HIGH COURT OF AUSTRALIA

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

EGH19 PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA DEFENDANT

EGH19 v Commonwealth of Australia
[2026] HCA 7
Date of Hearing: 15 October 2025
Date of Judgment: 18 March 2026
S55/2025

ORDER

The questions stated for the opinion of the Full Court in the special case filed on 25 August 2025 be answered as follows:

Question 1: *To the extent cl 070.612A(1) of Sch 2 to the* Migration Regulations 1994 *(Cth) authorises the imposition of condition 8620 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the* Migration Act 1958 *(Cth) when that power is construed subject to Ch III of the* Constitution*?*

Answer: *Yes.*

Question 2: *To the extent cl 070.612A(1) of Sch 2 to the* Migration Regulations 1994 *(Cth) authorises the imposition of condition 8621 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the* Migration Act 1958 *(Cth) when that power is construed subject to Ch III of the* Constitution*?*

Answer: *Yes.*

Question 3: Who should pay the costs of the special case?

Answer: The defendant.

Representation

L G De Ferrari SC with T P O'Connor and J R G Blaker for the plaintiff (instructed by Zarifi Lawyers)

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

CATCHWORDS

EGH19 v Commonwealth of Australia

Constitutional law (Cth) – Judicial power of Commonwealth – Where cl 070.612A(1) of Sch 2 to *Migration Regulations 1994* (Cth) provided that Minister must impose certain conditions on holder of Bridging R (Class WR) Subclass 070 (Bridging (Removal Pending)) visa ("BVR") if both "satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence" and "satisfied on the balance of probabilities that the imposition of the condition ... is ... reasonably necessary ... and ... reasonably appropriate and adapted ... for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk" – Where condition 8621 requires BVR holder to wear continuous electronic monitoring device at all times ("monitoring condition") – Where condition 8620 requires BVR holder to remain at notified address between hours of 10.00pm and 6.00am each day ("curfew condition") – Where rules of natural justice do not apply to decision of Minister to grant BVR subject to monitoring condition or curfew condition – Where monitoring condition and curfew condition remain in force for period of 12 months from date of grant – Where non-compliance with monitoring condition or curfew condition an offence punishable by term of imprisonment of between one and five years – Where plaintiff granted BVR subject to monitoring condition and curfew condition – Whether cl 070.612A(1) of Sch 2 to *Migration Regulations* invalid to extent it authorised and required Minister to impose monitoring condition and curfew condition because it exceeded regulation-making power conferred by s 504 of *Migration Act 1958* (Cth) when power construed subject to Ch III of *Constitution*.

Words and phrases – "adjudgment and punishment of criminal guilt", "bodily integrity", "*Boilermakers* principle", "constitutional paradigm", "constitutionally prescribed system of government", "curfew condition", "detriment", "exclusively judicial", "fundamental freedoms", "judicial power", "*Kable* principle", "legitimate and non-punitive purpose", "liberty", "*Lim* principle", "monitoring condition", "nature and severity", "*NZYQ* affected person", "penal or punitive", "prima facie punitive", "procedural fairness", "proportionality", "protective punishment", "punishment", "punitive purpose", "reasonably appropriate and adapted", "reasonably capable of being seen as necessary", "reasonably necessary", "separation of powers", "substantial risk of serious harm".

Constitution, Ch III.
Criminal Code (Cth), Div 395.
Migration Act 1958 (Cth), ss 72, 73, 76C, 76D, 76DA, 76E, 504.
Migration Regulations 1994 (Cth), regs 2.20, 2.25AD, 2.25AE, Sch 2, cll 070.111, 070.612A, Sch 8, cll 8620, 8621.

1 GAGELER CJ AND GLEESON J. *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[1] reopened and overruled *Al-Kateb v Godwin*[2] and applied *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[3] to hold that ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) are invalid as inconsistent with Ch III of the *Constitution* to the extent they purport to authorise executive detention of an unlawful non-citizen whose removal from Australia under s 198 has no real prospect of becoming practicable in the reasonably foreseeable future ("an *NZYQ* affected person").

2 The Commonwealth Parliament responded to *NZYQ* by enacting the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) and the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth). In conjunction with associated amendments to the *Migration Regulations 1994* (Cth),[4] the effect of that legislative response was to establish two distinct statutory regimes each potentially restrictive of the liberty of an *NZYQ* affected person on the initiative of the Minister administering the *Migration Act*.

3 The first of those statutory regimes, in Subdiv AF of Div 3 of Pt 2 of the *Migration Act*, provided for the Minister to grant to an *NZYQ* affected person a Bridging R (Class WR) Subclass 070 (Bridging (Removal Pending)) visa ("BVR") in accordance with criteria and on conditions prescribed in Pt 070 of Sch 2 to the *Migration Regulations*. The conditions able to be imposed by the Minister on the grant of a BVR specifically contemplated by both the *Migration Act* and the *Migration Regulations* as then amended were expressed to include a condition requiring the holder of a BVR to wear a monitoring device 24 hours each day ("the monitoring condition")[5] and a condition requiring the holder of a BVR to remain at a notified address between the hours of 10.00pm and 6.00am each day ("the curfew condition").[6] Clause 070.612A(1) of Sch 2 to the *Migration Regulations* authorised and required the Minister to impose each such condition unless the Minister was "satisfied that it [was] not reasonably necessary to impose that condition for the protection of any part of the Australian community".

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1 (2023) 280 CLR 137.

2 (2004) 219 CLR 562.

3 (1992) 176 CLR 1.

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

5 Condition 8621. See cl 8621 of Sch 8 to the *Migration Regulations*.

6 Condition 8620. See cl 8620 of Sch 8 to the *Migration Regulations*.

4 The second of the statutory regimes established in response to *NZYQ* will be seen to be significant in considering the constitutional validity of the imposition of the monitoring condition and the curfew condition pursuant to the first regime. It involved insertion of Div 395 into the *Criminal Code* (Cth), given effect as law by the *Criminal Code Act 1995* (Cth),[7] making provision for the Minister to apply[8] to the Supreme Court of a State or Territory for the making of a "community safety order", defined to include a "community safety detention order" and a "community safety supervision order",[9] in respect of an *NZYQ* affected person who has been convicted of a "serious violent or sexual offence" as defined for the purpose of the Division.[10]

5 Under Div 395 of the *Criminal Code*, the Supreme Court of a State or Territory is empowered to make a community safety supervision order on the application of the Minister if the Supreme Court is "satisfied on the balance of probabilities, on the basis of admissible evidence", that the person to be subjected to the order "poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence" (and that such conditions as may have been imposed on the grant of a visa held by the person "would not be effective in protecting the community from serious harm by addressing the unacceptable risk").[11] The Supreme Court is empowered to impose conditions on the person by the community safety supervision order if "satisfied" that the conditions in aggregate, "on the balance of probabilities, are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from serious harm by addressing the unacceptable risk of the [person] committing a serious violent or sexual offence".[12]

6 The conditions capable of being imposed by the Supreme Court of a State or Territory on an *NZYQ* affected person through the making of a community safety supervision order encompass conditions of the same nature as, but more flexible than, the monitoring condition and the curfew condition. The permissible conditions are specified to include that the person to be subjected to the order

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7 Section 3 of the *Criminal Code Act*.

8 Section 395.8 of the *Criminal Code*.

9 Section 395.2(1) (definition of "community safety order") of the *Criminal Code*.

10 Section 395.2(1) (definition of "serious violent or sexual offence") of the *Criminal Code*.

11 Section 395.13(1)(b) and (c) of the *Criminal Code*.

12 Section 395.14(1) of the *Criminal Code*.

"remain at specified premises between specified times each day"[13] and "be subject to electronic monitoring (for example, by wearing a monitoring device at all times)".[14]

7 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*[15] subsequently held that cl 070.612A(1) of Sch 2 to the *Migration Regulations*, in the form in which it was introduced as part of that initial legislative response to *NZYQ*, was inconsistent with Ch III of the *Constitution* to the extent it then purported to authorise and require the Minister to impose each of the monitoring condition and the curfew condition. The consequential effect of that holding was that the relevant paragraphs of cl 070.612A(1)[16] were invalid for exceeding the regulation-making power in s 504(1) of the *Migration Act* when that regulation-making power was read as subject to Ch III of the *Constitution*.[17]

8 In response to *YBFZ*, the *Migration Regulations* were further amended to repeal and substitute a new cl 070.612A(1) of Sch 2.[18] Clause 070.612A(1) as substituted purports to authorise and require the Minister to impose each of the monitoring condition and the curfew condition if the Minister is both "satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence" and "satisfied on the balance of probabilities that the imposition of the condition ... is ... reasonably necessary ... and ... reasonably appropriate and adapted ... for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk".[19] The expression "serious offence" is defined

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13 Section 395.14(5)(c) of the *Criminal Code*.

14 Section 395.14(7)(d) of the *Criminal Code*.

15 (2024) 99 ALJR 1; 419 ALR 457.

16 See cl 070.612A(1)(a) and (d) of Sch 2 to the *Migration Regulations*.

17 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [19], 43 [170]; 419 ALR 457 at 468, 510. See s 13(2) of the *Legislation Act 2003* (Cth). See also *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 373 [104]; *Palmer v Western Australia* (2021) 272 CLR 505 at 546 [119]-[120].

18 Item 2 of Sch 1 to the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth).

19 Clause 070.612A(1)(b) and (c) of Sch 2 to the *Migration Regulations*.

for this purpose[20] in terms which largely correspond with the definition of "serious violent or sexual offence" for the purpose of Div 395 of the *Criminal Code*.

9 By a special case in a proceeding commenced in the original jurisdiction of the High Court against the Commonwealth of Australia by an *NZYQ* affected person who has been granted a BVR subject to both the monitoring condition and the curfew condition, the ultimate issue now presented for determination is whether cl 070.612A(1) of Sch 2 to the *Migration Regulations* in its current form, as substituted in response to *YBFZ*, is inconsistent with Ch III of the *Constitution* to the extent it purports to authorise and require the Minister to impose each of the monitoring condition and the curfew condition, and therefore invalid because it exceeds the power conferred by s 504(1) of the *Migration Act* when that regulation-making power is construed as subject to the *Constitution*. Yet again, the issue is as to the application of *Lim*.

10 Yet again, applying *Lim*, the issue presented for determination must be resolved in the affirmative: cl 070.612A(1) of Sch 2 to the *Migration Regulations* is inconsistent with Ch III of the *Constitution* to the extent it purports to authorise and require the Minister to impose each of the monitoring condition and the curfew condition and therefore invalid for exceeding the power conferred by s 504 of the *Migration Act*.

11 To explain that result, it is necessary to commence by returning yet again to the content and scope of the constitutional limitation identified in *Lim* which was applied in *NZYQ* and *YBFZ*.

The constitutional limitation

12 The constitutional limitation identified in *Lim* was expressed in *NZYQ* at the level of generality appropriate to its application in that case in terms that "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".[21] The foundation of that constitutional limitation was explained in *NZYQ* in the language of *Lim* to lie in the recognition that Ch III of the *Constitution* has the substantive effect that, other than in "exceptional cases", "the involuntary

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20 Clause 070.111 (definition of "serious offence") of Sch 2 to the *Migration Regulations*, set out at [34] below.

21 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 157 [39].

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".[22]

13 However, the constitutional limitation identified in *Lim* and applied in *NZYQ* has not been confined to a Commonwealth law that authorises detention. Before *NZYQ*, the constitutional limitation identified in *Lim* had been recognised in *Alexander v Minister for Home Affairs*,[23] *Benbrika v Minister for Home Affairs* ("*Benbrika [No 2]*")[24] and *Jones v The Commonwealth*[25] to apply to a Commonwealth law that authorises deprivation of citizenship in the same way as the limitation applies to a Commonwealth law that authorises detention. The step taken in *YBFZ* was to recognise detention and deprivation of citizenship as instances of a wider category of detriments which, by reason of their nature and severity, warrant prima facie characterisation of a law imposing them as penal or punitive, resulting in the ultimate characterisation of the law as penal or punitive if the law cannot be justified as reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. The monitoring condition and the curfew condition were held to constitute detriments within that category.[26] The purported conferral of authority on the Minister to impose each condition was held invalid for want of a legitimate non-punitive purpose.[27]

14 Expressed at a level of generality appropriate to encompass its application in each of *Alexander*, *Benbrika [No 2]* and *Jones*, as well as in *YBFZ*, the constitutional limitation identified in *Lim* is therefore that a Commonwealth law purporting to impose a detriment of a nature and severity which warrants prima facie characterisation as penal or punitive, 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

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22 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 153 [28], quoting *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

23 (2022) 276 CLR 336.

24 (2023) 280 CLR 1.

25 (2023) 280 CLR 62.

26 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 18 [52], 20 [63]; 419 ALR 457 at 476, 478.

27 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23 [83]; 419 ALR 457 at 483.

Constitution unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose.

15 Judicial determination of whether a Commonwealth law contravenes that limitation was explained in *Jones* to be required to proceed in a manner "faithful to the constitutional values" safeguarded by the *Lim* limitation and "mindful of the procedural and substantive limitations inherent in the performance of the judicial function".[28]

16 Fidelity to the constitutional values safeguarded by the *Lim* limitation requires attention to the relationship between the individual and the body politic of the Commonwealth inherent in *Lim*'s assignment of the imposition of a detriment that is penal or punitive in character to the exclusively judicial function of adjudging and punishing criminal guilt other than in exceptional cases. The relationship between the individual and the body politic is the relationship inherent in the constitutional paradigm which posits the imposition of a penal or punitive detriment only: (1) by a court; (2) in the exercise of judicial power; and (3) in the performance of the exclusively judicial function of adjudging and punishing criminal guilt.

17 The three elements of the constitutional paradigm are cumulative. Each has distinct constitutional significance. The first element – the court element – entails that the detriment is imposed only through the agency of an entity that is separated from the executive and that meets the description of an "independent and impartial tribunal".[29] The second element – the judicial power element – entails that the detriment is imposed only as the adjudicated outcome of a controversy about an existing legal liability[30] through "'the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process', which 'requires that the parties be given an opportunity to present their evidence and [at least ordinarily] to challenge the evidence led against them'".[31] The third element – the exclusively judicial function element – more specifically entails that the detriment is imposed only "as a penal consequence prescribed by law for an

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28 *Jones v The Commonwealth* (2023) 280 CLR 62 at 82 [44].

29 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29]. See also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 75-76 [62]-[64].

30 *Fencott v Muller* (1983) 152 CLR 570 at 608.

31 *Magaming v The Queen* (2013) 252 CLR 381 at 401 [65], quoting *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56].

existing criminal liability determined to have arisen from the operation of positive law on past events or conduct".[32]

18 Through the combination of these elements, the relationship between the individual and the body politic can be said to be, as was said in *Lim* and as has been repeated many times since, such that the individual is "'ruled by the law, and by the law alone' and 'may ... be punished for a breach of law, but ... for nothing else'".[33]

19 The constitutional paradigm of a court exercising judicial power in the performance of the exclusively judicial function of adjudging and punishing criminal guilt must therefore be borne in mind in determining whether a Commonwealth law which imposes a prima facie penal or punitive detriment other than in accordance with that paradigm can be justified as reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. The constitutional paradigm sets the constitutional baseline from which any departure from any one or more of its elements is exceptional,[34] and from which any departure from any one or more of those elements must be reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.

20 The purpose of a law – what the law is designed to achieve in fact[35] – is constitutionally legitimate if and to the extent that the purpose is "compatible with

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32 *Garlett v Western Australia* (2022) 277 CLR 1 at 50 [134]. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 107; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [80]; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 111 [72]-[73]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 372 [85], 402 [174].

33 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-28, quoting Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 202. See also *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at 16 [36]-[37].

34 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 111 [73]. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 153 [28].

35 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 157 [40], citing *Brown v Tasmania* (2017) 261 CLR 328 at 392 [209] and *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171].

the constitutionally prescribed system of government".[36] An aspect of compatibility with the constitutionally prescribed system of government is compatibility with the constitutional paradigm. *YBFZ* itself was an illustration of that proposition. The "fundamental difficulty"[37] with the earlier form of cl 070.612A(1) of Sch 2 to the *Migration Regulations* exposed in *YBFZ* was one of incompatibility of its "designedly unparticularised and indeterminate" purpose of "protection of any part of the Australian community",[38] which invoked "a concept of such elasticity" as to be "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".[39] "If protection from any harm of any nature, degree, or extent were a legitimate non-punitive purpose", it was pointed out, "the very point of the legitimacy requirement would be undermined".[40]

21 Turning from the judicial determination of the purpose of a law to the judicial determination of whether the means adopted by a law in pursuit of an identified non-punitive purpose that has been determined to be compatible with the constitutionally prescribed system of government are reasonably capable of being seen as necessary, it is important to recognise that the requisite inquiry is to be undertaken in light of the constitutional paradigm. The inquiry has a substantive dimension and a procedural dimension. The inquiry is not simply as to what is authorised to be done but as to by whom and how it is authorised to be done.

22 The substantive dimension of the inquiry is the more obvious. For a law authorising imposition of a detriment of a nature and severity that is prima facie penal or punitive in character to be justified as reasonably capable of being seen as necessary for a purpose determined to be constitutionally legitimate, the nature

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36 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 157 [40].

37 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23 [81]; 419 ALR 457 at 483.

38 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 22 [76]; 419 ALR 457 at 482.

39 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23 [81]; 419 ALR 457 at 483, quoting *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 380 [111].

40 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483. See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 113-114 [79].

and severity of the detriment can be no greater than is reasonably necessary to achieve that purpose. Hence, it was emphasised in *NZYQ* that a Commonwealth law authorising executive detention "must limit the duration of that detention to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved".[41]

23 The procedural dimension of the inquiry is no less important. A law which authorises the imposition of a detriment determined to be no greater than is reasonably capable of being seen as necessary to achieve a constitutionally legitimate purpose may yet fail to be justified as reasonably capable of being seen as necessary for that purpose if the manner in which the law authorises the detriment to be imposed departs from the constitutional paradigm in a respect or to an extent that is not reasonably capable of being seen as necessary for that purpose. On the one hand, it might be reasonably capable of being seen as necessary for a law to authorise the imposition of a detriment otherwise than in the performance of the exclusively judicial function of adjudging and punishing criminal guilt. On the other hand, it might not be reasonably capable of being seen as necessary for the law to authorise the imposition of the detriment other than by a court in the exercise of judicial power.

24 Noteworthy in this respect is that in each of the two cases in which a Commonwealth law authorising imposition of preventive restrictions on liberty outside the constitutional paradigm of a court exercising judicial power in the performance of the exclusively judicial function of adjudging and punishing criminal guilt has been held to be reasonably capable of being seen as necessary for a legitimate and non-punitive purpose – *Thomas v Mowbray*[42] and *Minister for Home Affairs v Benbrika* ("*Benbrika [No 1]*")[43] – the Commonwealth law in question pursued its purpose by conferring federal jurisdiction on a court to order preventive restrictions on liberty in the exercise of judicial power on application by an executive officer. The extent of the departure from the constitutional paradigm was therefore limited to a departure from the third element: though authorised to be imposed by a court in the exercise of judicial power, the detriment was not authorised to be imposed in the performance of the exclusively judicial function of adjudging and punishing criminal guilt.

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41 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 157 [41], quoting *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 625 [374].

42 (2007) 233 CLR 307.

43 (2021) 272 CLR 68.

25 Also noteworthy is that in *Vella v Commissioner of Police (NSW)*[44] and *Garlett v Western Australia*,[45] each of which concerned a State law conferring State jurisdiction on a court to order a preventive restriction of liberty, the jurisdiction so conferred was held by a majority, on close scrutiny of the incidents of its legal and practical operation, not to impair the institutional integrity of the court concerned and therefore to be compatible with Ch III of the *Constitution*.

26 Together, *Thomas v Mowbray*, *Benbrika [No 1]*, *Vella* and *Garlett* support the emergence of a conventional understanding that the constitutionally guaranteed institutional independence of a court provides reason to consider that a power to constrain liberty by reference to what a person might do in the future, if it is to be conferred at all, is best conferred on a court. As the plurality explained in *Vella*:[46]

> "There are good reasons why such powers, if they are to exist, should be exercised by the judiciary. A person subject to an exercise of judicial power should have the power to obtain legal representation, the benefit of a hearing with fair process and generally held in public, an entitlement to written reasons for the decision as to the orders made which demonstrate the application of general rules to the facts of the case, and a power of appeal or to seek leave to appeal. 'This is not the way that any arm of the Executive conventionally operates.'"

27 Together, *Thomas v Mowbray*, *Benbrika [No 1]*, *Vella* and *Garlett* also illustrate that "[p]reservation of the constitutionally guaranteed institutional independence upon which the efficacy of such a conferral depends demands ... that the conferral occur through the legislative formulation of 'a judicial process of some refinement'".[47]

28 Since *Lim*, of the many cases in which a law authorising imposition of a detriment was held to have been prima facie penal or punitive in character, but justified as reasonably capable of being seen as necessary for a purpose determined to be constitutionally legitimate, *Jones* is the sole instance in which the law authorised the direct imposition of the detriment by administrative action. In *Jones*, the detriment involved revocation of Australian citizenship acquired by

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44 (2019) 269 CLR 219.

45 (2022) 277 CLR 1.

46 (2019) 269 CLR 219 at 260-261 [90], quoting *Thomas v Mowbray* (2007) 233 CLR 307 at 508 [599].

47 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 282 [158], quoting *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 614 [85].

naturalisation. Notably, the legitimate non-punitive purpose of the law was identified not as protection against a risk of future harm but as protection of the integrity of the naturalisation process.[48] The law was tailored to achieve that purpose insofar as the statutory criteria which authorised executive de-naturalisation were closely related to the statutory criteria which authorised executive grant of Australian citizenship by naturalisation.

29 Division 395 of the *Criminal Code* adopts the now conventional legislative model of conferring jurisdiction on a court to make preventive orders imposing restrictions on liberty, including restrictions on liberty in the nature of the monitoring condition and the curfew condition, in the exercise of judicial power. Clause 070.612A(1) of Sch 2 to the *Migration Regulations* does not.

30 Finally, it is important to recall that (as *NZYQ*[49] underscored and *YBFZ*[50] reiterated) the only difference between a citizen and an alien in the application of the constitutional limitation identified in *Lim* lies in the susceptibility of an alien to a law that is reasonably capable of being seen as necessary for one or other of two non-punitive purposes: removal from Australia; or enabling an application for permission to remain in Australia to be made and considered. Each of those purposes is legitimate with respect to aliens but illegitimate with respect of citizens. Neither has present relevance.

The impugned provision in context

31 Within Subdiv AF of Div 3 of Pt 2 of the *Migration Act*, s 73 empowers the Minister to grant a BVR to a person who the Minister is satisfied is an "eligible non-citizen" by virtue of being an *NZYQ* affected person.[51] The Minister is empowered to grant the visa without application.

32 The significance of the Minister being empowered to grant a BVR to an *NZYQ* affected person without application, against the background of such person being incapable of being detained under ss 189(1) and 196(1) of the *Migration Act*, is that the Minister can choose to impose the visa on a person who would otherwise be at liberty in Australia. By making that choice, the Minister engages the mandatory requirement of cl 070.612A(1) of Sch 2 to the *Migration Regulations*

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48 *Jones v The Commonwealth* (2023) 280 CLR 62 at 81 [40].

49 (2023) 280 CLR 137 at 153 [27], 158-159 [46].

50 (2024) 99 ALJR 1 at 10 [9]; 419 ALR 457 at 465. See also *CZA19 v The Commonwealth* (2025) 99 ALJR 650 at 665-666 [64]; 422 ALR 133 at 150-151.

