitted to a BVR holder.

303 It can be accepted, as the plaintiff contended, that the monitoring condition authorises what would otherwise amount to a trespass to the visa holder's person and an interference with their right to "bodily integrity".[470] However, as already noted, the broader principle is not a basis for subjecting every legislative authorisation of executive interference with common law rights to judicial scrutiny for invalidity. The Commonwealth identified numerous instances of such authorisation of interferences with a person's bodily integrity that could not

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469 *Archives Act 1983* (Cth), s 24.

470 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 233.

sensibly be characterised as prima facie punitive, including submitting to decontamination or medical testing,[471] the use of force in executing a warrant and making an arrest[472] and the taking of fingerprints, an iris scan or a physical measurement.[473] To those examples there can be added non-consensual body searches at airports.[474] Those forms of interference are of far less duration than the wearing of a monitoring device but many of them are far more intrusive. None are prima facie punitive, and neither is the monitoring condition.

304 The plaintiff contended that the right to privacy has been "long recognised by the common law as a fundamental right or interest" and cited various Australian[475] and overseas authorities[476] that describe the significance of privacy as an aspect of, or closely related to, human dignity.

305 Privacy and human dignity are important legal values that inform the development of the common law. However, as already explained, the present question is more narrowly focused than the approach of the common law to the preservation of personal privacy and human dignity. The present question is whether the interference with the visa holder's privacy, occasioned by the power to impose electronic monitoring, is prima facie punitive.

306 There is no historical or other basis for treating interferences with privacy as punitive and there are numerous examples to the contrary. On the plaintiff's argument, the power to approve search warrants (the issue of which is not a judicial act[477]), telecommunication intercepts and the installation of tracking and surveillance devices would all be prima facie punitive, as would the compulsory collection of movement data at points of international departure and arrival. Those measures are not prima facie punitive and the collection of information about a

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471 *Biosecurity Act 2015* (Cth), see in particular ss 89, 90-93.

472 *Crimes Act 1914* (Cth), ss 3G(b)-(c), 3ZC, 3ZZKG(2), 3ZZLD(2).

473 *Migration Act*, ss 257A, 5A(1); *Crimes Act*, s 3ZJ(3)(b)-(c), (4).

474 *Aviation Transport Security Act 2004* (Cth), ss 84, 89C, 95B, 95C.

475 See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226 [43]; *Clubb v Edwards* (2019) 267 CLR 171 at 195-196 [49]-[51], 198-199 [60], 205 [85], 209 [101], 235-236 [197]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 588-589 [159].

476 See, eg, *Katz v United States* (1967) 389 US 347 at 350; *R v Plant* [1993] 3 SCR 281 at 292.

477 See *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 321-322.

visa holder's movements either into, out of, or within the country cannot be characterised as such either.

307 Legislation that authorises the imposition of a detriment designed to shame or stigmatise a person can engage the broader principle. Historically, the imposition at a local level of various forms of punishment, such as the pillory, the repentance stool or "riding the stang",[478] were designed to shame an offender.[479] Most of the current sentencing legislation identifies denunciation of criminal conduct of an offender as an object of sentencing.[480] However, denunciation of *criminal conduct* is achieved through the offender's conviction and the imposition of other forms of punishment, and not by the court taking some step that has as its object the humiliation of the offender. To the contrary, sentencing courts often address submissions that a disproportionate level of publicity and shaming of an offender warrants an amelioration of their sentence.[481] A conviction for a criminal offence carries a stigma, although the same can often be said for findings of professional misconduct. Otherwise, the use of a public symbol to mark out the members of a particular race or members of a social group for disapprobation is a form of stigmatisation that could amount to collective punishment of the kind adverted to earlier which would warrant the characterisation of any law authorising its application as punitive.

308 As the suggestion of "stigma" arising from wearing the monitoring device only arose during oral argument, it was not the subject of any evidence in the special case beyond the provision of a description of the features and operation of

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478 "Riding the stang" was a practice previously employed throughout parts of England where an offender was made to straggle a "stang" (often a hurdle or wooden pole) and was paraded through the town while others banged pots and jeered. See Andrews, *Old-time punishments* (1890) at 180-187.

479 See Andrews, *Old-time punishments* (1890) at 176-177, 180-187; Andrews, *Bygone punishments* (1899) at 239-242; Bellamy, *Crime and Public Order in England in the Later Middle Ages* (1973) at 184-185.

480 See, eg, *Sentencing Act 1991* (Vic), s 5(1)(d); *Penalties and Sentencing Act 1992* (Qld), s 9(1)(d); *Sentencing Act 1995* (WA), s 9C(2)(a); *Sentencing Act 1995* (NT), s 5(1)(d); *Sentencing Act 1997* (Tas), s 3(e)(iii); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A(f); *Crimes (Sentencing) Act 2005* (ACT), s 7(1)(f); *Sentencing Act 2017* (SA), s 4(1)(b).