51 See s 72 of the *Migration Act* and reg 2.20 of the *Migration Regulations*.

to impose one or other or both of the monitoring condition and the curfew condition if the Minister is satisfied that the criteria for their imposition are met.

33 Within Pt 070 of Sch 2 to the *Migration Regulations*, cl 070.612A(1) relevantly provides:

> "For each of conditions [including the monitoring condition and the curfew condition] the Minister must impose the condition if:
>
> (a) ...
>
> (b) ... the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and
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> (c) the Minister is satisfied on the balance of probabilities that the imposition of the condition (in addition to the other conditions imposed by or under this subclause or another provision of this Division) is:
>
> (i) reasonably necessary; and
>
> (ii) reasonably appropriate and adapted;
>
> for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk."

34 For that purpose, cl 070.111 of Sch 2 to the *Migration Regulations* defines "serious offence" as follows:

> "***serious offence*** means an offence against a law of the Commonwealth, a State or a Territory where:
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> (a) it is an offence punishable by imprisonment for life or for a period, or maximum period, of at least 5 years; and
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> (b) the particular conduct constituting the offence involves or would involve:
>
> (i) loss of a person's life or serious risk of loss of a person's life; or
>
> (ii) serious personal injury or serious risk of serious personal injury; or
>
> (iii) sexual assault; or

(iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code*); or

(v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv); or

(vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or

(vii) domestic or family violence (including in the form of coercive control); or

(viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or

(ix) people smuggling; or

(x) human trafficking."

35 Paragraph (a) and sub-paras (i)-(vi) of para (b) of the definition of "serious offence" largely correspond with the definition of "serious violent or sexual offence" for the purposes of Div 395 of the *Criminal Code*.[52] Sub-paragraphs (vii)-(x) of para (b) of the definition of "serious offence" are additional.

36 The context of cl 070.612A(1) is otherwise unchanged from the context of the clause in the form in which it was considered in *YBFZ*. Two features of that context to which attention was drawn in *YBFZ* need to be recalled.

37 The first is that ministerial grant of a BVR under s 73 of the *Migration Act* subject to either the monitoring condition or the curfew condition attracts the two-stage decision-making procedure set out in s 76E of the *Migration Act*.[53] The "rules of natural justice do not apply" to the decision of the Minister to grant the visa subject to the condition.[54] Instead, those rules are displaced by the statutory requirement that, as soon as practicable after making the decision, the Minister

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52 Section 395.2(1) (definition of "serious violent or sexual offence") of the *Criminal Code*.

53 Section 76E(1) of the *Migration Act*, read with reg 2.25AD of the *Migration Regulations*.

54 Section 76E(2) of the *Migration Act.*

must notify the visa holder of the decision and invite representations as to why the visa should not be subject to the condition. The Minister must then grant a replacement visa without the condition if such representations are made and "the Minister is not satisfied, on the balance of probabilities, that the [holder] poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence [as defined for the purpose of Pt 070 of Sch 2 to the *Migration Regulations*]" or "if the Minister is satisfied, on the balance of probabilities, that the [holder] poses [such a] substantial risk ... the Minister is not satisfied, on the balance of probabilities, that the imposition of that condition ... is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk".[55]

38 The second contextual feature of cl 070.612A(1) to which attention was drawn in *YBFZ* is that the monitoring condition or the curfew condition, if imposed on a BVR that is granted, remains in force for a fixed period of 12 months from the date of the grant.[56] Non-compliance with either condition is an offence punishable by a term of imprisonment of between one and five years.[57]

39 The special case records that as at 30 June 2025, being three months after the plaintiff was granted a BVR subject to both the monitoring condition and the curfew condition, there were 346 BVR holders. The plaintiff was one of 46 who were subject to the monitoring condition and the curfew condition. Forty-one were subject to the monitoring condition but not the curfew condition. One was subject to the curfew condition but not the monitoring condition.

The position of the Commonwealth

40 The Commonwealth does not seek to reopen the holding in *YBFZ* that the nature and severity of the detriment imposed by each of the monitoring condition and the curfew condition warrants prima facie characterisation of their legislative imposition as penal or punitive and therefore as invalid unless justified as reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.

41 The weight of the Commonwealth's argument is that, unlike the form in which cl 070.612A(1) existed at the time of *YBFZ*, cl 070.612A(1) in its current

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55 Section 76E(4) and (7) of the *Migration Act*.

56 Regulation 2.25AE of the *Migration Regulations*.

57 Sections 76C, 76D and 76DA of the *Migration Act*.

form is justified as reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.

42 The Commonwealth identifies the purpose of cl 070.612A(1) in its current form as the protection of any part of the Australian community from harm of the kind caused by commission of a "serious offence" as defined for the purpose of Pt 070 of Sch 2. The Commonwealth argues that the purpose so identified is legitimate in its application to all offences that are punishable in the manner described in para (a) of the definition and that are constituted by conduct involving conduct of the nature described in para (b) of the definition.[58] The Commonwealth argues in the alternative that the purpose so identified is legitimate at least in relation to those offences that are punishable in the manner described in para (a) of the definition and that are constituted by conduct involving conduct of the nature described in para (b) of the definition in respect of which the harm inherent in the conduct can be characterised as "grave and specific".[59] The Commonwealth argues on this alternative that the descriptions in para (b) of the definition are severable[60] if and to the extent that the purpose cannot be so characterised in relation to some of those descriptions.[61]

43 In seeking to justify the imposition of the monitoring condition and the curfew condition as reasonably capable of being seen as necessary for the purpose so identified as the protection of any part of the Australian community from harm of the kind caused by commission of such a "serious offence", the Commonwealth eschews reliance on any characteristic that might distinguish an *NZYQ* affected person from any other person. This leads the Commonwealth to acknowledge that acceptance of its argument that cl 070.612A(1) in its current form is justified as reasonably capable of being seen as necessary for a legitimate non-punitive purpose would have the far-reaching consequence that Commonwealth legislative authorisation of executive imposition of restrictions equivalent to the monitoring condition and the curfew condition on any person, whether a citizen or an alien, by reference to criteria equivalent to those laid out in cl 070.612A(1)(b) and (c) would not transgress the constitutional limitation recognised in *Lim*.

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58 Relying on *Garlett v Western Australia* (2022) 277 CLR 1 at 35 [80].

59 Relying on *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 113-114 [78]-[79], 115-116 [85]-[86].

60 See s 13(2) of the *Legislation Act 2003* (Cth).

61 Relying on *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 120-121 [101].

44 Were the Commonwealth's position to be accepted, Commonwealth legislative authorisation of executive imposition of restrictions equivalent to the monitoring condition and the curfew condition would be unconstrained by Ch III of the *Constitution* and would turn solely on the availability of a source of Commonwealth legislative power. The availability of s 122 of the *Constitution* as a source of power to enact laws governing the conduct of persons in a territory[62] would mean, for example, that it would be constitutionally permissible to establish by Commonwealth law a statutory regime which authorises executive imposition of equivalent restrictions by reference to equivalent criteria on any or all inhabitants of a territory.

Purpose

45 With one qualification, the Commonwealth's identification of the legislative purpose of cl 070.612A(1) accords with the purpose that emerges from the proper construction of cl 070.612A(1)(b). The proper construction of the reference in cl 070.612A(1)(b) to ministerial satisfaction that a BVR holder "poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence" as defined in cl 070.111 is that it refers to ministerial satisfaction that the BVR holder poses a substantial risk of committing a "serious offence" as so defined. The harm to any part of the Australian community in the event of that risk materialising is to be found in the harm that is inherent in the particular conduct constituting the offence meeting a description in para (b) of the definition. The qualification to the Commonwealth's identification of the legislative purpose is that the specification of the level of risk of the harm involved in the commission of such an offence occurring must be treated as part of the description of that purpose.

46 The legislative purpose of cl 070.612A(1) is therefore most appropriately identified as protection of any part of the Australian community from a substantial risk of the harm that is inherent in particular conduct that constitutes a "serious offence" as defined for the purpose of Pt 070 of Sch 2 to the *Migration Regulations*.

47 Whether the purpose so identified is constitutionally legitimate in its application to all conduct constituting a "serious offence" as defined for the purpose of Pt 070 need not be determined. It is sufficient for present purposes to conclude that the purpose so identified is legitimate in its application at least to

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62 *Government of the Russian Federation v The Commonwealth* (2025) 99 ALJR 1562 at 1570-1571 [23]-[24]; 426 ALR 122 at 128-129.

particular conduct of the kinds described in para (b)(i)-(vi) of the definition.[63] The harm inherent in particular conduct of those kinds can readily be characterised as grave and specific. The descriptions of conduct of other kinds in para (b)(vii)-(x) of the definition are plainly severable.

48 The identified purpose is not rendered constitutionally illegitimate by reason that the purpose is pursued by cl 070.612A(1) of Sch 2 to the *Migration Regulations* solely in respect of the risk of harm that is posed by *NZYQ* affected persons. The *Constitution* has not been interpreted to impose a general requirement of substantive equality before the law,[64] and discrimination alone cannot change a purpose that is consistent with the constitutionally prescribed system of government into one that is not.[65] Inherent in the conferral of power on the Commonwealth Parliament by s 51(xix) of the *Constitution* to make laws with respect to "aliens" is that "the Parliament may make laws which impose upon those having this status burdens, obligations and disqualifications which the Parliament could not impose upon other persons"[66] and that, by those laws, it may create and differentiate between classes of those having this status in burdens, obligations and disqualifications it chooses to impose.

Necessity

49 Having: (1) identified the non-punitive purpose of cl 070.612A(1) of Sch 2 to the *Migration Regulations* in its current form as protection from a substantial risk of the harm that is inherent in particular conduct that constitutes a "serious offence" as defined for the purpose of Pt 070 of Sch 2; and (2) accepted the legitimacy of that purpose at least in part, the question becomes whether the authority purportedly conferred on the Minister to impose the monitoring condition and the curfew condition is reasonably capable of being seen to be necessary for that purpose.

50 This is the stage in the analysis at which cl 070.612A(1) of Sch 2 to the *Migration Regulations* in its current form must be found to infringe the constitutional limitation recognised in *Lim*.

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63 cf *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 99-100 [40]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611-612 [98].

64 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 44-45, 63-68, 153-155.

65 *Brown v Tasmania* (2017) 261 CLR 328 at 415-416 [276], 462-463 [422].

66 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2].

51 In *YBFZ*, a majority of the Court made the obiter observation that "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", the clause in its earlier form was "not reasonably capable of being seen as necessary for that purpose".[67] The significance of the observation lies in the circumstance that the two features of the context of the clause in that form to which the majority referred in support of the observation remain features of the context of the clause in its current form.

52 The continuing substantive feature of the context of cl 070.612A(1) in its earlier form to which attention was drawn in support of that observation in *YBFZ* was the fixed duration of the operation of the monitoring condition and the curfew condition of 12 months from the date of the grant of the BVR irrespective of whether imposition for the entirety of that period was reasonably capable of being seen as necessary for the identified purpose.[68] Now, as then, the fixed duration of the operation of the monitoring condition and the curfew condition means that the detriment which results from their imposition under cl 070.612A(1) of Sch 2 to the *Migration Regulations* fails the test of reasonable necessity to achieve the identified purpose of their imposition.

53 In *YBFZ*, the continuing procedural feature of the context of the clause to which attention was then drawn in support of the observation was the two-stage decision-making procedure set out in s 76E of the *Migration Act*, through the operation of which it was noted that the right of the holder of a BVR "to make representations against the conditions being imposed exists only after the conditions have been imposed".[69] The point made was that this exclusion of procedural fairness at the first stage of the decision-making procedure had the capacity to result in the conditions being imposed on the basis of incomplete or inaccurate information.

54 But the exclusion of procedural fairness at the first stage of the decision-making procedure set out in s 76E of the *Migration Act* is indicative of a more fundamental difficulty with attempting to justify the departure which conferral of authority on the Minister to impose the monitoring condition and the curfew condition under cl 070.612A(1) of Sch 2 in its current form involves from the

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67 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23 [84]; 419 ALR 457 at 483.

68 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23-24 [85]; 419 ALR 457 at 483-484.

69 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23 [85]; 419 ALR 457 at 483-484.

baseline set by the constitutional paradigm reflected in *Lim*'s assignment of the imposition of a detriment that is penal or punitive in character to the exclusively judicial function of adjudging and punishing criminal guilt. Procedural fairness can be statutorily excluded from an administrative process. Procedural fairness cannot be statutorily excluded from a judicial process, consistently with Ch III of the *Constitution*.[70]

55 Protection from a substantial risk of the harm inherent in particular conduct constituting a "serious offence" as defined for the purpose of Pt 070 of Sch 2 to the *Migration Regulations* justifies conferral, by cl 070.612A(1) of Sch 2 to the *Migration Regulations* in its current form, of authority to impose restrictions in the nature of the monitoring condition and the curfew condition other than in the performance of the exclusively judicial function of adjudging and punishing criminal guilt.

56 What cannot be accepted to be reasonably capable of being seen as necessary for that purpose is for cl 070.612A(1) of Sch 2 to the *Migration Regulations* in its current form to authorise imposition of restrictions of that nature other than by a court in the exercise of judicial power. Its departure from the baseline set by the constitutional paradigm is to that extent unjustified. Division 395 of the *Criminal Code* strengthens that proposition in demonstrating by its very existence an alternative legislative regime pursuant to which restrictions in the nature of the monitoring condition and the curfew condition are even now capable of being imposed by a court in the exercise of judicial power. This comparison between the two statutory regimes does not involve impermissible proportionality analysis by questioning whether there is a less restrictive means of achieving the legislative purpose.[71] Rather, the comparison points to the failure of that purpose to explain the scope of the power purportedly conferred by providing an example of a law that conforms with the constitutional baseline.

Conclusion

57 The purported conferral by cl 070.612A(1) of Sch 2 to the *Migration Regulations* on the Minister of authority to impose the monitoring condition and the curfew condition may be accepted to be for a non-punitive purpose that is at

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70 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 105 [177], 106-107 [184], 110 [194]. See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 593-594 [39]; *SDCV v Director-General of Security* (2022) 277 CLR 241 at 303-304 [172], 305 [174]; *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442 at 503 [164].

71 cf *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 344 [31]-[32].

least in part consistent with the constitutionally prescribed system of government. However, the conferral of that authority on the Minister is not reasonably capable of being seen to be necessary for that purpose.

58 The special case formally raises three specific questions for determination. The first and second questions respectively ask whether cl 070.612A(1) of Sch 2 to the *Migration Regulations* is inconsistent with Ch III of the *Constitution* and is therefore invalid to the extent it purports to authorise and require the Minister to impose each of the monitoring condition and the curfew condition. The answer to each is: yes. The third question asks who should pay the costs of the special case. The answer is: the Commonwealth.

59 GORDON J. In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*, a majority of this Court held that cl 070.612A(1)(a) and (d) of Sch 2 to the *Migration Regulations 1994* (Cth), which required the Minister to impose monitoring and curfew conditions on holders of a Bridging R (Class WR) visa ("BVR") unless the Minister was satisfied of certain matters, were invalid for exceeding the power conferred by s 504 of the *Migration Act 1958* (Cth) when that power was construed subject to Ch III of the *Constitution*.[72]

60 Following *YBFZ*, cl 070.612A(1) was repealed and replaced.[73] This proceeding concerns whether the substituted cl 070.612A(1) is invalid because, to the extent that it authorises the imposition of the same monitoring and curfew conditions, it still exceeds the power conferred by s 504 of the *Migration Act* when that power is construed subject to Ch III of the *Constitution*. The answer is "yes".

61 By cl 070.612A(1), the Minister must impose on a holder of a BVR[74] each of four specified conditions if the Minister is satisfied on the balance of probabilities that the visa holder poses a substantial risk of seriously harming any part of the Australian community by committing a "serious offence" and the Minister is satisfied on the balance of probabilities that the imposition of the condition is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk. The text of the four specified conditions has not changed since *YBFZ*. The two challenged conditions enable continuous electronic monitoring of the person's location by requiring the person to wear an electronic monitoring device affixed to the person ("the monitoring condition")[75] and require the person to remain in a specified location generally between the hours of 10 pm and 6 am ("the curfew condition").[76]

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72 (2024) 99 ALJR 1 at 9 [4]-[5], 12 [19], 24-25 [91]-[92], 43-44 [171]; 419 ALR 457 at 464, 468, 485-486, 510.

73 *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth), reg 4, read with Sch 1, item 2.

74 *Migration Regulations*, Sch 2, cl 070.612A(3), read with regs 2.25AA and 2.25AB and s 195A of the *Migration Act*. The BVR has one subclass, Subclass 070 (Bridging (Removal Pending)): *Migration Regulations*, reg 1.07 and Sch 1, item 1307.

75 *Migration Regulations*, Sch 8, cl 8621. See *YBFZ* (2024) 99 ALJR 1 at 13-14 [26]; 419 ALR 457 at 470.

76 *Migration Regulations*, Sch 8, cl 8620. See *YBFZ* (2024) 99 ALJR 1 at 14-15 [30]; 419 ALR 457 at 471.

62 The imposition of each of the monitoring and curfew conditions by the Executive Government of the Commonwealth involves one or both of a deprivation of liberty and interference with bodily integrity that is prima facie punitive and cannot be justified. Schemes that override an individual's liberty or interfere with their bodily integrity on the grounds of legislatively asserted preventive or protective imperatives unrelated to the adjudgment and punishment of criminal guilt are truly exceptional measures.[77] They are exceptional measures because they present risks of abuse to the fundamental freedoms of liberty[78] and bodily integrity,[79] and the constitutional value of the rule of law,[80] that underpin the separation of federal judicial power required by Ch III of the *Constitution*.

63 The purpose of cl 070.612A(1) – being to protect any part of the Australian community from the substantial risk of serious harm of the kind caused by the commission of a "serious offence" by the cohort of persons to whom the provision applies – is not a legitimate, non-punitive purpose. Neither an assertion of a protective purpose by the legislature or the Executive nor the label of "serious offence" can determine compatibility with Ch III of the *Constitution*.[81] This Court has accepted that, in an exceptional case, a Commonwealth law may confer on a court a power to order the deprivation of liberty otherwise than in adjudging and punishing criminal guilt to prevent the unacceptable risk of harm from particular kinds of predicted offending, including terrorism offences.[82] But those powers given by Commonwealth law (and by similar State laws) have generally been confined to addressing a grave and specific risk of harm from the commission of a further offence by a person who has been convicted of similar

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77 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-29; *Minister for Home Affairs v Benbrika* ("*Benbrika [No 1]*") (2021) 272 CLR 68 at 91 [18], 108 [65], 110-111 [71], 112 [75], 130-131 [134], 159-160 [207]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 153 [28]; *YBFZ* (2024) 99 ALJR 1 at 10-12 [8]-[15]; 419 ALR 457 at 465-467. See also *Garlett v Western Australia* (2022) 277 CLR 1 at 57 [163], 59-60 [168].

78 *Benbrika [No 1]* (2021) 272 CLR 68 at 108-109 [67], 111 [71], 132-133 [138]-[140]; *Garlett* (2022) 277 CLR 1 at 57 [163], 58-60 [167]-[168].

79 *YBFZ* (2024) 99 ALJR 1 at 11 [12]-[13]; 419 ALR 457 at 466-467.

80 *Garlett* (2022) 277 CLR 1 at 48 [128]-[129], 49 [133], 54 [150], 59-60 [168].

81 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 205-206, 258, 263; see also at 187-188; *Benbrika [No 1]* (2021) 272 CLR 68 at 97 [36], 145 [168]; *Garlett* (2022) 277 CLR 1 at 53 [146]-[147], 64-66 [179]-[180] and the authorities cited.

82 *Benbrika [No 1]* (2021) 272 CLR 68.

offences.[83] The requirement that the purpose of cl 070.612A(1) be directed to an exceptional case is not satisfied.

64 The Commonwealth has identified no legitimate basis which is consistent with the constitutionally prescribed system of government for cl 070.612A(1) being directed to the cohort of persons to whom it applies. Their alien status is, by reason of this Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[84] constitutionally irrelevant to whether the deprivation of liberty and interference with bodily integrity is justified.

65 Even if the identified purpose of cl 070.612A(1) were legitimate and non-punitive (and it is not), the imposition of each of the monitoring and curfew conditions is not reasonably capable of being seen as necessary for that purpose. Where courts have been given the power to deprive a person of their liberty for a protective purpose in an exceptional case, the power has been confined and regulated by the protections and assurances of the judicial process, including notice, procedural fairness, rules as to evidence and proof, the need to give reasons for decision and the availability of appeal rights.[85] There is a stark contrast with the scheme of which cl 070.612A(1) forms part, which deprives the visa holder of their liberty and interferes with their bodily integrity without hearing from them, for a fixed period of 12 months, whether or not they have committed any prior offence, based on a broadly and ill-defined concept of a "serious offence", on the state of whatever information happens to be before the Minister at the time, whether or not that information is in the form of admissible evidence, without any requirement to obtain or consider an expert opinion, and subject to limited rights of judicial review.

66 The questions of law for the opinion of the Full Court, and the answers, are as follows:

> (1) To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations* ... authorises the imposition of condition 8620 on a [BVR], is that clause invalid because it exceeds the power conferred by s 504 of

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83 *Benbrika [No 1]* (2021) 272 CLR 68 at 113-114 [79]; *YBFZ* (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 588-589 [9], quoting *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 495; *Garlett* (2022) 277 CLR 1 at 53 [145]-[148], 71 [190].

84 (2023) 280 CLR 137 at 158-159 [44]-[46].

85 *Benbrika [No 1]* (2021) 272 CLR 68 at 84-88 [7]-[12]. See also *Fardon* (2004) 223 CLR 575 at 612 [79]; *Garlett* (2022) 277 CLR 1 at 74 [198]. cf *YBFZ* (2024) 99 ALJR 1 at 23-24 [84]-[85]; 419 ALR 457 at 483-484.

the *Migration Act* ... when that power is construed subject to Ch III of the *Constitution*?

Answer: Yes.

(2) To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations* ... authorises the imposition of condition 8621 on a [BVR], is that clause invalid because it exceeds the power conferred by s 504 of the *Migration Act* ... when that power is construed subject to Ch III of the *Constitution*?

Answer: Yes.

(3) Who should pay the costs of the Special Case?

Answer: The defendant.

Liberty, bodily integrity and the constitutional framework

67 The right to personal liberty is the right of all persons to freedom of their person – freedom from arbitrary detention by others and freedom of movement. The "most elementary and important of all common law rights",[86] the right to personal liberty is longstanding. As the oft quoted passage from Blackstone's *Commentaries on the Laws of England* records:[87]

> "Of great importance to the public is the preservation of ... personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper ... there would soon be an end of all other rights and immunities. ...
>
> To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must ... express the causes of

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86 *Trobridge v Hardy* (1955) 94 CLR 147 at 152. See also *Baker v Campbell* (1983) 153 CLR 52 at 95; *Williams v The Queen* (1986) 161 CLR 278 at 292, citing Blackstone, *Commentaries on the Laws of England* (1765), bk 1 at 120-121, 130-131; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 125; *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 212 [45]; *Benbrika v Minister for Home Affairs* ("*Benbrika [No 2]*") (2023) 280 CLR 1 at 21 [52]; *YBFZ* (2024) 99 ALJR 1 at 10 [9], 11 [12], [14]; 419 ALR 457 at 465, 466, 467.

87 Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 1, ch 1 at 135-137.

the commitment, in order to be examined into (if necessary) upon a *habeas corpus*."

68 Closely related to the right to individual liberty is the right to bodily integrity, which has long been recognised by the common law.[88] It has its origins in the "right of personal security" identified by Blackstone as, along with the "right of personal liberty", one of the three "principal" rights of the people of England.[89] Blackstone described the "right of personal security" as "consist[ing] in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation".[90] It is the individual's right to their "limbs", as part of the "right of personal security", which is the origin of the common law's protection of the right to bodily integrity.[91] Blackstone explained that a person's limbs "cannot be wantonly destroyed or disabled without a manifest breach of civil liberty".[92]

69 As Brennan J observed in *Re Bolton; Ex parte Beane*, "[t]he Constitution ... does not contain broad declarations of individual rights and freedoms which deny legislative power to the Parliament, but the courts nevertheless endeavour so to construe the enactments of the Parliament as to maintain the *fundamental freedoms* which are part of *our constitutional framework*".[93] His Honour's references to "fundamental freedoms" and "our constitutional framework" are important: "[m]any of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force".[94] Liberty and bodily integrity are fundamental common law rights which

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88 *Trobridge* (1955) 94 CLR 147 at 152; *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 233; *Binsaris v Northern Territory* (2020) 270 CLR 549 at 561 [25], 566 [41].

89 Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 1, ch 1 at 128.

90 Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 1, ch 1 at 129.

91 *Marion's Case* (1992) 175 CLR 218 at 266. See also *YBFZ* (2024) 99 ALJR 1 at 11 [12]; 419 ALR 457 at 466.

92 Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 1, ch 1 at 130.

93 (1987) 162 CLR 514 at 523 (emphasis added).

94 *Re Bolton* (1987) 162 CLR 514 at 520-521.

are part of our accepted constitutional framework.[95] They form part of the compact between the individual and the state that this country inherited and within which the *Constitution* was enacted.[96] Neither their existence, nor their terms, can be overlooked.

Separation of federal judicial power

70 Chapter III of the *Constitution* separates the judicial power of the Commonwealth from federal legislative and executive power and exclusively assigns "to that separated judicial power [the] authority to impose punishment".[97] As a result, Ch III invalidates a Commonwealth law that purports to vest any part of that exclusively judicial function in the Executive.[98]

71 Two key rationales for Ch III's strict separation of federal judicial power have been repeatedly stated and are well established. Those two rationales are: first, the historical protection of liberty against incursions by the legislature or Executive;[99] and second, the protection of the impartiality of the judiciary so as to ensure that the judiciary can operate effectively as a check on legislative and executive power.[100]

72 The first of those rationales is of particular significance in this case. Recognition that Ch III is concerned with the judicial protection of liberty is not

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95 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11-12; *Re Bolton* (1987) 162 CLR 514 at 523, 528-529; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11; *Fardon* (2004) 223 CLR 575 at 632 [150]-[151]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 101-102 [147], 104-105 [158]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 275 [140]; *Benbrika [No 1]* (2021) 272 CLR 68 at 141-142 [160]; *The Commonwealth v AJL20* (2021) 273 CLR 43 at 85 [84]; *Garlett* (2022) 277 CLR 1 at 47-48 [127], 59-60 [168], 60 [170], 61-63 [173]-[174]; *YBFZ* (2024) 99 ALJR 1 at 11 [12]; 419 ALR 457 at 466.

96 *YBFZ* (2024) 99 ALJR 1 at 11 [12]; 419 ALR 457 at 466.

97 *YBFZ* (2024) 99 ALJR 1 at 9 [4]; 419 ALR 457 at 464.

98 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; *Lim* (1992) 176 CLR 1 at 27; *Benbrika [No 2]* (2023) 280 CLR 1 at 15 [33], 22-23 [56], 24 [60].

99 *Benbrika [No 1]* (2021) 272 CLR 68 at 108-109 [67], 111 [71], 131 [136], 132-133 [138]-[140]. See also *YBFZ* (2024) 99 ALJR 1 at 11 [15]; 419 ALR 457 at 467.

100 *Benbrika [No 1]* (2021) 272 CLR 68 at 131 [136], 133-134 [141]-[142]. See also *Garlett* (2022) 277 CLR 1 at 74 [199].

new.[101] The role of the judiciary as the protector of liberty, like liberty itself, lies at the heart of our inherited constitutional tradition.[102] Being the most basic of rights, the right to liberty is "characteristically the most jealously safeguarded by courts".[103] And, as Montesquieu said, "there is no liberty if the judicial power is not separated from the legislative and executive power".[104] The separation of judicial power "protects against the unjustified exercise of the power of the State against an individual's liberty".[105] Judicial protection of individual liberty against incursions by the legislature or the Executive has been and remains "a core value"[106] underpinning and protected by Ch III of the *Constitution*.[107]

73 Liberty is not the only fundamental freedom underpinning the separation of federal judicial power. The basic rights that underlie the compact between the individual and the state of which that separation of powers is the "constitutional emanation" also include the common law right to bodily

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101 *Wilson* (1996) 189 CLR 1 at 11. See also *Benbrika [No 1]* (2021) 272 CLR 68 at 134 [141].

102 *Benbrika [No 1]* (2021) 272 CLR 68 at 132 [138]. See also *Magaming v The Queen* (2013) 252 CLR 381 at 400 [63]; *Vella* (2019) 269 CLR 219 at 276 [141]-[142]; *Garlett* (2022) 277 CLR 1 at 47 [125], 56 [161]; *Benbrika [No 2]* (2023) 280 CLR 1 at 21 [52].

103 *Vella* (2019) 269 CLR 219 at 275 [140].

104 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 390, citing Montesquieu, *The Spirit of Laws* (Nugent trans, 1873), bk 11, ch 6 at 174. See also Story, *Commentaries on the Constitution of the United States* (1833), vol 3, ch 38 at 426.

105 *Benbrika [No 1]* (2021) 272 CLR 68 at 132 [138]. See also *R v Davison* (1954) 90 CLR 353 at 381-382; *Quinn* (1977) 138 CLR 1 at 11; *Vella* (2019) 269 CLR 219 at 275-276 [140]-[142].

106 *Vella* (2019) 269 CLR 219 at 276 [141]. See also *Benbrika [No 1]* (2021) 272 CLR 68 at 133 [139].

107 *Garlett* (2022) 277 CLR 1 at 74 [199]. See also *Quinn* (1977) 138 CLR 1 at 11; *Williams* (1986) 161 CLR 278 at 292; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 610 [94].

integrity.[108] As Jacobs J explained in *R v Quinn; Ex parte Consolidated Foods Corporation*:[109]

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

74 The *Constitution* does not contain a Bill of Rights.[110] That was the choice of the framers of the *Constitution*.[111] And, consistent with this choice, the limitations derived from Ch III are addressed to legislative and executive power,[112] not rights. Chapter III effects a restriction on the legislative and executive power of the Commonwealth which – by reason of the "ancient principles of the common law"[113] underpinning our *Constitution* – is concerned with individual liberty and bodily integrity. But it does not confer positive rights on individuals with respect to personal liberty or bodily integrity. This distinction is important.

Lim principle

75 One effect of the separation of powers required by Ch III of the *Constitution*, drawn from the plurality's reasons in *Chu Kheng Lim v Minister*

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108 *YBFZ* (2024) 99 ALJR 1 at 11 [12]-[14]; 419 ALR 457 at 466-467. See also *Re Bolton* (1987) 162 CLR 514 at 520-521.

109 (1977) 138 CLR 1 at 11 (emphasis added). See also *Magaming* (2013) 252 CLR 381 at 401 [67]; *Vella* (2019) 269 CLR 219 at 275 [140]; *Benbrika [No 1]* (2021) 272 CLR 68 at 108 [67].

110 *YBFZ* (2024) 99 ALJR 1 at 9 [6]; 419 ALR 457 at 464-465. See also *Re Bolton* (1987) 162 CLR 514 at 523.

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

112 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 355 [80]-[82]; *Benbrika [No 1]* (2021) 272 CLR 68 at 110-111 [71]; *Jones v The Commonwealth* (2023) 280 CLR 62 at 92 [74]-[75].

113 *Re Bolton* (1987) 162 CLR 514 at 520.

for Immigration, Local Government and Ethnic Affairs[114] and commonly referred to as the *Lim* principle, is that:[115]

> "exceptional cases aside, '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'.[116] That statement of principle reflects that Ch III is concerned with substance and not mere form, and that it is the involuntary deprivation of liberty itself that ordinarily constitutes punishment.[117]"

In other words, exceptional cases aside,[118] involuntary deprivation of liberty is itself punishment and, to be imposed, must be a consequence of the exercise of the judicial function of adjudging and punishing criminal guilt.

76 Thus, in *NZYQ*, this Court restated the *Lim* principle in these terms: "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".[119]

77 The two key rationales for the strict separation of federal judicial power also underpin the *Lim* principle.[120] Moreover, the commitment of the function of adjudging and punishing criminal guilt exclusively to courts is a core component

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114 (1992) 176 CLR 1.

115 *NZYQ* (2023) 280 CLR 137 at 153 [28].

116 *Lim* (1992) 176 CLR 1 at 27. See *Benbrika [No 1]* (2021) 272 CLR 68 at 90-91 [18]-[19], 108 [65], 130-131 [130]-[134], 159-160 [207]-[208].

117 *Lim* (1992) 176 CLR 1 at 27-28.

118 *Lim* (1992) 176 CLR 1 at 10, 27-28, 32, 58, 71; *Garlett* (2022) 277 CLR 1 at 63-64 [177]; *NZYQ* (2023) 280 CLR 137 at 157 [40]. See also *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 [20]; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 648 [108], 668 [183]; *Benbrika [No 1]* (2021) 272 CLR 68 at 111-112 [73]-[75].

119 (2023) 280 CLR 137 at 157 [39].

120 *Benbrika [No 1]* (2021) 272 CLR 68 at 108-111 [66]-[72], 131 [136]; *Garlett* (2022) 277 CLR 1 at 63 [175].

of Dicey's exposition of the rule of law, which "came to prominence in the final decade of the 19th century when the *Constitution* was in the process of formation".[121] The essence of the relationship between the individual and the state in our system of government is that the individual "may with us be punished for a breach of law, but ... for nothing else".[122] The characterisation of that function as exclusively judicial "is the central contribution that our common law system of adversarial trial has made to establishing and maintaining the relationship between the individual and the state within our inherited conception of the rule of law".[123]

Punishment by deprivation of liberty and interference with bodily integrity

78 As was confirmed and explained by the plurality in *YBFZ*, the deprivation of the "basic rights" of "human life, bodily integrity, and liberty" may, like detention in custody, constitute punishment.[124] This conclusion reflects "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)".[125] In turn, this principle 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"[126] which "ensures not only protection from arbitrary punishment but also the continuation of an independent and impartial judiciary".[127]

79 In reaching that conclusion, the plurality in *YBFZ* recognised that the boundaries of judicial power have never been exclusively determined by "the question whether courts alone historically exercised a power to order punishment by an interference with human life, bodily integrity, or liberty".[128] The characteristics of judicial power and of institutions qualified to exercise it are

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121 *Garlett* (2022) 277 CLR 1 at 48 [128].

122 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215, quoted by *Lim* (1992) 176 CLR 1 at 27-28 and *Garlett* (2022) 277 CLR 1 at 48 [129].

123 *Garlett* (2022) 277 CLR 1 at 49 [133]; see also 59-60 [168].

124 (2024) 99 ALJR 1 at 11 [14]; 419 ALR 457 at 467.

125 *YBFZ* (2024) 99 ALJR 1 at 11 [12]; 419 ALR 457 at 466.

126 *YBFZ* (2024) 99 ALJR 1 at 11 [12]; 419 ALR 457 at 466.

127 *YBFZ* (2024) 99 ALJR 1 at 11 [13]; 419 ALR 457 at 466. See [69] above.

128 (2024) 99 ALJR 1 at 11 [14]; 419 ALR 457 at 467.

not "frozen in time".[129] Rather, "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".[130]

80 The reference to, and focus on, "detention in custody" in *Lim* must be understood in light of the challenged provisions in that case. *Lim* was centrally concerned with deprivation of liberty because of the provisions challenged in that case: under those provisions, a person could be in "custody" even if not held in an immigration detention centre.[131] Under the challenged legislation in *Lim*, a "designated person" was required to be "kept in custody" until they were removed or given an entry permit.[132] A person could be in "custody" for the purposes of the *Migration Act* if they were being held "in a detention centre", "in a prison or remand centre", "in a police station or watch house" or "in another place approved by the Minister in writing", or in the company of and restrained by an officer or another person directed by the Secretary to accompany and restrain the person.[133] The plurality's reference in *Lim* to "detention in custody"[134] accordingly was not limited to full-time detention in a prison or in a detention centre. The reference to "detention"[135] was a reference to involuntary deprivation of liberty,[136] which is broader than full-time detention in custody. Exceptional cases aside,[137] "loss of liberty" as a punishment is ordinarily

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129 *YBFZ* (2024) 99 ALJR 1 at 11 [14]; 419 ALR 457 at 467, quoting *Vella* (2019) 269 CLR 219 at 276 [141].

130 *YBFZ* (2024) 99 ALJR 1 at 11 [14]; 419 ALR 457 at 467, quoting *Vella* (2019) 269 CLR 219 at 276 [141]. See, eg, *Plaintiff M68* (2016) 257 CLR 42 at 108 [173], 111 [184], 154 [354]-[356], 162 [388]; *Benbrika [No 2]* (2023) 280 CLR 1 at 25-26 [63].

131 (1992) 176 CLR 1 at 18-19 (*Migration Act*, s 11, as it then was).

132 (1992) 176 CLR 1 at 17 (*Migration Act*, 54L, as it then was).

133 *Lim* (1992) 176 CLR 1 at 18-19 (*Migration Act*, s 11, as it then was).

134 See [75] above.

135 *NZYQ* (2023) 280 CLR 137 at 157 [39]; *ASF17 v The Commonwealth* (2024) 98 ALJR 782 at 788-789 [31]-[32]; 418 ALR 382 at 390.

136 *NZYQ* (2023) 280 CLR 137 at 153 [28].

137 See fn 118 above.

one of the hallmarks reserved to criminal proceedings conducted in courts, with the protections and assurances that the criminal justice system provides.[138]

Relevance of alien status for Ch III purposes

81 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'".[139] The alien's vulnerability to exclusion or deportation "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'".[140] Accordingly, the detention of an alien 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".[141] On the other hand, it is a "fundamental and long-established principle that no person – alien or non-alien – may be detained by the executive absent statutory authority or judicial mandate",[142] as "an alien who is actually within this country enjoys the protection of our law".[143] In light of those principles, this Court held in *NZYQ* 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".[144]

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138 *Fardon* (2004) 223 CLR 575 at 612 [79], citing *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 178-179 [56]; *Garlett* (2022) 277 CLR 1 at 74 [198].

139 *NZYQ* (2023) 280 CLR 137 at 154 [29], quoting *Lim* (1992) 176 CLR 1 at 29. See also *YBFZ* (2024) 99 ALJR 1 at 10 [10]; 419 ALR 457 at 465.

140 *YBFZ* (2024) 99 ALJR 1 at 10 [10]; 419 ALR 457 at 465, quoting *Lim* (1992) 176 CLR 1 at 29.

141 *Lim* (1992) 176 CLR 1 at 32; *YBFZ* (2024) 99 ALJR 1 at 10 [10]; 419 ALR 457 at 465-466.

142 *NZYQ* (2023) 280 CLR 137 at 153 [27]. See also *Re Bolton* (1987) 162 CLR 514 at 520-521, 528; *YBFZ* (2024) 99 ALJR 1 at 10 [9]; 419 ALR 457 at 465.

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

144 *YBFZ* (2024) 99 ALJR 1 at 10 [11]; 419 ALR 457 at 466, referring to *NZYQ* (2023) 280 CLR 137.

Single question of characterisation

82 In *YBFZ*, a majority of this Court held that the imposition of the monitoring and curfew conditions on a subset of aliens was punitive and therefore infringed the separation of powers required by Ch III.[145] In reaching that conclusion, the plurality acknowledged that not every interference with individual liberty or bodily integrity will be punitive so as to "infringe on exclusively judicial power".[146] The protection of personal liberty by Ch III is not absolute: the Parliament and the Executive can legitimately deprive a person of their liberty.[147] Rather, where a Commonwealth law confers power on the Executive to impose a detriment, whether that law infringes the constitutional limit is determined by answering a "single question of characterisation" – that is, "whether the power to impose the detriment conferred by the law is properly characterised as punitive and therefore as exclusively judicial".[148]

83 Answering that question involves two "subsidiary steps".[149] Does the power to impose the relevant detriment have a prima facie punitive character, either by default (for example, a power to impose involuntary detention in custody) or by a process of characterisation (having regard to "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")?[150] Importantly, that question is one of "substance and not mere form".[151] If the answer to that first question is "yes", then it is necessary to ask: is there a justification, in the sense that "the power having a prima facie punitive character (by default or otherwise) is reasonably capable of being seen to be necessary

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145 (2024) 99 ALJR 1 at 9 [4]-[5], 12 [19], 24-25 [91]-[92], 43-44 [171]; 419 ALR 457 at 464, 468, 485-486, 510.

146 *YBFZ* (2024) 99 ALJR 1 at 12 [15]; 419 ALR 457 at 467.

147 See fn 118 above.

148 *YBFZ* (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468, citing *Jones* (2023) 280 CLR 62 at 82 [43]. See also *NZYQ* (2023) 280 CLR 137 at 158 [44]; *Benbrika [No 2]* (2023) 280 CLR 1 at 16 [35]-[36].

149 *YBFZ* (2024) 99 ALJR 1 at 12 [16], [18]; 419 ALR 457 at 468.

150 *YBFZ* (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468.

151 *YBFZ* (2024) 99 ALJR 1 at 12 [17]; 419 ALR 457 at 468, citing *Lim* (1992) 176 CLR 1 at 27.

(in the relevant sense of 'reasonably appropriate and adapted' rather than essential or indispensable) for a legitimate and non-punitive purpose"?[152]

84 In answering the question whether the law has a legitimate, non-punitive purpose, a purpose will be "legitimate" if it is compatible with the constitutionally prescribed system of government.[153] This Court has said that "the legitimate purposes of detention – those purposes which are capable of displacing the default characterisation of detention as punitive – must be regarded as exceptional".[154] A purpose justifying the imposition of a material and relatively long-term deprivation of liberty or interference with bodily integrity must also be exceptional: it must be sufficient to justify the nature and extent of that detriment. If protection from "any harm of any nature, degree, or extent were a legitimate non-punitive purpose, the very point of the legitimacy requirement would be undermined".[155]

85 That a law has a purpose of protecting the community from harm is insufficient.[156] Otherwise, there would be no meaningful limit on the state's exercise of coercive power to restrict individual liberty and interfere with an individual's bodily integrity.[157] Where the purpose of depriving a person of their liberty or interfering with their bodily integrity is the protection of the community from harm, the relevant harm must be both "grave and specific" for that purpose to be legitimate.[158] Whether the risk of harm from a particular offence is sufficiently grave for protection from that harm to be characterised as a legitimate, non-punitive purpose involves a contestable judgment of degree.[159]

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152 *YBFZ* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

153 *NZYQ* (2023) 280 CLR 137 at 157 [40].

154 *NZYQ* (2023) 280 CLR 137 at 157 [40], citing *Lim* (1992) 176 CLR 1 at 27-28.

155 *YBFZ* (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483. See also *Garlett* (2022) 277 CLR 1 at 53-54 [149], 58-59 [167].

156 *YBFZ* (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483.

157 *Garlett* (2022) 277 CLR 1 at 65 [179].

158 *Benbrika [No 1]* (2021) 272 CLR 68 at 113-114 [79]; *YBFZ* (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483. See also *Fardon* (2004) 223 CLR 575 at 588-589 [9], quoting *Veen* (1988) 164 CLR 465 at 495; *Garlett* (2022) 277 CLR 1 at 53 [145]-[148], 71 [190].

159 *Garlett* (2022) 277 CLR 1 at 55 [153].

86 Against this background, these reasons will consider the operation of cl 070.612A(1), the impugned conditions and the broader statutory context; set out the position of the plaintiff; and then explain why cl 070.612A(1), in authorising the imposition of the monitoring and curfew conditions, exceeds the power conferred by s 504 of the *Migration Act* when that power is construed subject to Ch III of the *Constitution*.

Section 504 of the *Migration Act*, cl 070.612A(1) and the impugned conditions

87 Section 504 of the *Migration Act* confers on the Governor-General a general regulation-making power "so broadly expressed as to require it to be read down as a matter of statutory construction to permit only those exercises of discretion that are within constitutional limits".[160] In these circumstances, to test whether a particular exercise of the power is valid, it is necessary to ask whether that exercise of statutory power, if it were a statute, would directly infringe the constitutional limit.[161] If it would be invalid, then it is invalid on the basis that it necessarily exceeds the scope of the authorising provision.[162]

88 The determinative issue is therefore whether, to the extent that cl 070.612A(1) of Sch 2 to the *Migration Regulations* authorises the Minister to impose the monitoring and curfew conditions on a BVR, it is invalid because it exceeds the power conferred by s 504 of the *Migration Act* when that power is construed subject to Ch III of the *Constitution*.

89 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 *Migration Act*[163] in such circumstances,[164] by reference to such criteria[165] and on such conditions[166] as are prescribed by regulation. The relevant class of visa,

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160 *Palmer v Western Australia* (2021) 272 CLR 505 at 547 [122]. See also *YBFZ* (2024) 99 ALJR 1 at 12 [19]; 419 ALR 457 at 468.

161 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 373 [104].

162 *Palmer* (2021) 272 CLR 505 at 546 [119]-[120], 547 [122].

163 *Migration Act*, s 37.

164 *Migration Act*, s 40(1).

165 *Migration Act*, s 31(3).

166 *Migration Act*, s 41(1).

the BVR, is a prescribed class of temporary visa which has one subclass, Subclass 070 (Bridging (Removal Pending)).[167]

90 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.[168] Under the *Migration Regulations*, a non-citizen is within a prescribed class for the grant of a bridging visa[169] and is taken to meet criteria prescribed for the grant of a BVR without application[170] if there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future.

91 Clause 070.612A of Sch 2 to the *Migration Regulations* originally formed part of the Commonwealth legislative response to this Court's decision in *NZYQ*.[171] That legislative response established a regime by which non-citizens in respect of whom there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future could be granted a BVR subject to a range of conditions.

92 When *YBFZ* was decided, cl 070.612A(1) provided that, if a BVR was 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 (including because of any other conditions imposed by or under another provision of this Division):
>
> (a) 8621;
>
> (b) 8617;
>
> (c) 8618;

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167 *Migration Regulations*, regs 1.07 and 2.01, read with Sch 1, item 1307.

168 *Migration Act*, s 72(1) para (b) of the definition of "eligible non-citizen".

169 *Migration Regulations*, reg 2.20(1) and (18).

170 *Migration Regulations*, reg 2.25AB.

171 See *YBFZ* (2024) 99 ALJR 1 at 10 [7]; 419 ALR 457 at 465.

(d) 8620."

93 Clause 070.612A(1) now provides:

"For each of conditions 8621, 8617, 8618 and 8620, the Minister must impose the condition if:

...

(b) despite the other conditions imposed on the visa by or under this subclause or another provision of this Division, the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and

(c) the Minister is satisfied on the balance of probabilities that the imposition of the condition (in addition to the other conditions imposed by or under this subclause or another provision of this Division) is:

(i) reasonably necessary; and

(ii) reasonably appropriate and adapted;

for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk."

94 Clause 070.612A(1) now requires the Minister to consider whether to impose each of the four specified conditions if satisfied on the balance of probabilities that the visa holder poses a "substantial risk" of seriously harming any part of the Australian community by committing a serious offence. A "substantial risk" in this context means a risk that is real, well-founded and not remote.[172] It does not require that the commission of a serious offence is more probable than not.[173] Unlike the expression "unacceptable risk", which is often used in similar schemes,[174] "substantial risk" primarily directs attention to the likelihood of the risk rather than the magnitude of the harm to any part of

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172 *Minister for Immigration, Local Government and Ethnic Affairs v Batey* (1993) 40 FCR 493 at 500-501.