481 See, eg, *Ryan v The Queen* (2001) 206 CLR 267 at 284-285 [52]-[53], 303-304 [123], 318-319 [177], cited in *Kenny v The Queen* [2010] NSWCCA 6 at [18]-[22]; *R v Nuttall; Ex parte Attorney-General (Qld)* (2011) 209 A Crim R 538 at 553 [65]; *Duncan v The Queen* [2012] NSWCCA 78 at [28]; *R v Wran* [2016] NSWSC 1015 at [72]-[79].

the monitoring device, including the on-body charger. Even so it can be accepted that, to the extent that a monitoring device attached to a person with or without the on-body charger is visible to members of the public, it will have a stigmatising effect. However, any such effect is incidental to the purpose of the device, which is to gather information about the movements of the person wearing it. The use of monitoring devices on the body of a person is far removed from the various types of stigmatising punishments that may invoke the broader principle. The fact that any stigmatising effect that derives from the attachment of a monitoring device to the body could often be avoided by wearing certain types of clothing or by the use of smaller forms of monitoring devices, such as a smart watch, only demonstrates the difficulty with using an inferred incidental consequence of a particular device that meets the statutory description of "monitoring device" as a basis to invalidate a statute.

309 Lastly, one matter raised in the joint reasons that was not the subject of any argument, or consideration in the special case, is the suggestion that the monitoring condition effects an "involuntary restraint on the liberty" because of the potential difficulty for BVR holders in locating power mains to recharge the monitoring equipment, and the possibility that the holder may, through "shame or ... fear", not attend certain places because of their knowledge that they are being monitored by the Commonwealth.[482] On the materials before this Court, it is not possible to ascertain the likelihood that any BVR holder will experience difficulty in accessing a power supply, nor is it possible to ascertain the extent to which there may be places that BVR holders may avoid because of a concern that they are being monitored. While these hypothetical possibilities might deter a BVR holder from exercising complete freedom of movement, they cannot be characterised as "involuntary restraints on liberty" in any constitutionally meaningful sense. They do not add to the assessment of whether the legislation imposing the monitoring condition undermines the exclusive vesting of the function of adjudging and punishing criminal guilt in the courts referred to in Ch III.

310 It follows that the power conferred by cl 070.612A(1)(a) to impose the monitoring condition is not prima facie punitive. Clause 070.612A(1)(a) is therefore valid. In any event, given that the curfew condition can be reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose,[483] the same result would have ensued had it been concluded that the monitoring condition was prima facie punitive.

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482 See reasons of Gageler CJ, Gordon, Gleeson and Jagot JJ at [61].

483 See below at [325].

The power to impose the curfew condition is valid

311 The plaintiff contended that the power purportedly conferred by cl 070.612A(1)(d) to impose the curfew condition is punitive. He contended that confining him to an address for eight hours a day amounts to a form of imprisonment at common law. The plaintiff also submitted that the concept of "detention", as discussed in *Lim* in the context of Ch III of the *Constitution*, aligns with the common law's understanding of false imprisonment. The plaintiff submitted that both the tort of false imprisonment and Ch III "are directed to protecting the right to liberty, including from the [e]xecutive".

312 It can be accepted that the involuntary confinement of the plaintiff to a particular address for eight hours, under threat of conviction and mandatory imprisonment if he leaves, is a sufficient restraint on his liberty which, if unlawful, would amount to false imprisonment warranting recovery of tortious damages[484] and the issue of a writ of habeas corpus to secure his release.[485] It can also be accepted that by preserving the independence of the judicial branch and its capacity to determine the scope of any legal authority conferred on the executive to imprison or detain, Ch III enhances the protection of the right to liberty. However, the present inquiry is not concerned with protecting the right to liberty per se, but preserving the courts' exclusive function of adjudging and punishing criminal guilt. The preservation of that function does not mandate either the default or prima facie characterisation of every form of interference with the right to liberty as punitive.

313 The principle in *Lim* embraces the notion that the "involuntary detention of a citizen *in custody* by the [s]tate is penal or punitive in character" (emphasis added).[486] Each of the decisions in *Lim* and *NZYQ* concerned aliens detained in immigration facilities. No specific question arose in those cases concerning whether the nature and duration of the alien's detention amounted to punishment. The Commonwealth accepted that the form of detention considered in those cases carried with it a default characterisation as punitive, which requires a relatively rigorous justification to avoid a final characterisation as such. In *Thomas v Mowbray*, Gleeson CJ described the principle in *Lim* as operating upon the

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484 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 631 [400]; see also *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 206-207 [24]-[25]; *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250.