173 *Batey* (1993) 40 FCR 493 at 500-501.

174 See, eg, *Criminal Code* (Cth), Div 105A; *Crimes (High Risk Offenders) Act 2006* (NSW); *Serious Offenders Act 2018* (Vic); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *High Risk Serious Offenders Act 2020* (WA); *Serious Sex Offenders Act 2013* (NT). See also [104]-[105] below.

the Australian community.[175] The Minister must make that assessment taking into account any other conditions imposed on the visa by or under the sub-clause or another provision of the Division.[176] However, cl 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.

95 "Serious offence" is defined in cl 070.111 of Sch 2 to the *Migration Regulations* as follows:

> "***serious offence*** means an offence against a law of the Commonwealth, a State or a Territory where:
>
> (a) it is an offence punishable by imprisonment for life or for a period, or maximum period, of at least 5 years; and
>
> (b) the particular conduct constituting the offence involves or would involve:
>
> (i) loss of a person's life or serious risk of loss of a person's life; or
>
> (ii) serious personal injury or serious risk of serious personal injury; or
>
> (iii) sexual assault; or
>
> (iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code*); or
>
> (v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv); or
>
> (vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or
>
> (vii) domestic or family violence (including in the form of coercive control); or

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175 cf *Benbrika [No 1]* (2021) 272 CLR 68 at 152-153 [192]-[193].

176 Clause 070.612A(2A) confirms that conditions imposed by or under the clause are in addition to any other condition imposed by or under another provision of the Division.

(viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or

(ix) people smuggling; or

(x) human trafficking."

96 The content of each of the four conditions listed in cl 070.612A(1) is set out in Sch 8 to the *Migration Regulations*.[177] Condition 8621 (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:

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

(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."

97 As explained in *YBFZ*,[178] the references in sub-cll (2) and (4) to an "authorised officer" are references to an "authorised officer" designated by the Minister under s 76F(6) of the *Migration Act*. Imposition of the monitoring condition under cl 070.612A(1) 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[179] or has committed an offence under the *Migration Act*[180] as well as "protecting the community in relation to" the visa holder.[181]

98 Condition 8617 requires the visa holder to notify Immigration within five working days if they receive, within any period of 30 days, an amount or amounts totalling $10,000 or more from one or more other persons or transfer such an amount or amounts to one or more other persons. Condition 8618 requires the visa holder to notify Immigration within five working days if they incur a debt or debts totalling $10,000 or more, they are declared bankrupt or there is a significant change in relation to their debts or bankruptcy.

99 Condition 8620 (the curfew condition) is as follows:

"(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

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178 (2024) 99 ALJR 1 at 14 [27]; 419 ALR 457 at 470.

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

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

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

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."

100 Section 76E of the *Migration Act* provides that 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*.[182] Instead, if the Minister makes a decision to grant a BVR subject to one or more of those conditions, the Minister must then, as soon as practicable after making the decision, give notice of the decision to the non-citizen and invite the non-citizen to make

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

representations as to why the visa should not be subject to one or more of the conditions.[183]

101 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 either (i) the Minister is not satisfied, on the balance of probabilities, that the non-citizen poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; or (ii) the Minister is not satisfied, on the balance of probabilities, that the imposition of that condition, or those conditions, is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.[184]

102 If one of the impugned conditions is imposed on the grant of a BVR, it remains in force for a period of 12 months from the date of the grant,[185] 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 of that 12-month period.[186] 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.[187]

103 For the holder of a BVR subject to a monitoring or curfew condition, it is an offence not to comply with the monitoring or curfew condition, punishable by a maximum penalty of five years' imprisonment or 300 penalty units, or both.[188] If a person is convicted of such an offence, the court must impose a sentence of imprisonment of at least one year.[189]

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

184 *Migration Act*, s 76E(4). See also *Migration Regulations*, Sch 2, cl 070.612A(4).

185 *Migration Regulations*, reg 2.25AE(1).

186 *Migration Regulations*, reg 2.25AE(2).

187 *Migration Regulations*, reg 2.25AE(3).

188 *Migration Act*, ss 76B, 76C, 76D.

189 *Migration Act*, s 76DA.

Broader legal context

104 Clause 070.612A(1) operates in the broader context of laws for the grant of bail[190] and parole[191] as well as laws providing for preventive supervision and detention.[192] One such scheme is the community safety order regime under Div 395 of the *Criminal Code* (Cth), which empowers the Supreme Court of a State or Territory, on application by the Minister, 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.[193] "Serious violent or sexual offence" is defined to include an offence punishable by imprisonment for life or for a period, or maximum period, of at least seven years where the particular conduct constituting the offence involved, involves or would involve any of the same conduct that falls within para (b)(i) to (vi) of the definition of "serious offence" in cl 070.111 of Sch 2 to the *Migration Regulations*, or sexual assault involving a person under 16.[194]

105 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 and on the basis of admissible evidence, that the offender poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence.[195] The Court is required to have regard to various matters, including any report of an assessment received from a relevant expert

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

191 See, eg, *Knight v Victoria* (2017) 261 CLR 306 at 318-320 [10]-[16].

192 See, eg, *Crimes (High Risk Offenders) Act 2006* (NSW); *Serious Offenders Act 2018* (Vic); *Criminal Law (High Risk Offenders) Act 2015* (SA); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *High Risk Serious Offenders Act 2020* (WA); *Serious Sex Offenders Act 2013* (NT). See also *Criminal Code* (Cth), Divs 105 and 105A; *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (High Risk Offenders) Act 2017* (NSW); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

193 *Criminal Code*, ss 395.5(1) and 395.8.

194 *Criminal Code*, s 395.2(1) definition of "serious violent or sexual offence".

195 *Criminal Code*, s 395.13(1)(b).

regarding the risk of the offender committing a serious violent or sexual offence.[196] A party to a community safety order proceeding may adduce evidence or make submissions to the Court.[197] The Minister is required to ensure that reasonable inquiries are made to ascertain any facts known to any Commonwealth law enforcement officer that would reasonably be regarded as supporting a finding that the community safety supervision order should not be made.[198]

106 The scheme under Div 395 of the *Criminal Code* is mutually exclusive with the imposition of the impugned conditions under cl 070.612A(1) of Sch 2 to the *Migration Regulations*.[199] In *YBFZ*, the plurality observed that the contrast between cl 070.612A(1) and the community safety order regime is "stark".[200] The stark contrast remains. There is also a stark contrast between cl 070.612A(1) and the post-sentence supervision and detention schemes which this Court has previously considered.[201]

107 Conditions of the kind in issue might be imposed on persons granted bail or admitted to parole. But the grant of bail and parole raise different issues. The power to impose conditions of bail is "not seen by the law as punitive or as appertaining exclusively to judicial power".[202] It is a power ancillary to the process of adjudging and punishing criminal guilt and may therefore be committed to courts as one of the "incidents in the exercise of strictly judicial powers".[203] The grant of parole involves the enhancement of the liberty of a person who would otherwise be in custodial detention because they are serving a sentence consequent upon their conviction for an offence.

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196 *Criminal Code*, ss 395.9(5), 395.11(1)(b)(i), 395.13(1)(b).

197 *Criminal Code*, s 395.28.

198 *Criminal Code*, s 395.8(2)(b).

199 *Migration Act*, s 76AA(1), (6), (7).

200 (2024) 99 ALJR 1 at 21 [72]; 419 ALR 457 at 480.

201 See, eg, *Fardon* (2004) 223 CLR 575 at 587-588 [6]; *Benbrika [No 1]* (2021) 272 CLR 68 at 84-88 [7]-[12]; *Garlett* (2022) 277 CLR 1 at 16-21 [14]-[33].

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

203 *Davison* (1954) 90 CLR 353 at 368, quoting *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151; *Vella* (2019) 269 CLR 219 at 281 [157].

The plaintiff

108 The plaintiff is a citizen of Papua New Guinea who first arrived in Australia in 2000 as a child and a dependant on his father's temporary visa. In November 2006, while still a minor, the plaintiff was convicted of murder and sentenced to a lengthy term of imprisonment. In December 2017, he applied for a Protection (Subclass 866) visa. In January 2018, he was released on parole and taken into immigration detention. Between February 2018 and May 2022, his application for a protection visa was refused on four separate occasions, but each refusal decision was set aside following merits or judicial review.

109 In October 2022, the plaintiff was granted a protection visa and released from immigration detention. In May 2023, he committed offences against his partner and his partner's father. He entered a plea of guilty in relation to the offence against his partner's father and was sentenced to three months' imprisonment. In May 2024, his protection visa was cancelled. In July 2024, he entered pleas of guilty in relation to the offences against his partner and was sentenced to an aggregate term of 18 months' imprisonment. In December 2024, the plaintiff was released on parole and taken into immigration detention.

110 In April 2025, a delegate of the Minister granted the plaintiff a BVR on conditions that included the monitoring and curfew conditions. The plaintiff was released into the community. At the time the plaintiff was granted the BVR, he was on parole and under the supervision of Corrective Services (NSW) and subject to two final apprehended domestic violence orders for the protection of his partner and his partner's father.

Impugned conditions prima facie punitive

111 The Commonwealth properly accepted that the power to impose each of the monitoring and curfew conditions is prima facie punitive given that the nature and severity of the detriments, and the historical incidence of the imposition of detriments of that kind, are unchanged since they were considered in *YBFZ*.[204] Nonetheless, the Commonwealth contended that the detriments imposed by the conditions were "markedly less severe" than those associated with full-time detention in custody and some other forms of interference with bodily integrity.

112 The deprivation of liberty and interference with bodily integrity imposed by the conditions are "material and relatively long-term".[205] The Commonwealth's submissions that sought to characterise the nature and extent of the detriments as more readily capable of justification than those associated with full-time detention

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204 (2024) 99 ALJR 1 at 18 [52], 20 [63]; 419 ALR 457 at 476, 478.

205 *YBFZ* (2024) 99 ALJR 1 at 18 [52], 19 [60]; 419 ALR 457 at 476, 477-478.

in custody and some other forms of interference with bodily integrity must be rejected. As will be seen, none of the Commonwealth's submissions affects the correctness of the plurality's characterisation in *YBFZ* of the extent and severity of the deprivation of liberty and interference with bodily integrity imposed by the same conditions.

Monitoring condition

113 It is not disputed that the detriment caused by requiring a visa holder to wear the "smart tag" (or "anklet") continuously, to keep it charged (requiring the attachment of the on-body charger), and to facilitate its installation, repair and removal is "material and relatively long-term".[206]

114 The components of the electronic monitoring equipment are the same as those that were the subject of this Court's decision in *YBFZ*. In *YBFZ*, the plurality observed that the device is "neither small nor discreet" and would not be "invisible under many forms of clothing (apart from, for example, long loose clothing)".[207] In this proceeding, the Commonwealth contended that the dimensions of the smart tag are such that it is capable of being concealed by ordinary clothing, including by slim-fitting tracksuit pants and suit pants. Whether the smart tag would be visible when worn under different kinds of clothing is plainly a question of degree. It remains the case that 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.[208]

115 There is an interference with bodily integrity and deprivation of liberty resulting from the electronic monitoring condition which is, "by reason of [its] nature or because of historical considerations",[209] prima facie punitive. The nature and severity of the consequences[210] of the imposition of the electronic monitoring at issue in this case – the fact, as explained, that the individual is monitored for 24 hours a day, seven days a week, and during that time required to wear a device that interferes with their bodily integrity and marks them to the public as

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206 *YBFZ* (2024) 99 ALJR 1 at 19 [60]; 419 ALR 457 at 477-478.

207 (2024) 99 ALJR 1 at 19 [58]; 419 ALR 457 at 477.

208 *YBFZ* (2024) 99 ALJR 1 at 20 [62]; 419 ALR 457 at 478.

209 *Lim* (1992) 176 CLR 1 at 27. See also *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 397 [159].

210 *Alexander* (2022) 276 CLR 336 at 399-400 [166]; *Benbrika [No 2]* (2023) 280 CLR 1 at 11 [21], 41 [109], 52 [141], 53 [144]; *Jones* (2023) 280 CLR 62 at 92-93 [76], 118 [149].

a criminal – and the severity of the consequences for breach of the condition, reinforce that the condition is prima facie punitive. Electronic monitoring, by virtue of being a recent technological development, does not have an extensive history of being imposed as punishment. However, the contemporary history of electronic monitoring for persons convicted of criminal offences is consistent with its characterisation as prima facie punitive. Electronic monitoring has been used in Australia[211] and other countries[212] as an alternative to prison.

Curfew condition

116 As the plurality explained in *YBFZ*, the "essential character of the curfew condition is the confinement of the person's movement, every night, to a single location".[213] The detriments imposed by the curfew condition are not "comparatively slight" or "modest",[214] nor is the detention imposed by the condition "trivial [or] transient in nature".[215] This is because, for up to one-third of every day, the person is confined to a specified place and they are required to remain at that specified place.[216]

117 It may be accepted that the Minister may mitigate the harshness of the curfew condition by varying the curfew hours applicable to individual visa holders upon their request.[217] Even where the hours of the curfew condition have

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211 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW), s 73A(2)(b); *Sentencing Act 1991* (Vic), s 48LA; *Sentencing Act 2017* (SA), s 72(1)(h); *Sentencing Act 1995* (WA), s 67A; *Sentencing Act 1997* (Tas), s 42AD(1)(g); *Sentencing Act 1995* (NT), s 47(1)(d)(ii). See also Kornhauser and Laster, "Punitiveness in Australia: electronic monitoring vs the prison" (2014) 62 *Crime, Law and Social Change* 445 at 453; Bartels and Martinovic, "Electronic monitoring: The experience in Australia" (2017) 9 *European Journal of Probation* 80; Pathinayake, "Electronic monitoring: A first step towards an integrated correctional system" (2020) 49 *Australian Bar Review* 294.

212 Black and Smith, *Electronic Monitoring in the Criminal Justice System*, Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice No 254 (May 2003); Scottish Government, *Electronic Monitoring: Uses, Challenges and Successes* (2019).

213 (2024) 99 ALJR 1 at 17 [49]; 419 ALR 457 at 475.

214 *YBFZ* (2024) 99 ALJR 1 at 18 [50]; 419 ALR 457 at 476.

215 *YBFZ* (2024) 99 ALJR 1 at 18 [51]; 419 ALR 457 at 476.

216 *YBFZ* (2024) 99 ALJR 1 at 18 [51]; 419 ALR 457 at 476.

217 *Migration Regulations*, Sch 8, cl 8620(1).

been varied, the deprivation of liberty will be material and relatively long-term. Where the Minister does not vary the ordinary hours, the condition will apply in the manner described in *YBFZ*.

118 In this case, the Commonwealth submitted that the ordinary curfew hours of 10 pm to 6 am encompass a period during which most people are within their overnight accommodation, quite independently of any curfew. That may be accepted only as a very general proposition. There is, of course, variation in behaviour in the community, including having regard to differing social and economic patterns. The persuasive force of the Commonwealth's argument is also blunted by the fact that, as the plurality observed in *YBFZ*, a visa holder cannot travel any distance that would prevent them from returning in time to a notified address.[218]

119 It is true that the curfew condition imposes no restriction on who can live with, visit or communicate with the visa holder during curfew hours, or on what the visa holder can do during those hours. That a person who is confined to their accommodation remains free to move within and associate with others within that accommodation does not deny that they are deprived of their liberty. The power to impose the curfew condition is a power of "detention", a deprivation of liberty, in the sense in which that word was used in *Lim*. "Whatever the conditions of detention, the detention itself involves involuntary deprivation of liberty."[219] That is the fundamental point to which the *Lim* principle is directed – the limits on the power to involuntarily deprive a person of their liberty.[220]

Does cl 070.612A(1) in authorising the impugned conditions have a legitimate, non-punitive purpose?

120 The imposition of each of the monitoring and curfew conditions by the Executive Government of the Commonwealth is prima facie punitive. The question then is whether the imposition of the conditions is justified: is the power reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose, so that its constitutional character will be non-punitive?[221] As was foreshadowed,[222] the impugned conditions are not imposed for a legitimate, non-punitive purpose.

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218 (2024) 99 ALJR 1 at 18 [51]; 419 ALR 457 at 476.

219 *Behrooz* (2004) 219 CLR 486 at 499 [21].

220 See [67]-[77] above. See also *Plaintiff M68* (2016) 257 CLR 42 at 154 [356].

221 *YBFZ* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

222 See [63]-[64] above.

Purpose of cl 070.612A(1)

121 The purpose of a provision is what the provision "is designed to achieve in fact".[223] Identifying the object or purpose of a provision is similar to identifying the "mischief" that the law is designed to address.[224] The object or purpose will be disclosed by the text, the context and, if relevant, the history of the law.[225]

122 The Commonwealth contended that the purpose of cl 070.612A(1) is to protect any part of the Australian community from serious harm of the kind caused by the commission of a "serious offence". The identified purpose is deficient in two respects. First, the text of the provision suggests that its purpose may be better described as to protect any part of the Australian community from *the substantial risk of* serious harm of the kind caused by the commission of a "serious offence".[226] Those additional words reflect that the purpose of the provision is to protect against the *risk* of harm, it not being certain that the visa holder would otherwise commit a "serious offence". Second, the purpose of the provision is to protect against the substantial risk of serious harm of the kind caused by a serious offence committed *by the cohort of persons to whom it applies*.

123 As the Commonwealth submitted, as a matter of construction, if the Minister is satisfied on the balance of probabilities that there is a substantial risk of the visa holder committing a "serious offence", then it follows that, for the purposes of the provision, there is a substantial risk of the visa holder seriously harming a part of the Australian community. There is no separate inquiry as to whether the harm arising from the commission of that offence is properly characterised as serious. The words "seriously harming any part of the Australian community" are descriptive of the effect that the commission of a "serious offence" is seen to have.

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223 *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132].

224 *McCloy* (2015) 257 CLR 178 at 232 [132], citing *APLA* (2005) 224 CLR 322 at 394 [178]; *Brown v Tasmania* (2017) 261 CLR 328 at 363 [101], 391-392 [208]-[209], 432 [321].

225 *McCloy* (2015) 257 CLR 178 at 284 [320]; see also 212-213 [67], 232 [132]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50]; *Brown* (2017) 261 CLR 328 at 432 [321].

226 See *Benbrika [No 1]* (2021) 272 CLR 68 at 102-103 [46].

Is that purpose legitimate and non-punitive?

124 As has been explained,[227] where, as here, the purpose of depriving a person of their liberty or interfering with their bodily integrity is the protection of the community from harm, the relevant harm must be both "grave and specific" for that purpose to be legitimate.[228] In light of the identified purpose of the provision, answering that question necessarily directs attention to the nature of the risk of harm that is sought to be protected against and the cohort of persons to whom the provision applies.

125 First, the risk of harm to which the impugned clause is directed is not sufficiently grave for protection from that harm to be characterised as a legitimate, non-punitive purpose.

126 In *Minister for Home Affairs v Benbrika*, the plurality accepted that the protection of the community from the risk of harm from a "serious Part 5.3 offence" relating to terrorism was a legitimate, non-punitive purpose for a Commonwealth law which authorises a court to order continued detention.[229] One matter on which the Court divided was the question of the gravity of harm sought to be protected against across the range of terrorism offences designated as "serious".[230] Nonetheless, it was important to the plurality's reasoning that "[t]errorism poses a singular threat to civil society".[231] Terrorism offences are also "defined by reference to motive – religious, political or ideological – and those

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227 See [85] above.

228 *Benbrika [No 1]* (2021) 272 CLR 68 at 113-114 [79]; *YBFZ* (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483. See also *Fardon* (2004) 223 CLR 575 at 588-589 [9], quoting *Veen* (1988) 164 CLR 465 at 495; *Garlett* (2022) 277 CLR 1 at 53 [145]-[148], 71 [190].

229 (2021) 272 CLR 68 at 97 [36], citing *Thomas v Mowbray* (2007) 233 CLR 307 at 490 [544] among other authorities; see also 102-103 [46]. See also *Vella* (2019) 269 CLR 219 at 247 [58], 248 [61]; *YBFZ* (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483.

230 *Benbrika [No 1]* (2021) 272 CLR 68 at 103 [48], cf 108 [64], 118 [93], 119 [97], 120-121 [100]-[101], 144-145 [168]-[170], 146 [175].

231 *Benbrika [No 1]* (2021) 272 CLR 68 at 97 [36].

motives may never change".[232] That motivational context informs the gravity of the conduct.[233]

127 In *Fardon v Attorney-General (Qld)*, this Court upheld the validity of a State post-sentence detention scheme for persons who posed an unacceptable risk of committing a further "serious sexual offence" (that is, a sexual offence involving violence or against children).[234] Not only are sexual offences "almost universally given special significance" in criminal justice systems,[235] but repeated serious sexual offending is often driven by psychological factors and disordered sexual attitudes.[236]

128 In *Garlett v Western Australia*, a majority of this Court held that State legislation conferring on a court the power to impose a continuing detention order on a person who posed an unacceptable risk of committing a "serious offence", which was defined to include the offence of robbery, did not infringe the *Kable* principle.[237] However, it was relevant to the plurality's reasoning that that case concerned State legislation,[238] in respect of which it has been observed that "[t]he *Kable* principle is less strict than the limitations on *Commonwealth* legislative power derived from Ch III".[239] In any event, the conclusion of the dissenting judges that the offence of robbery was not sufficiently grave for the law to fall within an exception to the *Lim* principle reinforces that the constitutional question involves a contestable judgment of degree.[240]

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232 *Garlett* (2022) 277 CLR 1 at 70 [189].

233 *Garlett* (2022) 277 CLR 1 at 70 [189], quoting Ruddock, "Law as a Preventative Weapon Against Terrorism", in Lynch, Macdonald and Williams (eds), *Law and Liberty in the War on Terror* (2007) 3 at 5.

234 (2004) 223 CLR 575 at 593 [24], 601-602 [43]-[44], 619-622 [106]-[120], 648 [198], 658 [234].

235 Floud and Young, *Dangerousness and Criminal Justice* (1981) at 50, cited by *Garlett* (2022) 277 CLR 1 at 69 [188].

236 *Garlett* (2022) 277 CLR 1 at 69 [188].

237 (2022) 277 CLR 1 at 14 [6], 42 [107], 77 [206]-[207]. See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

238 *Garlett* (2022) 277 CLR 1 at 28-29 [57]-[60], 34 [76], 42 [107].

239 *Garlett* (2022) 277 CLR 1 at 67 [184] (emphasis in original), cf 46-47 [123].

240 *Garlett* (2022) 277 CLR 1 at 55-56 [153]-[158], 71 [191], 73 [195], 75 [200].

129 In *YBFZ*, the plurality described the predecessor to cl 070.612A(1)[241] as concerned with a risk of harm that was "designedly unparticularised and indeterminate".[242] It may be accepted that cl 070.612A(1) now identifies that the Minister must be satisfied that the visa holder poses "a substantial risk" of seriously harming any part of the Australian community by committing a "serious offence". However, the Executive Government, like the Parliament, cannot draft itself into power by using labels.[243]

130 The label of "serious offence" obscures the fact that the term is defined to include offences that involve or would involve a range of conduct that would not necessarily present a "grave" risk of harm. For example, "serious offence" is defined to include an offence against a law of the Commonwealth, a State or a Territory that is punishable by at least five years' imprisonment and that involves or would involve "threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group", or which involves or would involve "sexual assault" or "domestic or family violence".[244] Plainly those aspects of the definition of "serious offence" will capture some offending which is grave. However, the definition captures a potentially wide range of offending not all of which will present a grave risk of harm. Moreover, the definition of "serious offence" also embraces an offence where the particular conduct constituting the offence involves or would involve "people smuggling".[245] It is not immediately apparent how preventing the substantial risk of an offence of that kind protects any part of the Australian community from serious harm.

131 Significantly, the Minister must only be satisfied on the balance of probabilities that the visa holder poses a "substantial risk" – in the sense of a real, well-founded and not remote risk – of committing one of those kinds of offences, even if the predicted offending is at the lower end of the severity for the relevant offence. The risk to be assessed is not the risk of a particular identified offence but

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241 See [92] above.

242 (2024) 99 ALJR 1 at 22 [76]; 419 ALR 457 at 482.

243 cf *Benbrika [No 1]* (2021) 272 CLR 68 at 145 [168], citing *Australian Communist Party* (1951) 83 CLR 1 at 205-206, 263; see also (1951) 83 CLR 1 at 187-188. See also *Garlett* (2022) 277 CLR 1 at 53 [146]-[147].

244 *Migration Regulations*, Sch 2, cl 070.111 para (b)(iii), (vii), (viii) of the definition of "serious offence".

245 *Migration Regulations*, Sch 2, cl 070.111 para (b)(ix) of the definition of "serious offence".

a class of offences involving particular conduct, making the assessment of risk more abstract and indirect.

132 Second, the cohort of persons to whom cl 070.612A(1) applies, described in sub-cl (3), is defined "very widely".[246] It includes people who hold a visa that was granted under reg 2.25AA in respect of whom, at the time of grant, there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future; people who hold a visa that was granted under reg 2.25AB; and people who hold a visa that was granted under s 195A of the *Migration Act*.

133 As was explained in *YBFZ*, the persons to whom cl 070.612A(1) applies *include* certain individuals with serious criminal histories but are not *limited* to such persons.[247] Rather, the power conferred by the clause is, "on its face, ... 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)".[248] The clause still applies to any person who was, is, or becomes an eligible non-citizen subject to reg 2.25AA or reg 2.25AB of the *Migration Regulations* or holds a visa under s 195A of the *Migration Act*.[249]

134 The Commonwealth submitted that the subset was selected on the basis that it is a group of persons in respect of whom the normal regime of visa cancellation for breach of visa conditions or on character grounds, and then removal from Australia, is not effective. That fact does not make this cohort unique. It is also true of Australian citizens. Of course, in seeking to "respond to felt necessities", the Executive Government, like the Parliament, is not relegated to "resolving all problems ... if it resolves any".[250] But here the Commonwealth has identified no legitimate basis which is consistent with the constitutionally prescribed system of government for confining the cohort in the manner in which the regulations have done so.

135 The alien status of the cohort of persons to whom the provision applies is, by reason of this Court's decision in *NZYQ*, not constitutionally relevant to whether

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246 cf *Vella* (2019) 269 CLR 219 at 294 [196].

247 (2024) 99 ALJR 1 at 16 [37]; see also 21 [74]; 419 ALR 457 at 473; see also 481.

248 *YBFZ* (2024) 99 ALJR 1 at 16 [37]; 419 ALR 457 at 473.

249 cf *YBFZ* (2024) 99 ALJR 1 at 16 [38]; 419 ALR 457 at 473.

250 *McCloy* (2015) 257 CLR 178 at 251 [197]; *Brown* (2017) 261 CLR 328 at 462-463 [422].

the deprivation of liberty and interference with bodily integrity is justified.[251] The Commonwealth accepted as much when it contended that a scheme of this kind could be imposed on Australian citizens in a Territory. The Commonwealth could not make such a law. That is, the Commonwealth could not make a law permitting the Executive to impose a curfew or require the wearing of an ankle bracelet on any person who the Executive concluded posed a substantial risk of committing a "serious offence". Such a law would not have a legitimate, non-punitive purpose. That conclusion applies with no less force when the cohort of persons affected by the law is defined as it is here.

136 Whether it would be possible to read down or sever the provision so that a legitimate, non-punitive purpose may be identified[252] is a question not reached. First, some of the sub-paragraphs of para (b) of the definition of "serious offence" refer to kinds of offending that may or may not be sufficiently "grave" to supply a legitimate, non-punitive purpose. Second, the invalid purpose emerges not just from the manner in which "serious offence" is defined but from the nature of the Minister's required state of satisfaction in relation to the risk that a visa holder will commit a "serious offence" and the cohort of persons to whom the provision applies. Third, and in any event, it is unnecessary to consider how the provision might be read down or severed in circumstances where cl 070.612A(1) is not capable of being seen as necessary for the identified purpose.

Is cl 070.612A(1) reasonably capable of being seen as necessary for a legitimate and non-punitive purpose?

137 If the power to impose each of the conditions had a legitimate and non-punitive purpose, which it does not, it would be necessary to determine whether that power would be reasonably capable of being seen as necessary for that purpose.[253] For the following reasons, the answer would be "no".

138 "Necessary" means "'reasonably appropriate and adapted' rather than essential or indispensable".[254] At this step, the Court is required to assess the relationship between means and ends[255] – that is, between the power to impose a detriment and the legitimate and non-punitive purpose. As such, it is necessary to identify the legal and practical operation of the provision.

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251 See [81] above.

252 cf *Legislation Act 2003* (Cth), s 13(2).

253 *YBFZ* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

254 *YBFZ* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

255 *NZYQ* (2023) 280 CLR 137 at 158 [44].

Cohort on whom the conditions may be imposed

139 As has been explained,[256] the cohort of persons to whom cl 070.612A(1) applies, described in sub-cl (3), is defined very widely. There is no requirement that a person has committed or has been convicted of or sentenced for a "serious offence", or indeed *any* offence, in order for one or both of the impugned conditions to be imposed. The Commonwealth accepted, for example, that the Minister might be required to impose one or more of the conditions if a visa holder has associated with an extremist group or made statements online that indicate a risk that they will commit a "serious offence". Further, one or more of the impugned conditions might be imposed on a visa holder who has been convicted of something less serious than a "serious offence". No correlation is required between the nature or character of any prior offending and that of the "serious offence" that the visa holder is found to pose a substantial risk of committing.[257]

No right by visa holder to make representations before conditions imposed

140 The visa holder only has a right to make representations against the conditions being imposed *after* the conditions have been imposed.[258] That feature contributed to the plurality's conclusion in *YBFZ* that cl 070.612A(1) would not have been reasonably capable of being seen as necessary for the purpose of protecting the Australian community from the risk of harm arising from future offending.[259] That vice of the provision remains.

141 The lack of any opportunity for the visa holder to make representations before the impugned conditions are imposed increases the risk that "the Minister never has the information necessary to meaningfully assess" whether the visa holder poses the relevant risk or whether the imposition of the condition is reasonably necessary and reasonably appropriate and adapted for the provision's purpose.[260] By the time the visa holder has the opportunity to make representations, they have already been deprived of their liberty and their bodily integrity has already been interfered with.

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256 See [132]-[135] above.

257 cf *Garlett* (2022) 277 CLR 1 at 71 [190].

258 *Migration Act*, s 76E(2)-(4).

259 (2024) 99 ALJR 1 at 23 [85]; 419 ALR 457 at 483-484. See also *Alexander* (2022) 276 CLR 336 at 372 [85].

260 *YBFZ* (2024) 99 ALJR 1 at 23 [85]; 419 ALR 457 at 484.

No constraints on source of information or procedure for obtaining information

142 The scheme does not prescribe the information that the Minister is permitted to rely on in forming their opinion as to the relevant risk, nor any procedure by which such information is to be obtained or established. The assessment is not required to be made on the basis of admissible evidence.[261] These features also increase the risk that the Minister might not have "the information necessary to meaningfully assess" whether the visa holder poses the relevant risk or whether the imposition of the condition is reasonably necessary and reasonably appropriate and adapted for the provision's purpose.[262]

143 The assessment of a person's risk of offending is "notoriously difficult" and evaluative.[263] Yet that function is left to be determined by the Minister on the basis of whatever material happens to be before the Minister at the time of the decision. There is no requirement for the Minister to obtain any expert advice or report to evaluate the nature of that risk,[264] to seek any relevant information from the visa holder that might bear on the relevant inquiry, or to ensure that reasonable inquiries have been made to ascertain any facts that would reasonably be regarded as supporting a finding that the conditions should not be imposed.[265]

144 Put another way, there is a distinct possibility that, despite a paucity of relevant evidence or the fact that material evidence weighing against the imposition of the conditions is not before the Minister, the Minister might be satisfied of the relevant matters on the balance of probabilities and therefore impose one or both of the impugned conditions.

Required state and degree of satisfaction

145 Despite the serious consequences of imposing one or both of the conditions, the Minister is only required to be satisfied "on the balance of probabilities" that the visa holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence.[266] As has been

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261 cf *Benbrika [No 1]* (2021) 272 CLR 68 at 85 [10].

262 *YBFZ* (2024) 99 ALJR 1 at 23 [85]; 419 ALR 457 at 484.

263 *Kable* (1996) 189 CLR 51 at 123. See also *Veen v The Queen* (1979) 143 CLR 458 at 464; *McGarry v The Queen* (2001) 207 CLR 121 at 141-142 [61].

264 cf *Benbrika [No 1]* (2021) 272 CLR 68 at 85-86 [9]-[10], 99 [40].

265 cf *Benbrika [No 1]* (2021) 272 CLR 68 at 87-88 [12].

266 cf *Benbrika [No 1]* (2021) 272 CLR 68 at 85 [10], 99 [40].

explained,[267] that required state of satisfaction attaches to classes of offences involving particular conduct, making the assessment of risk more abstract and indirect than if the Minister were assessing the risk of the visa holder committing a particular offence. Of course, in reaching the required state of satisfaction, the Minister must act reasonably.[268]

146 The fact that the Minister is required to reach a state of satisfaction that the imposition of the condition is "reasonably necessary" and "reasonably appropriate and adapted … for the purpose of protecting any part of the Australian community from serious harm by addressing" the substantial risk of the visa holder committing a serious offence cannot and does not determine whether the legal and practical operation of the provision as a whole is reasonably capable of being seen as necessary for a legitimate, non-punitive purpose. The Executive Government, like the Parliament, cannot draft itself into power by dressing the clause in the garb of constitutional validity.[269]

Order in which conditions required to be considered

147 The Minister is required to consider whether to impose the monitoring condition first, and only after considering whether to impose that condition must the Minister consider whether to impose the curfew condition. The effect is that, in deciding whether to impose the monitoring condition, the Minister must not have regard to whether the other conditions (such as the curfew condition) would render unnecessary for the clause's purpose the imposition of the monitoring condition. That feature of cl 070.612A(1) reveals a disconnection between means and ends.

148 Between considering whether to impose the monitoring and curfew conditions, the Minister must consider whether to impose the conditions requiring declaration of the receipt or transfer of large sums and the declaration of large debts and bankruptcy.[270] Although those conditions are not challenged, the Commonwealth accepted that it is "not particularly clear" how they relate to the clause's purpose, except that they might be relevant to the substantial risk of a "serious offence" involving the production, publication, possession, supply or sale of, or other dealing in, child abuse material.

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267 See [131] above.

268 See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 349 [24], 362 [63], 370 [88]-[89]; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 564 [53], 575 [89], 583 [131].

269 cf *Australian Communist Party* (1951) 83 CLR 1 at 205-206, 263.

270 See [98] above.

No time limit within which Minister is to decide whether to impose second visa without conditions

149 After the grant of the first visa, assuming that visa is subject to the monitoring and curfew conditions, the Minister is required "as soon as practicable" to invite the visa holder to make representations about why their visa should not be subject to one or more of the impugned conditions "within the period and in the manner specified by the Minister".[271] There is no time limit as to how long after the conditions have been imposed, or the visa holder provides any representations, the Minister is required to consider those representations and determine whether a second visa should be granted without the conditions. Until such time, or such time as the visa holder successfully challenges the imposition of any conditions by judicial review, the visa holder will remain deprived of their liberty and subject to ongoing interference with their bodily integrity. The period during which one or more of the impugned conditions might apply despite the criteria in cl 070.612A(1) not being satisfied, having regard to the visa holder's representations, is indefinite.

Period for which the impugned conditions are imposed

150 Regulation 2.25AE(1) provides that, if a condition listed in cl 070.612A(1) is imposed on the grant of a BVR, it remains in force for a period of 12 months from the date of the grant. The imposition of the conditions for a fixed period of 12 months weighs against their characterisation as reasonably capable of being seen as necessary. If the Minister decides to grant a further visa subject to the impugned conditions after those 12 months, a person would still only be given the opportunity to make representations about the re-imposition of the impugned conditions *after* that had occurred.

Review rights

151 Where the visa holder makes representations following the Minister's decision to impose one or more of the impugned conditions, the Minister must provide reasons for the subsequent decision whether or not to grant a second visa not subject to any one or more of the conditions.[272] The Minister's decision to impose the impugned conditions, and not to grant a second visa that is not subject to the conditions, is reviewable by the courts, including on the ground that the Minister reached the required state of satisfaction unreasonably.[273]

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

272 *Migration Act*, s 76E(5).

273 See *Li* (2013) 249 CLR 332 at 351-352 [30], 363-364 [67], 370-371 [90]; *SZVFW* (2018) 264 CLR 541 at 551 [12], 565 [54], 572 [78], 574 [84].

That the visa holder poses the relevant risk, and that the imposition of the impugned condition is reasonably necessary and reasonably appropriate and adapted, as opposed to the Minister's satisfaction on the balance of probabilities as to those facts, are not objective jurisdictional facts for the purposes of judicial review.[274] There is an evident contrast between the reviewability of the Minister's decision and that of a decision of a court to impose conditions depriving a person of their liberty, which may be subject to appeal by way of rehearing as of right.[275]

Conclusion

152 The imposition of each of the monitoring and curfew conditions on a non-citizen by the Executive Government of the Commonwealth involves one or both of a deprivation of liberty and interference with bodily integrity that is prima facie punitive and cannot be justified. To the extent that cl 070.612A(1) authorises the imposition of those conditions, it exceeds the power conferred by s 504 of the *Migration Act* when that power is construed subject to Ch III of the *Constitution*. Given that conclusion, it is unnecessary to consider the plaintiff's alternative argument that s 504 of the *Migration Act*, in authorising the relevant operation of cl 070.612A(1), is not supported by the aliens power in s 51(xix) of the *Constitution*. The questions of law stated for the opinion of the Full Court should be answered in the terms set out above.

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274 cf *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28].

275 cf *Benbrika [No 1]* (2021) 272 CLR 68 at 87 [11].

EDELMAN J.

Introduction

153 One of the purposes of a separation of powers is the protection of the liberty of the individual.[276] Although that liberty purpose of the separation of powers does not have independent and direct effect,[277] this purpose underlies the separation of Commonwealth judicial power implied in the *Constitution*[278] and the principles concerning the recognition of the separate judicial power in Ch III of the *Constitution*, "The Judicature". For decades, and in many, many cases, the established concept of punishment has been used, with limited exceptions, to identify a category of Commonwealth power which, within the separation of powers implied by the *Constitution*, is exclusively judicial. At the margins, the identification of whether a law is punitive can be difficult. The exercise should be undertaken by reference to the notion of punishment which has been long understood in the law, without undue complexity or fiction and without creating a unique concept of punishment for constitutional purposes.

154 Consider the example of a power to detain a person and to attach to them a monitoring device as a consequence of their conviction of a serious offence. There is no doubt that this power is punitive and therefore exclusively judicial. Now consider a second example of a power to detain and constrain the same person, who, having committed the serious offence, is thought to pose a substantial risk of committing another serious offence, with detention and constraint seen to be reasonably necessary for the purposes of addressing that risk.

155 At its most basic, the question in this case is whether the power in the second example is punitive. When compared with the first example, the power in the second example imposes on the same person the same consequences for the same crime with some of the same purposes. Importantly, in both examples, the person's offending enlivens the power to impose the consequences. In the first

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276 Montesquieu, *The Spirit of Laws* (Nugent trans, 1873), bk 11, ch 6 at 174.

277 *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at 33 [86].

278 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 390-393; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11; *Grollo v Palmer* (1995) 184 CLR 348 at 392-393; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-12; *Nicholas v The Queen* (1998) 193 CLR 173 at 256 [201(3)] fn 330; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 275 [140]; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 133-134 [141]. See also *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 44 [173]; 419 ALR 457 at 511.

example, the consequence of that offending is backward-looking retribution for the offence as well as forward-looking deterrence and incapacitation from further offending. In the second example, the consequence is forward-looking deterrence and incapacitation to reduce a substantial risk of the commission of a serious offence in the future.

156 It is difficult to see why the same doctrine of separation of Commonwealth judicial power, based upon the same underlying concern for liberty, and utilising the same concept of punishment, should treat these two powers differently. In *Vella v Commissioner of Police (NSW)*,[279] four members of this Court assumed that detention in the second example would be punitive, observing that "[t]here are good reasons why such powers, if they are to exist, should be exercised by the judiciary".

157 In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*,[280] this Court considered Commonwealth legislation and regulations that purported to give a power and a duty to impose conditions of home detention and constraint (by ankle monitoring device) upon certain people released from immigration detention. The power and duty was not given to the judiciary. It was given to the Minister to be exercised "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".[281] A majority of this Court held that the power and duty was an exclusive judicial power that could not be conferred upon the Executive.[282]

158 The day after delivery of that 2024 decision in *YBFZ*, the Governor-General in Council made the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth), which amended the *Migration Regulations 1994* (Cth). Once again, these "2024 Amendments" did not confer powers on the judiciary. Instead, the amended *Migration Regulations* purported to give the Minister the same powers but enlivened by different conditions, including (in broad terms) a requirement that the Minister is satisfied that the person poses a substantial risk of committing a serious offence and that the condition is reasonably necessary and reasonably appropriate and adapted to addressing that risk.

159 The 2024 Amendments that introduced the powers for the Executive to detain and constrain, by imposing home detention and monitoring conditions, are

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279 (2019) 269 CLR 219 at 260-261 [90].

280 (2024) 99 ALJR 1; 419 ALR 457.

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

282 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23 [83], 24-25 [90]-[92]; 419 ALR 457 at 483, 485-486.

invalid. More precisely, the scope of the regulation-making power in the *Migration Act 1958* (Cth)[283] should be partially disapplied in its application that would empower these 2024 Amendments,[284] thus rendering this aspect of the 2024 Amendments beyond power. The questions in this special case must be answered accordingly.

Punishment as a concept generally to identify exclusive judicial power

The punishment category of exclusive judicial power

160 In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, the joint judgment of Brennan, Deane and Dawson JJ (with whom Gaudron J relevantly agreed[285]) reiterated the well-established principle[286] within the separation of powers in the *Constitution* that the "adjudgment and punishment of criminal guilt under a law of the Commonwealth" are generally part of the exclusive role of the judiciary.[287] The concepts of adjudgment of criminal guilt and punishment are closely related but separate limbs.[288] Those concepts have been used as a matter of substance to mark out exclusive judicial power in many cases.

161 The category of punishment was treated in *Lim* as one general test, with limited exceptions, which identifies where a power is exclusively judicial. The use of the category in that way has been recognised and applied in many cases with the meaning of punishment being its ordinary conception (even if some cases then artificially extended that meaning). This concept of punishment was recognised or

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283 *Migration Act 1958* (Cth), s 504(1) read with ss 41(1), 41(3).

284 *Migration Act 1958* (Cth), s 3A.

285 (1992) 176 CLR 1 at 53.

286 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444; *R v Davison* (1954) 90 CLR 353 at 383; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536-539, 607-610, 613-614, 632, 647, 649, 685, 689, 703-707, 721.

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

288 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [15]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 423 [235]; *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at 15 [31]-[33], 24 [60], 34-35 [90], 51 [139].

applied in *Kruger v The Commonwealth*.[289] It was similarly recognised or applied in *Al-Kateb v Godwin*,[290] in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,[291] in *Re Woolley; Ex parte Applicants M276/2003*,[292] in *Albarran v Companies Auditors and Liquidators Disciplinary Board*,[293] in *Haskins v The Commonwealth*,[294] in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*,[295] in *Magaming v The Queen*,[296] in *Kuczborski v Queensland*,[297] in *Duncan v New South Wales*,[298] in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*,[299] in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*,[300] in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*,[301] in *Falzon v Minister for Immigration and Border Protection*,[302] in *Minogue v Victoria*,[303] in *Vella v Commissioner of Police (NSW)*,[304] in *The Commonwealth v*

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289 (1997) 190 CLR 1 at 62, 84, 109, 162.

290 (2004) 219 CLR 562 at 584 [44]-[45], 649-650 [261]-[263], 659 [291], 662-663 [303].

291 (2004) 219 CLR 486 at 499 [21], 527 [118], 559 [218].

292 (2004) 225 CLR 1 at 12 [16]-[17], 23-27 [53]-[62], 75 [221]-[222], 77 [227], 85 [261].

293 (2007) 231 CLR 350 at 356 [8], 363 [35], 379 [97].

294 (2011) 244 CLR 22 at 35-37 [21]-[24], 57-60 [96]-[100].

295 (2013) 251 CLR 322 at 385 [206]-[207].

296 (2013) 252 CLR 381 at 396 [47], 399-401 [61]-[67].

297 (2014) 254 CLR 51 at 120 [233]-[234].

298 (2015) 255 CLR 388 at 407 [41], 408 [43].

299 (2015) 256 CLR 569 at 592-593 [37]-[38], 610-612 [94]-[98], 639-640 [191]-[194], 651-652 [235]-[236].

300 (2015) 255 CLR 352 at 371-372 [32]-[34], 386 [79].

301 (2016) 257 CLR 42 at 69-70 [40]-[41], 124 [238].

302 (2018) 262 CLR 333 at 340 [14]-[15], 341 [17], 357 [88].

303 (2019) 268 CLR 1 at 15 [13], 26-27 [48].

304 (2019) 269 CLR 219 at 279-280 [152].

AJL20,[305] in *Alexander v Minister for Home Affairs*,[306] in *Jones v The Commonwealth*,[307] in *ASF17 v The Commonwealth*,[308] and in *CZA19 v The Commonwealth*.[309]

162 In many of those cases, and others, members of this Court considered whether a law invalidly permitted the Executive to adjudicate guilt or impose punishment (or both). In many of those cases, the question was whether the executive detention or other harsh consequences imposed on a person were punishment and therefore the subject of exclusive judicial power. It is too late now, even if it were thought desirable to do so, to adopt the approach, suggested by Gummow J in *Fardon v Attorney-General (Qld)*,[310] of abandoning the criterion of punishment as a category of exclusive judicial power with limited exceptions.

163 The suggestion of Gummow J in *Fardon* was that the criterion of punishment as a category of exclusive judicial power should be replaced with a new constitutional principle constraining, other than in exceptional cases, the exercise of *any* Commonwealth power, legislative, judicial, or executive, for the State to detain a citizen in custody involuntarily without adjudication of criminal guilt.[311] Such a principle would no longer be concerned with the separation of judicial power but would create a general constitutionally implied freedom from Commonwealth power to detain. Further questions would arise: (i) How would the boundaries of, or exceptions to, this freedom from detention be identified beyond those recognised in *Lim*? (ii) What would count as involuntary detention? (iii) Why should interference with bodily integrity not be protected alongside interference with liberty by involuntary detention? (iv) What about other rights or values closely associated with liberty, such as privacy and dignity?

164 Perhaps the largest question that would arise is the source of such a new implication, since the new implication would not be a principle that separates power but would be one which limits or removes power. The true answer may be that to the extent that the principle exists it is much more constrained. An answer,

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305 (2021) 273 CLR 43 at 63 [22], 106-107 [137].

306 (2022) 276 CLR 336 at 367 [71]-[72], 396 [158], 423 [235].

307 (2023) 280 CLR 62 at 80-81 [39], 92 [75], 118 [148], 130 [188].