485 See, eg, *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 556; *Re Officer in Charge of Cells, ACT Supreme Court; Ex parte Eastman* (1994) 68 ALJR 668 at 669; 123 ALR 478 at 480; *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at 623 [77], 648 [189].

486 *Lim* (1992) 176 CLR 1 at 27; see also at 32, 55.

"involuntary detention of a citizen in custody by the state" and contrasted that form of detention with lesser "restraints on liberty", such as a home curfew.[487]

314 The parties referred to decisions concerning Art 5 of the European Convention on Human Rights which proscribes the deprivation of a person's liberty save in specified cases and in accordance with procedures prescribed by law. Decisions of the European Court of Human Rights have held that 24-hour house arrests are tantamount to imprisonment in a custodial institution and involve a deprivation of liberty.[488] The House of Lords reached the same conclusion in relation to an 18-hour curfew which was coupled with the effective exclusion of social visitors.[489] However, the House of Lords reached the opposite conclusion in relation to an overnight curfew of 12-hours duration, where the affected person was confined to their home and garden and required government approval of adult visitors.[490]

315 The plaintiff sought to distinguish these decisions on the basis that the concept of a deprivation of liberty, as referred to in Art 5 of the European Convention on Human Rights, does not align with what amounts to false imprisonment at common law.[491] That submission can be accepted, but for the reasons already stated it does not assist the plaintiff. That said the outcome of these decisions is of limited assistance as they concern a very different legal context to the present inquiry as to whether a law can be characterised as punitive. Nevertheless, their consideration of the nature, duration, effects and manner of implementation of the penalty or measure in determining whether there was a deprivation of liberty,[492] especially the absence or presence of a power to determine who else may enter or leave the location, is of utility.

316 The plaintiff submitted that during the eight-hour period in which the curfew condition is in effect, the Commonwealth "exercises total control over [his] liberty". With respect, that is not an accurate statement. There are a number of features of the restrictions on the plaintiff's liberty during that eight-hour period that are a marked contrast to the detention in custody that was the factual predicate of *Lim* and *NZYQ*. These features undermine any suggestion of "total control"

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487 (2007) 233 CLR 307 at 330 [18]; see also at 356 [116] per Gummow and Crennan JJ.

488 See cases cited in *JJ* [2008] AC 385 at 410 [14].

489 *JJ* [2008] AC 385 at 414-415 [24], 425 [63], 437-438 [105].

490 *Secretary of State for the Home Department v E* [2008] AC 499 at 511-512 [23]-[25], 519-520 [59]-[60], 520 [63], 520-521 [66]-[67].

491 See *R (Jalloh) v Secretary of State for the Home Department* [2021] AC 262.

492 See, eg, *JJ* [2008] AC 385 at 410-411 [16].

being exercised by the Commonwealth over the plaintiff. Thus, it is the BVR holder and not the Commonwealth that chooses the place of confinement, being one of a number of addresses, including an address that the visa holder can notify on short notice (at least one day in advance). The Commonwealth has no role in the selection or approval of the address. Unlike detention centres or the curfews considered in the cases from the United Kingdom, the Commonwealth does not exercise any control over who else may reside at or enter those addresses. The Commonwealth does not exercise any control over what occurs at those premises. The Commonwealth does not reserve any power to enter those premises or require notification of who else resides at or enters those premises. Otherwise, the usual period of confinement is limited to overnight hours when it is less likely that the visa holder would be otherwise absent from their home address. The visa holder's movements for the remainder of the day are not restricted (but will often be electronically monitored).

317 The qualitative differences between the curfew condition and detention in custody or 24-hour house arrest warrant acceptance of the Commonwealth's submission that the curfew condition is not akin to the detention in custody considered in *Lim* and *NZYQ* and accordingly, does not attract a "default characterisation" as punitive, and the associated rigorous approach to whether it can be justified. Nevertheless, the level of detriment imposed by the curfew condition is still prima facie punitive. The restriction on liberty and movement for a third of the day, supported by the threat of criminal prosecution and mandatory imprisonment, is a very significant restraint. The Commonwealth sought to resist this conclusion by pointing to the type of curfews noted above, namely those applicable in times of civil unrest, wartime or during a pandemic. However, those are examples of general curfews. Here, the curfew condition is specifically directed to a particular individual based on an assessment that must include a consideration of the risk they pose and most likely includes a consideration of their past behaviour.

318 The plaintiff contended that, given the potential breadth of and ambiguities associated with the phrase "protection", the Court could not be satisfied that a legitimate and non-punitive purpose for the power to impose the curfew condition could be ascertained. This contention has already been addressed and rejected. Clause 070.612A is far from a model of drafting. Nevertheless, when properly construed, it has legitimate and non-punitive purposes.