308 (2024) 98 ALJR 782 at 795 [66]; 418 ALR 382 at 398.

309 (2025) 99 ALJR 650 at 660 [40], 665 [63], 671 [91]; 422 ALR 133 at 143-144, 150, 157-158.

310 (2004) 223 CLR 575 at 612 [80]. See also at 612-613 [81]-[82].

311 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [80].

which respects the values upon which the principle rests as informing the limits of Commonwealth power, but which does not require the creation of unnecessary constitutional implicatures, may be that the principle is simply about the limits of any Commonwealth head of power. The often-repeated, perhaps facile, statement that constitutional powers in s 51 are to be interpreted "with all the generality which the words used admit"[312] does not mean that powers in s 51 are unlimited in scope. There are legal limits to all power other than in a dictatorship.[313] And at least one recent decision of a majority of this Court has suggested, sub silentio, that the requirement that a head of power confined by subject matter or purpose must have a sufficiently substantial connection with that subject matter or purpose does much more than merely identify extreme outer limits of a power.[314] Questions of sufficiency may invite analysis of constitutional values. Unfortunately, as I explain below, the issue of the limits of Commonwealth legislative power was conflated in *Lim* with the question of constitutional separation of Commonwealth powers.

The boundaries of the concept of punishment

165 Although the concept of punishment can be difficult to apply beyond the core instances of punishment, this difficulty of application does not deny the existence of a clear core of the concept of punishment. In a number of decisions of this Court,[315] reference has been made to H L A Hart's "standard case" of punishment broadly involving:[316] (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

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312 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225, quoted in *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

313 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 53 [117].

314 See, eg, *Spence v Queensland* (2019) 268 CLR 355.

315 See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [265]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 641 [174]; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 158 [204]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 424 [238]; *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at 41 [109], 52 [140]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 32-33 [124]-[125]; 419 ALR 457 at 495-496.

316 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 4-5. See, earlier, Flew, "The Justification of Punishment" (1954) 29 *Philosophy* 291.

and administered by an authority constituted by a legal system against which the offence is committed. But Hart was conscious that this was only the standard case; he recognised that it could be an "abuse" to rely upon the absence of conditions (ii) and (iii) to assert that some unpleasant consequence was necessarily not punishment.[317]

166 The concept of punishment, although raising difficult questions at the margins, must be applied as a matter of substance. Thus, the Commonwealth Parliament could not, merely by relabelling a criminal offence with harsh consequences as "civil", permit the Executive to adjudicate upon a contravention of that norm. The same is true of the concept of punishment. This Court should not be hoodwinked by the sophistry of a strict separation between the concept of "punishment" and that of "protection". As I have repeatedly maintained, protection of the public is a goal of punishment; it is a fundamental category error to treat protection and punishment as entirely independent categories.[318]

167 Although there are difficulties with some of the reasoning in the decisions of this Court in this area,[319] an effort should be made to follow the precedent of this Court. Nevertheless, the reasoning which asserts a strict category separation in all cases between punishment and protection is so obviously wrong that it should never be followed.[320] Indeed, Hart's path-breaking work on punishment has even

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317 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 5-6. See *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 32-33 [124]-[125]; 419 ALR 457 at 495-496.

318 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 149 [183]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 380 [111]; *Garlett v Western Australia* (2022) 277 CLR 1 at 91 [249]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 34 [130]; 419 ALR 457 at 497-498.

319 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 98-100 [38]-[41]; *Garlett v Western Australia* (2022) 277 CLR 1 at 24-25 [46], 25 [49], 27-28 [55]. Compare *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589 [11], 597 [34], 612-613 [81]-[82], 631 [147], 644 [185], 647 [196], as discussed in *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 162-164 [214]. See also *Chester v The Queen* (1988) 165 CLR 611 at 619; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 254-255 [78].

320 *Vunilagi v The Queen* (2023) 279 CLR 259 at 311 [164].

been described as attributing the goal of protection or reduction in wrongdoing as the *only* justification for punishment.[321]

168 The notion of "protection of the community" encompasses three of the commonly asserted purposes of punishment (although these purposes are not exclusively confined to punishment): incapacitation, specific deterrence, and general deterrence. Of these, "[i]ncapacitation is the simplest of theories, because, as the name suggests, the good that punishment achieves is that it incapacitates an offender by doing something to him that prevents him from committing further crimes".[322] And, as for specific and general deterrence, it ought to be undeniable that these are part of the purposes of punishment adopted by the law. For instance, the doctrine of this Court, however regrettably,[323] is that the sole purpose of civil penalties regimes—regimes avowedly concerned with punishment—is deterrence.[324]

169 As I have previously explained, many criminal justice theorists rightly take the view that there are instances of punishment, which can be described as "protective punishment",[325] in which the harsh consequence imposed is not concerned with retribution but focuses upon the backward-looking aspect of punishment (the commission of a past offence) only as an incident of the forward-

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

322 Moore, *Placing Blame: A General Theory of the Criminal Law* (1997) at 84.

323 *Laming v Electoral Commissioner of the Australian Electoral Commission* (2025) 99 ALJR 1260 at 1283 [125]-[127]; 424 ALR 359 at 388-389.

324 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450, explaining *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 506 [55] and *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at 195-196 [116].

325 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 148-149 [182]; *Garlett v Western Australia* (2022) 277 CLR 1 at 94 [258]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 160-161 [51]; *ASF17 v The Commonwealth* (2024) 98 ALJR 782 at 801 [97]; 418 ALR 382 at 406; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 33 [126]; 419 ALR 457 at 496.

looking aspect (the possible commission of future offences) with the purpose of punishment being the protection of the community.[326]

Understanding the YBFZ approach to punishment

170 In *YBFZ*,[327] a joint judgment of four members of this Court proposed what one leading commentator has described as a "structured, sequenced" approach to the constitutional test of punishment.[328] That "structured punishment" approach seems to require that four questions be asked, apparently in order:[329]

1. Is the law "prima facie punitive" by default because of the extent to which it curtails liberty?

2. If the law is not punitive by default, is the law properly characterised as punitive by reference to the meaning and scope of the law, its practical and legal operation, and its purpose?

3. Does the law have a legitimate and non-punitive purpose?

4. If a purpose of the law is legitimate and non-punitive, is the law reasonably capable of being seen as necessary for that legitimate and non-punitive purpose?

171 On one view, expressed by some members of this Court in a different context, such a "structured punishment" approach might be labelled as merely a "tool of analysis" and disregarded as having no precedential effect if it is not

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326 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 154-155 [196], referring to 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; Nathan, "Punishment the Easy Way" (2022) 16 *Criminal Law and Philosophy* 77 (published online 2 October 2020).

327 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; 419 ALR 457.

328 Hammond, "Key issues with the constitutionality of preventive control powers", *LSJ Online*, 7 February 2025.

329 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [16]-[18]; 419 ALR 457 at 468.

considered to assist in a particular case.[330] But, as I have previously said, such reasoning diminishes the authority of this Court and should not be adopted.[331] All legal reasoning of a majority of this Court has some precedential value. And where that legal reasoning is dispositive, and expressed at the right level of generality, then it is binding upon lower courts and should not be departed from in this Court unless re-opened and overruled.

172 In my view, however, the reasoning of the joint judgment in *YBFZ* concerning the first three questions should not be understood as a structured, or deconstructed, approach to punishment but rather as the identification of overlapping aspects of a single enquiry into whether a law is punitive. Despite the terms in which the structured approach is expressed in *YBFZ*, the first three questions plainly cannot be independent tests or criteria for whether a law is punitive. For instance, if a law is characterised by reference to question (2) as punitive based upon its text, context, and purpose ("the end or object the law is designed to achieve"[332]), then it would be nonsense for a court then to conclude, at question (3), that the law is valid because it has a legitimate and non-punitive purpose. A law that authorised the Executive to imprison people who are homeless for the commission of offences could not become valid if the law also had the purpose of providing accommodation for those people. An invalid constitutional purpose is not saved by adding a valid purpose to it.[333]

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330 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 72 [101]; *Brown v Tasmania* (2017) 261 CLR 328 at 376 [158], 464 [427], 476-477 [473]; *Clubb v Edwards* (2019) 267 CLR 171 at 224 [158], 305 [390]; *Palmer v Western Australia* (2021) 272 CLR 505 at 552 [140], 553 [144], 572 [198]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 593 [172]; *Babet v The Commonwealth* (2025) 99 ALJR 883 at 896-897 [49], 900-901 [72], 936 [242]; 423 ALR 83 at 97, 102-103, 148; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1080-1081 [343]; 423 ALR 241 at 341.

331 *Clubb v Edwards* (2019) 267 CLR 171 at 332-333 [468], citing *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48; *Babet v The Commonwealth* (2025) 99 ALJR 883 at 923 [177]; 423 ALR 83 at 132; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1054 [215]-[217]; 423 ALR 241 at 305-306.

332 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468.

333 *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1045 [177]-[179]; 423 ALR 241 at 293. See also (2025) 99 ALJR 1000 at 1022 [58], 1038 [140], 1065 [270]-[271]; 423 ALR 241 at 262, 283, 320-321. Compare (2025) 99 ALJR 1000 at 1089-1091 [392]-[394]; 423 ALR 241 at 353-355.

173 These first three questions also cannot be the only questions that fall for consideration in characterising a law as punitive or not. For instance, although there is no doubt that the characterisation exercise will be informed by the underlying values that support the separation of powers[334] (with the more extreme the constraint upon a person's liberty the more likely a characterisation that the law is punitive[335]), historical considerations can also be very important. Indeed, the joint judgment in *Lim* described limited instances of "traditional powers" of detention which, even though punitive, were not exclusively judicial.[336]

174 The best understanding of the approach of the joint judgment in *YBFZ* must be that, despite the apparent structured approach to punishment, the first three questions were not intended to be separate enquiries but were instead intended only as indicia of relevant matters to consider in the single characterisation enquiry of whether a law is punitive: the constraint upon liberty and harshness of the consequences of the law (question (1)); the importance for characterisation of a focus upon the text and context of the law (question (2)); and the careful identification of the purpose of the law (question (3)). Those matters and all other relevant circumstances of the law should be assessed against the standard case of punishment.

175 The fourth question is different. A law whose purpose is, or purposes are, legitimate and non-punitive is, by definition, a law that is not punitive. Although the disproportionate pursuit of a purpose might invite an inference that some other purpose exists, the law cannot be deemed to be punitive simply because it pursues one of its purposes in a disproportionate manner. As I explained in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[337] and *YBFZ*,[338] it is a fiction, or a "deeming", derived from *Lim* to treat a law as punitive if the means adopted by the law are disproportionate to its legitimate ends (ie, not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose). Yet, as six members of this Court said in *Plaintiff M96A/2016 v The Commonwealth*,[339] on numerous occasions since *Lim* it has been reiterated that the detention of aliens

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334 See Ananian-Welsh, "History and Values in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*" (2025) 36 *Public Law Review* 3.

335 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 426 [244].

336 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28. See *Private R v Cowen* (2020) 271 CLR 316 at 387 [180].

337 (2023) 280 CLR 137 at 161 [52].

338 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 25 [93]; 419 ALR 457 at 486.

339 (2017) 261 CLR 582 at 593 [21].

will contravene Ch III of the *Constitution* if it is not reasonably capable of being seen as necessary for the purposes of deportation, to enable an application for an entry permit to be made and considered, or for associated purposes.[340]

176 The law, no less constitutional law, should be wary of fictions. They usually conceal reasoning. There is an obvious concealment in the constitutional syllogism that says: (i) laws which authorise punishment by the Executive are invalid; (ii) laws which confer disproportionate powers on the Executive for detention or monitoring of aliens for a legitimate, non-punitive purpose are deemed to be punitive; and therefore (iii) such disproportionate laws are invalid.

177 The concealment lies in *why* such laws are deemed to be punitive in the minor premise of the syllogism. In *YBFZ*, I suggested that the only answer could be that such laws are beyond the scope of Commonwealth power over the subject of aliens.[341] Although the powers within s 51 are to be interpreted "with all the generality which the words used admit",[342] there are limits to every power. The proportionality test derived from *Lim* and raised by the fourth question has a powerful resonance with the test sometimes suggested for so-called "purposive" heads of power,[343] or the so-called incidental operation of heads of power,[344] in s 51. There may be good reasons not to rely upon fine distinctions between aspects of a power (core or incidental) or types of power (purposive or non-purposive) in order to determine whether to apply this proportionality approach,[345] including as a means to ascertain whether a connection with a subject matter falls outside the

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340 See *CZA19 v The Commonwealth* (2025) 99 ALJR 650 at 659 [35], 661-662 [46], 669-670 [85], 670-671 [90]; 422 ALR 133 at 142, 145-146, 156, 157.

341 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 37-42 [142]-[161]; 419 ALR 457 at 502-508.

342 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225, quoted in *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

343 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 317-318, 322-324; *Leask v The Commonwealth* (1996) 187 CLR 579 at 593-594.

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

345 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 40-41 [153]-[159]; 419 ALR 457 at 505-507. See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 93-94; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 317, 375-376, 387-388.

vague adjectival descriptions of connection such as "tenuous",[346] "insubstantial",[347] "remote",[348] or "distant".[349] Indeed, it might be fairly claimed that a majority of this Court has already, albeit in the teeth of other authority, sub silentio adopted such a proportionality approach to heads of Commonwealth power.[350]

The 2024 Amendments, their purpose, and their meaning

178 Prior to the decision of this Court in *YBFZ*, the relevant regulation, cl 070.612A of Sch 2 to the *Migration Regulations*, read 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;
>
> (b) 8617;
>
> (c) 8618;
>
> (d) 8620.
>
> Note: See regulation 2.25AE for the period for which the visa is subject to these conditions (if imposed).

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346 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 338, 353, 354, 369.

347 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 119; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 334, 351, 353, 354, 369.

348 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 354.

349 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369.

350 *Spence v Queensland* (2019) 268 CLR 355 at 402-414 [51]-[84], and particularly at 407 [62]. Compare at 510-511 [350].

(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."

179 The relevant (unchanged) visa conditions are set out in Sch 8. Condition 8621 requires the visa holder to "wear a monitoring device at all times". Condition 8617 requires the visa holder to notify the Department of Home Affairs within five working days of having received or transferred amounts of $10,000 or more within any period of 30 days. Condition 8618 requires the visa holder to notify 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. Condition 8620 requires the visa holder to be subject to home detention, restricting their location to a notified address at prescribed times.

180 Clause 070.612A of the *Migration Regulations* was amended on 7 November 2024 by the 2024 Amendments. The "Amended Regulation" now provides as follows:

"(1) For each of conditions 8621, 8617, 8618 and 8620, the Minister must impose the condition if:

(a) subclause (3) applies to the visa; and

(b) despite the other conditions imposed on the visa by or under this subclause or another provision of this Division, the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and

(c) the Minister is satisfied on the balance of probabilities that the imposition of the condition (in addition to the other conditions imposed by or under this subclause or another provision of this Division) is:

(i) reasonably necessary; and

(ii) reasonably appropriate and adapted;

for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

Note: See regulation 2.25AE for the period for which the visa is subject to these conditions (if imposed).

(2) The Minister must decide whether or not to impose each of the conditions mentioned in subclause (1) in the order in which those conditions are mentioned 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; or

(c) the visa was granted under section 195A of the Act.

(4) Nothing in this clause requires the Minister to decide whether or not to impose a condition mentioned in subclause (1) if the visa must, under subsection 76E(4) of the Act, be granted without it being subject to that condition."

181 A "serious offence" is defined by cl 070.111 of Sch 2 as an offence against a law of the Commonwealth, a State or a Territory where:

"(a) it is an offence punishable by imprisonment for life or for a period, or maximum period, of at least 5 years; and

(b) the particular conduct constituting the offence involves or would involve:

(i) loss of a person's life or serious risk of loss of a person's life; or

(ii) serious personal injury or serious risk of serious personal injury; or

(iii) sexual assault; or

(iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code*); or

(v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv); or

(vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or

(vii) domestic or family violence (including in the form of coercive control); or

(viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or

(ix) people smuggling; or

(x) human trafficking."

182 The purpose of the Amended Regulation is plain: to protect any part of the Australian community from serious harm of the kind caused by the commission of a serious offence. That purpose should not be confused with the *means* by which the purpose is to be achieved:[351] namely, by the identification of, and imposition of conditions upon, a relevant visa holder who poses a substantial risk of causing serious harm in that manner. As the Explanatory Statement which accompanied the 2024 Amendments provides, the conditions have "a protective purpose against serious harm to the Australian community" and that purpose is addressed by "having regard to the risk of harm the non-citizen poses".[352]

183 As for the means by which the purpose is achieved, an issue in dispute was whether the requirement in cl 070.612A(1)(b) for the Minister to be satisfied of "a

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351 See *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 at 1265 [110]; 419 ALR 324 at 351.

352 Australia, Minister for Immigration and Multicultural Affairs, *Migration Amendment (Bridging Visa Conditions) Regulations 2024*, Explanatory Statement at 19.

substantial risk of seriously harming any part of the Australian community by committing a serious offence" involves one criterion or two criteria. One criterion is that the Minister must be satisfied on the balance of probabilities that the visa holder poses a substantial risk of committing a serious offence. A second criterion was said to be that the Minister must also be satisfied that there is a substantial risk that the commission of that serious offence would seriously harm any part of the Australian community.

184 The interpretation that the Minister is required to be satisfied of only one criterion treats serious harm to any part of the Australian community as merely descriptive of the commission of a serious offence. In other words, "conduct is regarded as criminal for the very reason that its commission harms society, or some part of it".[353]

185 By contrast, the interpretation that the Minister is required to be satisfied of two criteria treats cl 070.612A(1)(b) as requiring the Minister to decide whether the potential commission of a serious offence gives rise to a substantial risk of serious harm to any part of the Australian community. It is unlikely that the Commonwealth Parliament intended that the Minister might conclude that there is no substantial risk of serious harm to any part of the Australian community despite the commission of a serious offence. Such a parliamentary intention is even more unlikely in circumstances where "serious offence" is defined but "serious harm" is not. And such a parliamentary intention becomes unlikely in the extreme when it is appreciated that an assessment of whether a serious offence might not cause serious harm to any part of the Australian community could invite potentially bizarre questions. Does the murder of a single person involve serious harm to a *part* of the Australian community? Would the human trafficking of a person from outside Australia cause serious harm to any part of the Australian community? The interpretation that would treat cl 070.612A(1)(b) as containing two criteria must be rejected.

186 An assessment of whether there is a "substantial risk" is a vague criterion but it is of a nature with which courts, at least, are familiar.[354] A substantial risk was described in the Statement of Compatibility with Human Rights, attached to

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353 *Garlett v Western Australia* (2022) 277 CLR 1 at 35 [82], quoting *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 170 [228], in turn quoting *McGarry v The Queen* (2001) 207 CLR 121 at 129 [20].

354 See *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 241 [43], 246-247 [57].

the Explanatory Statement for the 2024 Amendments,[355] as requiring the Minister or their delegate "to be satisfied that the risk of harm to the community is not remote, farfetched or insubstantial". A substantial risk might, on that approach, even be "quite unlikely" to occur.[356]

187 A test of proportionality is also introduced by the requirement in cl 070.612A(1)(c) that the Minister must be satisfied on the balance of probabilities that the condition imposed to address the substantial risk, as an addition to the other conditions considered in the order required by cl 070.612A(2), is "reasonably necessary" and "reasonably appropriate and adapted" for the purpose of protecting any part of the Australian community from serious harm. Those tests, although also vague with a wide margin of appreciation, invoke concepts of proportionality with which courts, at least, are well familiar.[357]

Does the decision in *Benbrika [No 1]* resolve this case?

188 The Commonwealth relied heavily upon the decision of four members of this Court in the majority in *Minister for Home Affairs v Benbrika*[358] ("*Benbrika [No 1]*"), submitting that that decision had determined that the purpose of protecting the community from harm was a legitimate, non-punitive purpose.

189 In *Benbrika [No 1]*, this Court considered the validity of a law that provided for the continued detention of a terrorist offender if, in broad terms, at the conclusion of the offender's sentence a Supreme Court was satisfied, to a high degree of probability, that the offender posed an unacceptable risk of committing a terrorist offence.[359] Mr Benbrika's primary submission relied upon the decision in *Lim* to assert that the law was invalid. Mr Benbrika's submission faced an immediate problem. The essence of the principle in *Lim* is concerned with the separation of powers, which requires that each of the dual functions of adjudgment

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355 Australia, Minister for Immigration and Multicultural Affairs, *Migration Amendment (Bridging Visa Conditions) Regulations 2024*, Explanatory Statement at 8.

356 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

357 See *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 243-244 [49]-[51], 248 [60].

358 (2021) 272 CLR 68.

359 *Benbrika [No 1]* (2021) 272 CLR 68 at 82-83 [2].

and punishment of criminal guilt be exclusively judicial.[360] As the joint reasons of Kiefel CJ, Bell, Keane and Steward JJ explained in *Benbrika [No 1]*, the relevant issue in *Lim* was whether the judicial power of the Commonwealth had been impermissibly conferred upon the Executive.[361] But the law in *Benbrika [No 1]* conferred power on the judiciary, not the Executive.

190 Since the impugned law in *Benbrika [No 1]* conferred power on the judiciary, the primary argument for Mr Benbrika was not really concerned with the *Lim* principle of separation of powers at all. It was instead an argument "that no arm of the federal government may authorise the detention of a person in custody for the purpose of protecting the community against the unacceptable risk of harm posed by a terrorist offender".[362] It was an argument about a lack of power.

191 Mr Benbrika put his argument about lack of power in two ways. First, he submitted that this Court should adopt the approach of Gummow J in *Fardon*,[363] and abandon the concept of punishment as a category of exclusive judicial power, replacing it with a general limit on all Commonwealth power, executive or judicial, to detain.[364] That submission was not accepted. But the joint judgment did adopt a limit on Commonwealth power which was described as the "allied *Lim* principle": that, subject to exceptions, "involuntary detention ... exists only as an incident of the adjudgment and punishment of criminal guilt".[365] The joint judgment then considered whether the continued detention of Mr Benbrika was punishment other than for criminal guilt and concluded that it was non-punitive detention, principally for the reason that the detention was protective rather than punitive.[366]

192 There are two grave difficulties with the reasoning of the joint judgment in *Benbrika [No 1]*. The first, which I have addressed above, is the category error of attempting to draw a strict dichotomy between punishment and protection. The second is the notion of an "allied *Lim* principle" that constrains the Commonwealth Parliament from conferring power to detain upon either the Executive or the

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360 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27. See *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at 17-18 [41], 28 [69], 34-35 [90]-[91].

361 *Benbrika [No 1]* (2021) 272 CLR 68 at 90 [18].

362 *Benbrika [No 1]* (2021) 272 CLR 68 at 95 [30].

363 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [80].

364 *Benbrika [No 1]* (2021) 272 CLR 68 at 90 [16], 91-92 [20].

365 *Benbrika [No 1]* (2021) 272 CLR 68 at 91 [19], 95 [28]. See also at 95 [29].

366 *Benbrika [No 1]* (2021) 272 CLR 68 at 98-103 [37]-[47].

judiciary. To the extent that the description of this principle as an "allied *Lim* principle" suggests that this principle is based upon the separation of Commonwealth powers, the reasoning of the joint judgment is wrong. The asserted principle is not "allied" to the separation of powers in *Lim*. It might be understood as a limit on Commonwealth heads of power, such as where the detention is disproportionate. Alternatively, the misnamed "allied *Lim* principle" might be better understood,[367] as Steward J (who was a member of the joint judgment in *Benbrika [No 1]*) recognises in this case, as a constraint, derived from the principle in *Kable v Director of Public Prosecutions (NSW)*,[368] on the conferral upon State or Territory courts of exclusive Commonwealth judicial power.