319 The critical issue is whether the power to impose the curfew condition is reasonably capable of being seen as necessary for the legitimate and non-punitive purposes that have been identified.

320 In submitting that it was not so capable, the plaintiff referred to four features of the scheme for imposing the curfew condition. The first is the "default" operation of cl 070.612A(1)(d), which requires the imposition of the condition unless the Minister reaches a positive state of satisfaction that the protection of

part of the community does not require its imposition. The second was the absence of a meaningful balancing process that assesses the risk arising from the commission of a particular crime or the specification of a degree of risk which the curfew condition guards against. The third was the fixed period of 12 months for the operation of the condition. The fourth was the absence of any requirement to afford procedural fairness or give reasons.

321 In addressing these points, it is necessary to recall the conclusion above that the degree of detriment imposed on the visa holder by the curfew condition is not as severe as the plaintiff contends. This conclusion informs the assessment of what is reasonably necessary to give effect to the purely protective purpose of cl 070.612A(1)(d).[493]

322 The proper construction of cl 070.612A and the manner of its application have already been explained. The use of a default position to impose the curfew condition does not advance the plaintiff's case for invalidity, given the obligation of the Minister to address the provision in the manner outlined and to only address whether it is reasonably necessary to impose the curfew condition if the other three conditions (and any other conditions that are imposed) do not protect against the identified risk. The specified period of 12 months is lengthy, but not unreasonable given the forms of harm that are sought to be protected against.

323 Natural justice is not required to be afforded prior to the making of a decision to grant a visa subject to the curfew condition, but notice of the decision must be given and any submissions seeking revocation of the condition must be engaged with.[494] Such an approach is not unreasonable, especially in the context of matters affecting security[495] and where all relevant information pertinent to the risk that might be posed by a visa holder may not be available at the time when the BVR is granted.

324 The most troubling aspect of these provisions is the lack of an obligation imposed on the Minister to give reasons for his or her failure to be satisfied that it is not reasonably necessary to impose a curfew condition for the protection of any part of the Australian community. The absence of such an obligation is a potentially significant obstacle to securing judicial scrutiny of the power conferred by cl 070.612A(1)(d), especially to ensure that its exercise does not stray beyond its purely protective purpose. That lacuna could be at least partly filled by the exercise of a court's power, in an appropriate case, to require production of

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493 See above at [239].

494 *Migration Act*, s 76E(2)-(3); *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 598-599 [23]-[25].

495 See, eg, *Migration Act*, s 501CA.

documents concerning such a decision and to allow interrogatories to be administered to those who made it,[496] although those steps are far from a complete substitute for obtaining reasons in advance of commencing proceedings.

325 The requirement that the detriment be reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose affords a degree of latitude to the legislature. Even in the absence of an obligation to give reasons, in light of the above construction of the provisions and the nature of the detriment imposed, the power conferred by cl 070.612A(1)(d) to impose the curfew condition is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose, and that is so whether or not the monitoring condition is also imposed. Had the curfew been lengthier or more onerous, the absence of an obligation to provide reasons may have proved fatal, but in its current form it was not.

Disposition

326 The agreed questions of law submitted in the form of a special case for the opinion of the Full Court were as follows:

> "(1) Is cl 070.612A(1)(a) of Sch 2 to the [*Migration Regulations*] invalid because it infringes Ch III of the *Constitution*, either alone or in its operation with cl 070.612A(1)(d)?
>
> (2) Is cl 070.612A(1)(d) of Sch 2 to the [*Migration Regulations*] invalid because it infringes Ch III of the *Constitution*, either alone or in its operation with cl 070.612A(1)(a)?
>
> (3) What, if any, relief should be granted to the [p]laintiff?
>
> (4) Who should pay the costs of the Special Case?"

327 These questions must be understood in the context that cl 070.612A came into force via the use of the regulation-making power conferred by s 504 of the *Migration Act.* One of the limits on that power is that it cannot be used to promulgate a regulation that is inconsistent with Ch III of the *Constitution*. If the

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496 See, eg, *Commissioner of Taxation v Nestle Australia Ltd* (1986) 12 FCR 257 at 265; *Australian Securities Commission v Somerville* (1994) 51 FCR 38 at 45, 48-49; *Minister for Immigration and Multicultural and Indigenous Affairs v Wong* [2002] FCAFC 327 at [23]; *HK Systems Australia Pty Ltd v Minister for Home Affairs* (2008) 169 FCR 46 at 48-49 [7]-[10]; *QJMV v Minister for Home Affairs* [2021] FCA 255 at [29]-[30].

regulations are inconsistent, then they are invalid because they are not authorised by s 504. With that understanding, the questions should be answered as follows:

(1) No;

(2) No;

(3) None; and

(4) The plaintiff.