193 In any event, neither the limits of Commonwealth heads of power nor the principle in *Kable* was properly raised by EGH19 in this case. The submission of EGH19 was that the home detention and monitoring conditions imposed by or under the Amended Regulation were punishment (by reference to the approach in *YBFZ*) and therefore, by the Commonwealth separation of powers, the power to impose such conditions could only have been conferred upon the judiciary. That submission can only be addressed by a proper assessment of the boundaries of the concept of punishment, unimpeded by the category error that treats punishment and protection as always being mutually exclusive.

Are the powers introduced by the 2024 Amendments punitive?

The response to the YBFZ *joint judgment's criticisms of the previous regulation*

194 The Commonwealth pointed to three significant changes made by the 2024 Amendments when the Amended Regulation is compared with the prior regulation. Those changes responded to reasons for the invalidity of the previous regulation that had been expressed in the joint judgment in *YBFZ*.

195 First, a reason for the invalidity of the previous regulation given by the joint judgment in *YBFZ* was that the purpose of the regulation of "protection of any part of the Australian community" was protection from any form of harm at all, however minor, and not merely from the harm of future offending.[369] In my view, that literal interpretation was "highly implausible" as a reflection of the parliamentary intention to respond to prospective offending.[370] Nevertheless, the

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

368 (1996) 189 CLR 51.

369 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 20-22 [64]-[76]; 419 ALR 457 at 479-482.

370 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 29 [112]; 419 ALR 457 at 491-492.

view of the joint judgment was that it was not even "reasonably open"[371] to treat the previous regulation as having a narrower purpose and that the broad purpose of protection from any harm at all was a "fundamental difficulty".[372]

196 Whatever the merit of that interpretation of purpose, the 2024 Amendments made plain that such an interpretation is not to be adopted. It is now clear, and not merely reasonably open, that the purpose of the Amended Regulation is to respond to prospective offending: to protect "any part of the Australian community from serious harm by addressing that substantial risk [of seriously harming any part of the Australian community by committing a serious offence]".[373]

197 Secondly, another reason given by the joint judgment in *YBFZ* for the invalidity of the previous regulation was that the regulation failed to "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 necessary to authorise the Minister not to impose the curfew and monitoring conditions on the person's visa".[374] This concern was also addressed in the Amended Regulation, which, in addition to providing for the nature of the harm (serious harm) arising from the commission of a serious offence, provides for the Minister's satisfaction, on the balance of probabilities, of a substantial risk of that harm.

198 Thirdly, and relevantly to the fourth *YBFZ* question concerning limits to Commonwealth power, the joint judgment in *YBFZ* observed of the previous regulation that the Minister's power to impose the conditions could be exercised even if it could not be, or had not been, established that the imposition of the home detention or monitoring condition was reasonably necessary for the achievement of any legitimate purpose.[375] That criticism was also addressed in the Amended Regulation by requiring the Minister to be satisfied on the balance of probabilities that the imposition of the relevant condition is reasonably necessary and reasonably appropriate and adapted to the protective purpose. As the Commonwealth correctly submitted, the natural implication from the terms of the

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371 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 22 [75]; 419 ALR 457 at 481.

372 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23 [81]; 419 ALR 457 at 483.

373 *Migration Regulations 1994* (Cth), Sch 2, cl 070.612A(1)(b)-(c).

374 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 20 [65]; 419 ALR 457 at 479.

375 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 23 [85]; 419 ALR 457 at 483-484.

Amended Regulation is that the Minister's satisfaction must be formed on reasonable grounds.[376]

Not seeing the wood for the trees

199 The Commonwealth relied upon these three significant changes effected by the 2024 Amendments in response to the joint judgment in *YBFZ*. Each of the three changes directly and substantially addressed the criticisms made by the joint judgment in that decision. But in focusing upon those particular criticisms at the expense of addressing the proper repository of this type of power, the 2024 Amendments evidence a failure to see the wood for the trees.

200 The changes that were made by the 2024 Amendments focused the punishment to be imposed under the Amended Regulation upon a purpose concerned with future offending. The changes tailored the punishment to instances where there was a substantial risk of the commission of a serious offence. And the changes made the punishment more proportionate. But the changes failed to address the foundational basis for the punitive nature of the conditions. For the reasons below, the conditions upon which the Amended Regulation operated depended almost invariably, as a matter of practical reality, upon the commission of past serious offences. The purpose of the conditions remained concerned with incapacitation and deterrence. The conditions remained punishment.

201 The home detention and monitoring conditions of the Amended Regulation are concerned with the future commission of a serious offence by the person subject to those conditions. Although there is no express requirement of past offending, the best predictor of future behaviour in this administrative regime will almost invariably be past behaviour. Hence, the conditions will almost invariably be imposed as a consequence of past offending. This is an example of the "newer penology" to which I referred in *YBFZ* in the course of explaining that "'protective punishment' ... combines the backward-looking aspects of punishment (the commission of a past offence) with consequences based upon predictions of future behaviour".[377] It was in that context, which plainly includes the backward-looking aspects of punishment, that I explained that this Court has "long acknowledged that the imposition of harsh or unpleasant consequences on a person based upon predictions of future behaviour is punishment".[378] The imposition of a harsh or

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376 See *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at 563 [26].

377 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 33 [126]; 419 ALR 457 at 496, citing Zedner, *Criminal Justice* (2004) at 291.

378 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 33 [127]; 419 ALR 457 at 496.

unpleasant consequence without any connection to past behaviour, and merely as a response to the possibility of the future commission of an offence by itself, is not necessarily punishment. A backward-looking aspect will usually be required. Indeed, as part of the backward-looking aspect, even a single past offence might not be sufficient to establish the requisite likelihood of commission of a future serious offence.[379]

202 In very limited cases it is possible that the conditions imposed by the Minister might not be the consequence of past offending. For instance, as the Commonwealth submitted, a person might, without any past offending but due to close association and involvement with an extremist group and online activity, present a substantial risk of committing a serious offence of threatening violence towards a person on the ground of an attribute of the person (within para (b)(viii) of the definition of "serious offence" in cl 070.111 of Sch 2 to the *Migration Regulations*). It may be arguable that these limited cases are too remote from the standard case of punishment for the imposition of the home detention and monitoring conditions to be recognised as punitive measures. But such cases, if they arise, are likely to be a tiny proportion of those in which the home detention and monitoring conditions are imposed. Even if these cases were not punitive, the Commonwealth did not suggest that if the Amended Regulation were otherwise punitive it might have valid application only in this very limited class of case. Such limited application would defeat the object of the Amended Regulation.

203 As for the purpose of the home detention and monitoring conditions, the Explanatory Statement for the 2024 Amendments records that the home detention condition has the purpose of "regulating the behaviour" of the person subject to it and:[380]

> "The purposes of electronic monitoring as a condition [are] to deter the individual from committing further offences whilst holding the [Subclass 070 (Bridging (Removal Pending)) visa], knowing they are being monitored, and thereby keep the community safe. Electronic monitoring will also assist with the prevention of absconding behaviour, which is contrary to the obligation of the visa holder to engage in the Government's efforts to facilitate their removal."

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379 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 242 [46].

380 Australia, Minister for Immigration and Multicultural Affairs, *Migration Amendment (Bridging Visa Conditions) Regulations 2024*, Explanatory Statement at 11, 14.

204 The Explanatory Statement further provides that:[381]

> "Taking all these factors into account, the importance of reducing absconding and recidivism through electronic monitoring means that, where the Minister is required to impose this condition [of electronic monitoring] on the basis that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence, this would represent a reasonable, necessary and proportionate limitation on the right to privacy."

205 The fundamental point in this case, however, is that the protective concern of the conditions does not deprive them of their punitive nature. To reiterate: the concept of punishment is not independent of protection. There are instances, which might be described as "purely protective",[382] where conditions such as detention might not be punishment. The most obvious instances are where the detention is wholly independent of any wrongdoing by the detainee. Examples are detention for the purpose of ensuring that an alien is deported when practicable, or detention to preserve the integrity of visa conditions while a visa application remains under consideration.[383]

206 Even where the detention might be concerned to protect against harm to the community, the detention is very likely to be purely protective if the real concern is with that harm irrespective of past wrongdoing and not dependent on future wrongdoing. An example is orders confining those with infectious diseases or those who pose a danger to themselves or the public due to extreme psychiatric illness.[384] Those instances contrast with instances of "protective punishment", such as an order of imprisonment at the Governor's pleasure after an offender's sentence had been served. In a unanimous judgment, this Court in *Chester v The Queen*[385] correctly characterised such an order, with the purpose "of protecting the public from the commission of further crimes", as "punishment".[386]

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381 Australia, Minister for Immigration and Multicultural Affairs, *Migration Amendment (Bridging Visa Conditions) Regulations 2024*, Explanatory Statement at 12.

382 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [44].

383 See *CZA19 v The Commonwealth* (2025) 99 ALJR 650 at 674 [108]; 422 ALR 133 at 162.

384 See *Benbrika [No 1]* (2021) 272 CLR 68 at 155 [197].

385 (1988) 165 CLR 611.

386 *Chester v The Queen* (1988) 165 CLR 611 at 617, 619.

207 In summary, the home detention and monitoring conditions of the Amended Regulation impose the harsh consequences of infringement of liberty and bodily integrity. They do so, almost invariably, as a response to the commission of past offences. And they do so for the purposes, in common with the basic purposes of the standard case of punishment, of incapacitation and deterrence. Abductive inference, or the colloquial "duck test", conclusively points to the home detention and monitoring conditions as being punishment.

208 During the oral hearing of this matter, the Commonwealth relied upon examples of executive power that are not punishment although consequences are imposed by the Executive with forward-looking incapacitation aspects and for protection of the community. One example given was the conditions imposed on a grant of bail by the Executive, such as home detention or monitoring conditions imposed as conditions of a grant of bail by the police. Another was the same conditions imposed on a grant of parole by the Executive. These examples do not assist the Commonwealth. The conditions carried out or imposed by the Executive upon a grant of bail or parole cannot be artificially separated from the grant of bail or parole itself. The grant of bail or the grant of parole on conditions is an enhancement of the liberty of a detained offender or suspected offender. It is not a harsh consequence.

209 The same might arguably be said if the home detention and monitoring conditions were imposed as visa conditions for a person who sought to enter Australia. The additional liberty comes at a price. But the conditions are not imposed on persons such as EGH19—persons within the category affected by the decision in *NZYQ*[387] and presently entitled to writs of habeas corpus if they were detained for the purposes of removal—as a price to enter or remain in Australia. The conditions are imposed as a consequence of a substantial risk of them committing a serious offence in the future, almost invariably because of their past offending.

The fourth *YBFZ* question

210 For the reasons given earlier, as a matter of principle this question can only sensibly be understood as concerned with a limit on all power, not as an issue of the separation of powers. Indeed, from the point of view of constitutional design, it would be little short of bizarre for this Court to conclude that disproportionate detention is a subject matter to be vested exclusively in the judiciary. By what rational constitutional design could it be said that a law conferring a power of detention of aliens must confer the power only on the judiciary if the law adopts means that are disproportionate to the purpose of the power? In other words, why should disproportionate detention be exclusively judicial? To the contrary, the

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387 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 161 [52].

notion of proportionality in the imposition of judicial sentences of detention is a "settled fundamental legal principle".[388]

211 Since the home detention and monitoring conditions of the Amended Regulation are punitive, no issue arises as to whether the means adopted by the Amended Regulation in imposing the home detention and monitoring conditions are reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. Further, the intersection between that issue and questions of the limits of constitutional power over aliens was not directly raised by the questions on the special case. There is therefore no proper basis in this special case to address these matters. Such matters are best assessed in circumstances where powers conferred on the judiciary are said not to be reasonably capable of being seen as necessary for either a punitive or a non-punitive purpose.

Conclusion

212 A consequentialist objection to the reasoning in *NZYQ* might be that the more severe that past criminal offending happens to be the less likely it is that another country will accept an alien for relocation and therefore the less likely it is that an alien will be successfully deported. So too, a consequentialist objection to the reasoning of the majority in this case might be that it is harder for the Executive to detain or monitor those who have committed offences than those who have not.

213 Even if consequentialist reasoning were legitimate in constitutional law, these objections are based upon a flawed premise in this case. The flawed premise is that the same exercise of power, with the same justifications, is involved where the power involves: (i) harsh treatment of offenders for their offences, not merely as a result of the failure of a condition subsequent of their visa;[389] and (ii) harsh treatment of a group of persons, whether offenders or not, without any necessary connection with offending. The exercise of power is different where it is concerned with punishment rather than the executive implementation of general government policy.

214 In any event, these consequentialist objections need not be addressed in this case, which was properly presented on a purely legal basis and properly involving the purely legal premise that the separation of powers in the *Constitution* vests the power to punish exclusively in the judiciary. The questions of law posed by the special case should be answered as follows:

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

389 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 35-36 [137]; 419 ALR 457 at 500.

Question 1: To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) authorises the imposition of condition 8620 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the *Migration Act 1958* (Cth) when that power is construed subject to Ch III of the *Constitution*?

Yes.

Question 2: To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) authorises the imposition of condition 8621 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the *Migration Act 1958* (Cth) when that power is construed subject to Ch III of the *Constitution*?

Yes.

Question 3: Who should pay the costs of the special case?

The defendant.

215 STEWARD J. The plaintiff is a citizen of Papua New Guinea, whose protection visa was cancelled pursuant to s 501(3A) of the *Migration Act 1958* (Cth). He thus became liable to be detained pending his removal from Australia. In 2025, he was granted a Bridging R (Subclass 070) visa on the basis, following the decision of this Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[390] that there was no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future. As I have previously explained, correctly understood, *NZYQ* was confined to an explanation of the outer limits of the exception from the *Lim* principle[391] for the detention of an alien for the purpose of his or her removal or deportation.[392] *NZYQ* stands for no broader proposition. In consequence of the decision in *NZYQ*, the plaintiff was released from immigration detention.

216 The bridging visa granted to the plaintiff was subject to a number of conditions. The plaintiff challenges the constitutional validity of the regulation which imposes two of these conditions – the monitoring condition (condition 8621) and the curfew condition (condition 8620) – which are described below. He does so in reliance upon the reasons of the plurality in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*,[393] and thus, on the basis that the regulations which authorise the imposition of the impugned conditions offend Ch III of the *Constitution*. For the reasons expressed below, the plaintiff's case fails.

The two impugned conditions

217 The two impugned conditions are contained in Sch 8 to the *Migration Regulations 1994* (Cth). They were enacted in reaction to the decision of the Court in *NZYQ*.[394] The text of each condition is set out in the reasons of Gordon J. They were previously capable of being imposed by the Minister pursuant to former cl 070.612A(1)(a) and (d) of Sch 2 to the *Migration Regulations*. In *YBFZ*, a

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390 (2023) 280 CLR 137.

391 See generally *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

392 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 46 [186]; 419 ALR 457 at 514.

393 (2024) 99 ALJR 1; 419 ALR 457.

394 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth).

majority of this Court held that these regulations were invalid because each infringed Ch III of the *Constitution*.[395] I did not agree with that conclusion.

218 Following *YBFZ*, former cl 070.612A(1) was repealed and replaced with new cl 070.612A(1), which also provides for the imposition of conditions 8621 (the monitoring condition) and 8620 (the curfew condition),[396] each of which remains in the same terms. However, new cl 070.612A(1) of Sch 2 to the *Migration Regulations* enacts different rules with respect to the imposition of these two (unchanged) impugned conditions.

219 The monitoring condition requires the visa holder to: wear a monitoring device at all times; allow an authorised officer to fit, install, repair or remove that device and any related monitoring equipment; and take any steps specified in writing by the Minister, and any other reasonable steps, to ensure that the device and any related monitoring equipment remain in good working order. The device itself is small and weighs only 135g. It is capable of being concealed by ordinary clothing, including by a slim-fitting tracksuit or suit pants. Photographs of a person wearing the device whilst wearing different types of clothing, and which formed part of the special case, bear this out.

220 The curfew condition requires the visa holder to remain at a notified address for up to eight hours, usually from 10pm to 6am. The notified address may be the visa holder's home; an address where the visa holder stays regularly because of a close personal relationship with a person there; or another address notified by the visa holder at least one day in advance. In *YBFZ*, I compared this condition with compulsory detention in the following way:[397]

> "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)*. Whilst in detention the liberty of a person is very greatly constrained; they are in a foreign location, which is guarded, in circumstances where each day is largely controlled by the State.

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395 That conclusion in *YBFZ* was reached by a majority of five judges of this Court. The plurality was comprised of Gageler CJ, Gordon, Gleeson and Jagot JJ. Edelman J, writing separately, reached the same conclusion by different reasoning.

396 *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth), Sch 1, item 2.

397 (2024) 99 ALJR 1 at 52 [216]; 419 ALR 457 at 522 (footnote omitted). The reference to *Vella* was to the plurality drawing a distinction between custodial detention/non-custodial "home detention" and a curfew: (2019) 269 CLR 219 at 245 [53].

> 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."

221 Failure to comply with either condition is an offence which attracts a mandatory minimum sentence of one year of imprisonment, with a maximum sentence of five years.[398]

The holding in *YBFZ*

222 As mentioned above, the passing into law of the original cl 070.612A was a reaction to the decision of this Court in *NZYQ*. It was an attempt to address a perceived danger thought to arise from the releasing into the community of some aliens who had previously committed serious crimes. As it happens, and practically but perhaps not inexorably, the more severe the past criminal offending, the less likely it is that an alien will be successfully deported, given that it is usually very difficult for a receiving country to accept the return of a serious criminal offender. In turn, this increases the probability that such an alien will – in view of this Court's decision in *NZYQ* – be permitted to enter or re-enter the Australian community and be issued with a bridging visa.

223 This reality presented the legislative branch with a real dilemma. As noted above, Parliament's first attempt to grapple with that dilemma (ie, former cl 070.612A(1)) was held by a majority of this Court in *YBFZ* to be invalid due to it offending Ch III of the *Constitution*. It now falls to this Court to determine whether the second attempt (ie, new cl 070.612A(1)) is similarly invalid, and to do so by applying the reasons of the plurality in *YBFZ* – which marked a notable shift in this Court's Ch III jurisprudence.

224 In *YBFZ*, I disagreed with the test formulated by the plurality for determining when a law conferring power on the executive branch of government infringes Ch III of the *Constitution*. That test has two parts. The first step asks whether the power to impose a detriment is prima facie punitive (step 1).[399] The second step asks whether a law, which is prima facie punitive, is nonetheless

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398 *Migration Act 1958* (Cth), ss 76C, 76D, 76DA.

399 (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468.

justified (step 2).[400] That looks to see whether the law 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 the means and ends of the impugned law, and the relationship between the two.

225 I refer to and continue to adhere to my reasoning in *YBFZ*. I maintain the view that involuntary detention, imposed as a punishment, should not be equated with any form of deprivation of liberty or any bodily disadvantage, for compelling historical constitutional reasons. In that respect, the decisions in *Minister for Home Affairs v Benbrika* ("*Benbrika [No 1]*")[401] and in *Garlett v Western Australia*,[402] whilst not formally overruled, would now appear to have been effectively diluted, or at least re-explained, with the reasons of the dissenting judgments now being preferred.

226 But whilst I continue to consider that this new Ch III jurisprudence is not supported by the *Constitution*, I am bound to apply it.[403] I do so in this judgment, as best as I can, and to the extent I can discern what it requires. It may be difficult to do so because even recently, in a unanimous judgment of this Court, we said that "'[p]unishment', in the generic sense of State infliction of involuntary hardship or detriment, is not [an exercise of judicial power]".[404]

The constitutional concept of punishment

227 But how does one characterise a law as punitive, or prima facie punitive? We know that punishment is *not* merely the presence of any interference, or all interferences, with individual liberty or bodily integrity *without more*. That is because that is what the plurality observed in *YBFZ*. The plurality said:[405]

> "But not every interference with individual liberty or bodily integrity involves punishment and, thereby, exclusively judicial power derived from

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400 (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

401 (2021) 272 CLR 68.

402 (2022) 277 CLR 1.

403 *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1070-1071 [294]-[296]; 423 ALR 241 at 327-328, referring to *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599-600.

404 *Cherry v Queensland* (2025) 99 ALJR 782 at 790 [41]; 422 ALR 343 at 354, quoting *Minogue v Victoria* (2019) 268 CLR 1 at 20-21 [31].

405 (2024) 99 ALJR 1 at 11-12 [15]; 419 ALR 457 at 467.

> Ch III of the *Constitution.* ... 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."

228 Some interferences were said by the plurality to be punitive "by default".[406] One of these is the power to impose involuntary detention in custody. That proposition is plainly supported by the decision of this Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[407] But, if a given law is not punitive "by default", how does one then determine whether a given interference is or is not punitive? The plurality in *YBFZ* answered that question in the following way:[408]

> "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'). 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'."

229 With respect, the foregoing supplies an insufficient answer. It deploys highly generalised, undefined and abstract concepts, which will lead to inevitable judicial disagreement.[409] Resort to seemingly venerable constitutional sentiments is of little assistance in deciding actual cases.

230 In contrast, in *YBFZ*, Edelman J adopted Professor Hart's conception of punishment, at least as a starting point for determining when an interference with liberty or bodily integrity may be seen as punitive. Professor Hart wrote that punishment involved five elements, which were extracted by Edelman J in *YBFZ* as follows:[410]

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406 (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468.

407 (1992) 176 CLR 1.

408 (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468 (footnotes omitted).

409 (2024) 99 ALJR 1 at 46 [184]; 419 ALR 457 at 513-514.

410 (2024) 99 ALJR 1 at 32 [124]; 419 ALR 457 at 495-496, citing Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 4-5.

> "(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".

231 I previously accepted the relevance of these five factors in *Benbrika v Minister for Home Affairs* ("*Benbrika [No 2]*"),[411] in which I also agreed with Edelman J's observation in *Alexander v Minister for Home Affairs* that the five elements did not constitute a conclusive test.[412] But they are a compelling starting point. I also agreed[413] with his Honour's observation in *Alexander* that an important aspect of the concept of punishment is that it acts "as a sanction for certain proscribed conduct".[414]

232 The last proposition confirms that a foundational element of the concept of punishment is the presence of a link, causative in nature, between a person's prior criminal or wrongful conduct and the imposition of harm, whether bodily or otherwise, upon that person. Punishment, as a constitutional proposition, is not a concept at large, to be engaged whenever a judge subjectively perceives, for some reason, that an interference with liberty or bodily integrity is sufficiently harsh. Punishment, as a constitutional precept, must be tied to orthodox and traditional understandings of judicial power as mandated by Ch III of the *Constitution*. Generally, punishment is the privation of some good, inflicted by legitimate authority on the wrongdoer, for his or her correction and/or for the penalising of the offence.

233 In that respect, as observed by this Court on multiple occasions, including in both *The Commonwealth v Director, Fair Work Building Industry Inspectorate*[415] and *Australian Building and Construction Commissioner v Pattinson*:[416]

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411 (2023) 280 CLR 1 at 52 [140]-[141].

412 (2022) 276 CLR 336 at 424 [238].

413 (2023) 280 CLR 1 at 52 [141].

414 (2022) 276 CLR 336 at 424 [239].

415 (2015) 258 CLR 482 at 506 [55], quoting *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152.

416 (2022) 274 CLR 450 at 459 [15], quoting *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152.

"[p]unishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation".

234 However, while I broadly concur with much of Edelman J's analysis in *YBFZ* as to when a law is punitive, there are two important propositions in his Honour's reasons which I cannot, with very great respect, agree with entirely. The first is Edelman J's observation that this Court has "long acknowledged that the imposition of harsh or unpleasant consequences on a person based upon predictions of future behaviour is punishment".[417] I cannot agree with the foregoing if it is meant to be an absolute proposition. The correct statement of law is that the imposition of harsh consequences on a person based upon predictions of future behaviour is punishment, if it serves as a further sanction for past offending.

235 The decision of this Court in *Chester v The Queen*[418] was said by Edelman J in *YBFZ* to support the foregoing statement.[419] *Chester* concerned a provision of the *Criminal Code* (WA) which empowered a sentencing judge to give a direction that a convicted person, on the expiration of a finite term of imprisonment, be thereafter "detained during the Governor's pleasure". Whilst that further period of detention was intended to protect the public from persons who were likely to offend again, it was nonetheless described by this Court as punishment.[420] But, with respect, that was because *Chester* concerned the involuntary detention of a person, a state of affairs which is always considered "by default" to be punitive in nature.[421] That explains the Court's description of the detention in *Chester*.

236 The second proposition is that a purpose of protection cannot always be distinguished from a purpose of punishment. Edelman J in *YBFZ* was of the view

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417 (2024) 99 ALJR 1 at 33 [127]; 419 ALR 457 at 496.

418 (1988) 165 CLR 611.

419 (2024) 99 ALJR 1 at 33 [127]; 419 ALR 457 at 496.

420 (1988) 165 CLR 611 at 618-619.

421 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27. In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 34 [131]; 419 ALR 457 at 498, Edelman J also referenced *Veen v The Queen [No 2]* (1988) 164 CLR 465 and *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575. Both of these cases, however, also concerned involuntary detention.

that they are not necessarily separate categories and, as a result, the reasoning of the plurality in *Benbrika [No 1]*[422] was wrong.[423]

237 The decision in *Benbrika [No 1]* concerned the provisions of the *Criminal Code* (Cth) which authorised a judge to order the detention of certain types of offender, in defined circumstances, following the expiration of his or her term of sentence. It was a case about the exercise of federal judicial power, and was not directly concerned with the *Lim* jurisprudence, which concerns limits on executive power. The contention was that the power conferred on the court was incompatible with the exercise of Ch III power by the court, in the sense described in *Kable v Director of Public Prosecutions (NSW)*.[424] It was argued that an "allied *Lim* principle"[425] operated to constrain judicial power and that this was needed to avoid offending the *Kable* principle. A majority of this Court upheld the validity of the provisions, and the plurality did so because the purpose of the detention was to protect the community and was not a species of further punishment.[426] The plurality observed that the historical exceptions to the *Lim* principle – namely detention by the executive branch of those suffering from mental illness or infectious disease – shared a purpose of protection of the community from harm.[427] It followed that a scheme for the protection of the community from the harm that particular forms of criminal activity may pose could constitute an analogous exception,[428] and that in *Benbrika [No 1]* it did so.[429] The plurality reasoned:[430]

> "There is no principled reason for distinguishing the power of a Ch III court to order that a mentally ill person be detained in custody for the protection of the community from harm and the power to order that a terrorist offender be detained in custody for the same purpose. It is the protective purpose that

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422 (2021) 272 CLR 68.

423 (2024) 99 ALJR 1 at 34 [130]-[132]; 419 ALR 457 at 497-498.

424 (1996) 189 CLR 51.

425 (2021) 272 CLR 68 at 95 [28].

426 (2021) 272 CLR 68 at 98-99 [39].

427 (2021) 272 CLR 68 at 96 [32].

428 (2021) 272 CLR 68 at 96 [32].

429 (2021) 272 CLR 68 at 97 [36], 100 [41].

430 (2021) 272 CLR 68 at 97-100 [36]-[41] (footnote omitted).

> qualifies a power as an exception to a principle that is recognised under our system of government as a safeguard on liberty. ...
>
> This Court has consistently held ... that detention that has as its purpose the protection of the community is not punishment."

238 No part of the foregoing reasons of the plurality in *Benbrika [No 1]* confined the type of harm in question to that which is "grave and specific", although similar language was later deployed by the plurality in *YBFZ*.[431] The origin of this language may be found in the reasons of one judge in dissent in *Benbrika [No 1]*.[432] It did not, however, form part of the principle endorsed by the plurality in that case.

239 In *YBFZ*, Edelman J rejected the reasoning of the plurality in *Benbrika [No 1]*. His Honour's reasons are noteworthy. He said:[433]

> "prevention of the commission of offences and protection of the community from offending are goals or purposes of punishment; 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'. Unsurprisingly, any distinction between punishment and prevention or protection has been politely described in this Court as being, at best, 'elusive'."

240 Several points should be made in this respect. First, as set out above, criminal punishment exhibits more than simply a purpose of protecting the community from criminal behaviour; it also encompasses the purposes of retribution and rehabilitation. Second, a law which seeks to protect the community in the future, by imposing some form of constraint on the liberty or bodily integrity of a person, *may* also be punitive. That will be so if, properly construed, the law reveals the presence of a punitive purpose. A close nexus with prior offending may show this, if that offending can be seen to be the reason, or a reason, for the imposition of the detriment, with protection of the community being a consequence or outcome or other objective. In other words, the detriment will be characterised as punishment if in form, or by way of substance, it constitutes a further sanction for past criminal conduct. Third, however, a law which seeks to achieve a protective purpose, and which is engaged by reference to past circumstances, including where applicable past offending, will not always, or necessarily, be characterised as punitive. The past offending may merely form an evidentiary

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431 (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483.

432 (2021) 272 CLR 68 at 113 [79].

433 (2024) 99 ALJR 1 at 34 [130]; 419 ALR 457 at 497-498 (footnotes omitted).

justification, or other factum, for the imposition of a particular constraint on a person, which is directed at protecting the public from harm and no more.

241 The decision of the majority of the Supreme Court of the United States in *Kansas v Hendricks*[434] is an illustration of the third proposition. The case concerned the validity of legislation which was enacted in Kansas to address the problem of managing repeat sexual offenders.[435] It provided for a court to order the involuntary commitment of a person, found beyond a reasonable doubt to be a "sexually violent predator", who was scheduled for release from prison. The applicable Act defined the term "sexually violent predator" as:[436]

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence".

242 In other words, the Act provided for a person's detention by reference to the likelihood that the person, in the future, would engage in predatory acts of sexual violence. Amongst other claims, the offender argued that the Act was invalid as it offended the double jeopardy prohibition found in the *Constitution of the United States*. That was said to be because the involuntary detention it authorised constituted "newly enacted 'punishment'" which was "predicated upon past conduct for which [the offender] has already been convicted and forced to serve a prison sentence".[437] That submission was rejected by the Supreme Court. The Act deployed the past offending for the purpose of making a predictive conclusion about the likelihood of future offending, and not as an additional punishment. Thomas J, with whom Rehnquist CJ, O'Connor, Scalia and Kennedy JJ joined, said:[438]

> "As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness. We have

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434 (1997) 521 US 346.

435 (1997) 521 US 346 at 350.

436 (1997) 521 US 346 at 352, quoting *Sexually Violent Predator Act of 1994*, Kan Stat Ann §59-29a02(a).

437 (1997) 521 US 346 at 361.

438 (1997) 521 US 346 at 361-362.

> previously concluded that an Illinois statute was nonpunitive even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal conduct was 'received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior.' ... [T]he fact that the Act may be 'tied to criminal activity' is 'insufficient to render the statut[e] punitive.'"

243 For the reasons given below, new cl 070.612A is also an example of the third proposition.

Former and new cl 070.612A

244 The distinguishing feature of former cl 070.612A(1) is that conditions 8621 and 8620 were bound to apply "unless the Minister [was] satisfied that it [was] not reasonably necessary to impose that condition for the protection of any part of the Australian community". In other words, imposition of the conditions was the default position. New cl 070.612A(1) abandons that approach. It is expressed in the following terms:

> "For each of conditions 8621, 8617, 8618 and 8620, the Minister must impose the condition if:
>
> (a) subclause (3) applies to the visa; and
>
> (b) despite the other conditions imposed on the visa by or under this subclause or another provision of this Division, the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and
>
> (c) the Minister is satisfied on the balance of probabilities that the imposition of the condition (in addition to the other conditions imposed by or under this subclause or another provision of this Division) is:
>
> (i) reasonably necessary; and
>
> (ii) reasonably appropriate and adapted;
>
> for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk."

245 The term "serious offence" is now defined in cl 070.111 of Sch 2 to the *Migration Regulations* as follows:

> "***serious offence*** means an offence against a law of the Commonwealth, a State or a Territory where:

(a) it is an offence punishable by imprisonment for life or for a period, or maximum period, of at least 5 years; and

(b) the particular conduct constituting the offence involves or would involve:

(i) loss of a person's life or serious risk of loss of a person's life; or

(ii) serious personal injury or serious risk of serious personal injury; or

(iii) sexual assault; or

(iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code*); or

(v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv); or

(vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or

(vii) domestic or family violence (including in the form of coercive control); or

(viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or

(ix) people smuggling; or

(x) human trafficking."

246 The Solicitor-General of the Commonwealth submitted that new cl 070.612A(1) differs from former cl 070.612A(1) in three significant respects, each of which was designed to address criticisms made of the former law by the plurality in *YBFZ*. As the Solicitor-General correctly submitted, *YBFZ* is here distinguishable, in that the Court is confronted with "a radically different, more tailored, narrower regime ... [which] should be held to have responded to the limits identified in *YBFZ* in a valid way". To the extent that former cl 070.612A(1) was prima facie punitive, I consider that the three differences render new cl 070.612A(1) non-punitive.

247 The first difference addresses the following observation of the plurality in *YBFZ*:[439]

> "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."

248 Imposition of conditions 8621 and 8620 is now no longer the default position but, rather, turns upon the Minister, amongst other things, being positively satisfied on the balance of probabilities that the visa holder poses a substantial risk of committing a serious offence.

249 The second difference addresses the plurality's lack of satisfaction in *YBFZ* that former cl 070.612A(1) had a protective purpose. Their Honours reasoned as follows:[440]

> "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'."

250 In contrast, new cl 070.612A(1) makes its protective object its express purpose. The Minister is not authorised to impose either condition 8621 or condition 8620 unless the Minister is satisfied on the balance of probabilities that to do so is necessary "for the purpose of protecting any part of the Australian community from serious harm".

251 The third difference addresses the plurality's concern in *YBFZ* that former cl 070.612A(1) did not identify with sufficient precision the harm sought to be protected against or the nature of the Minister's required state of satisfaction. The plurality in *YBFZ* said:[441]

> "The stated purpose of 'protection of any part of the Australian community' is expressed at a high level of generality. The provision, for

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439 (2024) 99 ALJR 1 at 23 [85]; 419 ALR 457 at 483.

440 (2024) 99 ALJR 1 at 23 [81]; 419 ALR 457 at 483, quoting *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 380 [111].

441 (2024) 99 ALJR 1 at 20 [65]; 419 ALR 457 at 479.

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

252 New cl 070.612A(1) is much more specific. The particular nature of the serious offences which it is concerned to prevent in the future is identified by defining that term. The definition marks the seriousness of the offending by requiring the offence to be punishable for a maximum period of at least five years. The definition then lists ten types of criminal offending. They all involve, or could involve, physical harm to a member or members of the Australian community. The offending is expressed in generic terms to cover the differing ways the Commonwealth, a State or a Territory might express offending of the kind listed.

253 In argument, it was suggested that, for example, the conduct of "people smuggling", listed in the definition, might not involve harm to the Australian community. The Solicitor-General suggested that the inclusion of this type of conduct might be capable of being severed. But if the type of people smuggling envisaged would not include the risk of "seriously harming" any part of the Australian community, in the sense required in cl 070.612A(1)(b), then the Minister would *not* be satisfied that the visa needs to include either condition 8621 or condition 8620. Conversely, if the type of people smuggling which is apprehended would involve the risk of serious harm, the Minister may be so satisfied. In that respect, the words "risk of seriously harming any part of the Australian community" are controlling words in cl 070.612A(1)(b) and should not be ignored. It is the risk of harm which is the concern of this clause – a risk of harm caused by the committing of a serious offence.

254 Moreover, new cl 070.612A(1) specifies the degree of risk of harm that must exist – it must be a "substantial risk" – as well as the evidentiary burden that must be met, and the Minister must be satisfied "on the balance of probabilities". And, in accordance with basal principles of administrative law, the state of satisfaction must be reasonably reached. In this context, the word "substantial" refers to a risk which is "real" or "of substance".[442]

255 Moreover, the Minister must be satisfied that the condition is both "reasonably necessary" and "reasonably appropriate and adapted" for the purpose of protecting any part of the Australian community from serious harm by addressing the substantial risk of the relevant harm. This obliges the Minister to consider the practical effect of the imposition of a condition on a given visa holder. Reflecting that reality, the special case records that, as at 30 June 2025, there were 346 aliens who held a bridging visa of the kind held by the plaintiff. Of these, 88 were subject to one or both of conditions 8621 and/or 8620: 46 were subject to

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442 See, eg, *Hann v The Commonwealth* (2004) 88 SASR 99 at 106-107 [25].

both conditions; 41 were subject to condition 8621 but not condition 8620; and one was subject to condition 8620 but not condition 8621.

256 In the course of argument, it emerged that new cl 070.612A(1) does not address two other problems which the plurality identified in *YBFZ* as being present in the old regime. The first is that a visa holder can only make representations against the imposition of the conditions after they have been imposed, and in that sense may arguably be denied an aspect of procedural fairness.[443] The second is that each condition generally remains imposed for a period of up to 12 months.[444] For the reasons expressed below, these "problems", in and of themselves, cannot deny the existence here of a valid legitimate and non-punitive purpose.

Step 1 of the test: is the impugned regulation prima facie punitive?

257 In *YBFZ*, I held that the original (now repealed) power to impose conditions 8621 and 8620 was not prima facie punitive. For the foregoing reasons, I would also not accept that the new power to impose those conditions is prima facie punitive. Accordingly, I would hold that new cl 070.612A(1) is not invalid for that reason (put another way, the plaintiff's case fails at step 1 of the test).

258 However, the defendant conceded that the new power to impose conditions 8621 and 8620 is prima facie punitive.

Step 2 of the test: a legitimate and non-punitive purpose

259 Because of the defendant's concession, which led to a comparative lack of argument regarding the application of step 1 of the test, it is necessary to apply step 2 of the test; that is, whether cl 070.612A(1), being prima facie punitive, is nonetheless justified. Accordingly, the purpose of the power conferred by cl 070.612A(1) must be considered. In *YBFZ*, I was satisfied that the power to impose conditions 8621 and 8620 contained in former cl 070.612A(1) was not punitive but was instead protective (ie, the power had a legitimate and non-punitive purpose). The former power thus did not offend Ch III of the *Constitution*.

260 As to the power to impose the monitoring condition, I reasoned that:[445]

> "the purpose of the device is not to punish the plaintiff but to protect the community. ...

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443 (2024) 99 ALJR 1 at 23 [85]; 419 ALR 457 at 484.

444 (2024) 99 ALJR 1 at 23-24 [85]; 419 ALR 457 at 484.

445 (2024) 99 ALJR 1 at 53 [219]-[220]; 419 ALR 457 at 523.

> [T]he wearing of the device [is not] 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."

261 In relation to the power to impose the curfew condition, I said:[446]

> "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."

262 New cl 070.612A(1) justifies no different conclusion. That is so for the following reasons.

263 First, the quality of the interferences with liberty and bodily integrity is no different. Indeed, as noted above, the substance of each of the monitoring condition and the curfew condition is unchanged from that in *YBFZ*; what has changed are merely the circumstances in which those conditions will be imposed. The conclusions I reached on this issue in *YBFZ* thus, for me, remain dispositive.

264 Second, the three changes made to cl 070.612A(1), *a fortiori*, further justify that conclusion. In particular, they support the conclusion that the purpose of the power is to protect the community by the use of orthodox means, being the wearing of the monitoring device and the imposition of a curfew. The requirements for the imposition of these conditions reveal no inherently causative relationship with past offending. Indeed, new cl 070.612A(1) is exactly silent about the need for any past offending. Rather, in reaching the required state of satisfaction both about the substantial risk that the visa holder poses, and also about each condition to be imposed as being reasonably necessary and reasonably appropriate and adapted to protect the Australian community, the Minister will consider and rely upon, no doubt, the past conduct of that visa holder, whether it be criminal offending or otherwise.

265 In that respect, the visa holder's past conduct is evidence, which is analogous to the past conduct considered to be evidence by the United States Supreme Court in *Kansas v Hendricks*, and no more. If the past conduct does not justify the states of satisfaction required by new cl 070.612A(1), then the bridging visa must be issued without any of conditions 8621, 8617, 8618 or 8620. If past conduct, together with any other information or relevant evidence, necessarily justifies the reaching of the required state of satisfaction, then one or more of the

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446 (2024) 99 ALJR 1 at 52 [217]; 419 ALR 457 at 522.

prescribed conditions may be imposed, in order to protect the Australian community. The goal is protection; any past offending is considered only for that purpose and the fact of such offending is subordinated to that goal.

266 I otherwise respectfully agree with the Solicitor-General that the three changes made to cl 070.612A(1) patently support the power's purpose of protection. I also agree that the need for the imposition of the conditions to be both reasonably necessary and reasonably appropriate and adapted shows that the power is aptly calibrated to the purpose of protection. In other words, the express terms of cl 070.612A(1)(c) demonstrate that the power is controlled by what is reasonably capable of being seen as necessary to fulfil its protective purpose. In that respect, in determining what is reasonably necessary and what is appropriate, a judge must avoid the temptation of unduly criticising legitimate policy choices made by Parliament. The task of the judge is not to demand a re-write of the statute which adheres instead to the judge's own subjective policy choices.

267 Third, I do not consider that the two remaining "problems" identified by the plurality in *YBFZ*, which remain unaddressed in new cl 070.612A(1), justify a different conclusion. As to the issue of procedural fairness, the new jurisprudence of this Court effectively treats Parliament's choice to pass a law which is unfettered by a need to provide natural justice, or which curtails the need to provide natural justice, as always infringing some unspoken, but unmovable, requirement to give due process of law. But our *Constitution* contains no equivalent to the 14th Amendment to the *Constitution of the United States*; and no such equivalent may be implied from our *Constitution*'s content or structure. This jurisprudence once again undermines, and interferes with, choices reserved to the people's representatives in Parliament.

268 As it happens, the power to issue a bridging visa with conditions 8621 and 8620 without prior notice reflects a need to ensure that there is no gap between the release of an alien from detention, such as immigration detention, and the issue of a bridging visa. This ensures that the alien is not – for any moment – free within the Australian community without a visa which justifies his or her presence in this country, and which thus denies any possible application of s 189 of the *Migration Act* (which provides for the detention of unlawful non-citizens in Australia). Once a decision is made to grant a bridging visa, the *Migration Act* supplies the visa holder with procedural fairness. The Minister must "[a]s soon as practicable after making the decision" give the person a written notice that sets out the decision and invite the person to make representations as to why the visa should not be subject to one or more of the prescribed conditions.[447] If the person makes such representations and the Minister is not thereafter satisfied on the balance of probabilities that the person poses a substantial risk of seriously harming the Australian community by committing a serious offence, or is not satisfied that

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447 *Migration Act 1958* (Cth), s 76E(3).

imposing one or more conditions is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the Australian community, the Minister must issue another visa which is not subject to such conditions.[448]

269 As for the period of 12 months for which conditions generally remain imposed, I accept that this would be a matter to be weighed in the balance in determining whether the imposition of a given condition was reasonably necessary or reasonably appropriate and adapted. Moreover, as set out above, the *Migration Act* prescribes a procedure whereby, following the making of submissions by the visa holder, the conditions may be earlier removed.

270 It follows that these two attributes do not convert a protective power into one which bears a punitive purpose. Accordingly, the power has a legitimate and non-punitive purpose, for which the power is reasonably capable of being seen as necessary or reasonably appropriate and adapted – and as a result, the power is not invalid by reason of offending Ch III of the *Constitution*.

271 In that respect, I wish to emphasise that allegiance to the rule of law must here ultimately demand faithful adherence and loyalty to those laws passed by the people's representatives, and to the legislative choices embedded in them, subject only then to the *Constitution*. That is why in my view a declaration of the invalidity of a law passed by Parliament must only occur as a remedy of last resort and no more.

The issue of power

272 The plaintiff further advanced alternative contentions to the effect that new cl 070.612A(1) is invalid by reason of s 504 of the *Migration Act* being unsupported by s 51(xix) of the *Constitution* (or any other head of legislative power) to the extent it provides for the making of new cl 070.612A(1). This issue did not arise on the agreed questions in the special case and thus need not be considered.

Disposition

273 I would answer the questions posed by the special case as follows:

Question (1): To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) authorises the imposition of condition 8620 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the *Migration Act 1958*

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448 *Migration Act 1958* (Cth), s 76E(4).

(Cth) when that power is construed subject to Ch III of the *Constitution*?

Answer: No.

Question (2): To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) authorises the imposition of condition 8621 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the *Migration Act 1958* (Cth) when that power is construed subject to Ch III of the *Constitution*?

Answer: No.

Question (3): Who should pay the costs of the Special Case?

Answer: The plaintiff.

JAGOT J.

The special case

274 The special case concerns the Commonwealth's second attempt to legislate to impose a duty on the Minister administering the *Migration Act 1958* (Cth) to subject certain aliens (meaning non-citizens) in Australia to conditions on a visa (a Bridging R (Class WR) Subclass 070 (Bridging (Removal Pending)) visa ("BVR")) unilaterally granted to them by the Minister requiring them to wear an ankle monitoring bracelet ("the monitoring condition") and to obey a night-time curfew ("the curfew condition").[449]

275 The Court invalidated the Commonwealth's first attempt to so legislate in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ("*YBFZ*").[450] The first legislative attempt required the Minister to impose the monitoring condition and the curfew condition on a BVR the Minister unilaterally granted to an "eligible non-citizen"[451] unless the Minister was satisfied that it was not reasonably necessary to impose the condition for the protection of any part of the Australian community. In *YBFZ* the law imposing that duty on the Minister was held to exceed the regulation-making power in s 504 of the *Migration Act* when s 504 is construed, as it must be, so as not to infringe Ch III of the *Constitution*.[452] The law infringed Ch III of the *Constitution*, which separates judicial power from legislative and executive power, by purporting to confer an exclusively judicial power of punishment on the Minister, a member of the executive branch of government, when Ch III of the *Constitution* permits the Commonwealth to confer judicial power only on the judicial branch of government.

276 The Commonwealth's second attempt to so legislate requires the Minister to impose the monitoring condition and the curfew condition on a BVR unilaterally granted by the Minister to an eligible non-citizen if, in effect, the Minister is satisfied on the balance of probabilities that the eligible non-citizen poses a substantial risk of seriously harming any part of the Australian community by

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449 *Migration Regulations 1994* (Cth), Sch 2, cl 070.612A(1), as amended by the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth), Sch 1, item 2.

450 (2024) 99 ALJR 1; 419 ALR 457.

451 See *YBFZ* (2024) 99 ALJR 1 at 9 [2] and fn 3; 419 ALR 457 at 464.

452 (2024) 99 ALJR 1 at 12 [19]; 419 ALR 457 at 468, referring to *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].

committing a "serious offence" (as defined) and that each condition is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk. The second legislative attempt is invalid on the same basis as the first attempt. The source of invalidity remains the doctrine of the separation of powers as embodied in the structure and provisions of the *Constitution*, specifically the separation of judicial from legislative and executive power secured by Ch III of the *Constitution*.

277 As a result, the answers to the questions in the special case are as follows:

(1) To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) authorises the imposition of condition 8620 on a BVR (the curfew condition), is that clause invalid because it exceeds the power conferred by s 504 of the *Migration Act* when that power is construed subject to Ch III of the *Constitution*?

Answer: Yes.

(2) To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations* authorises the imposition of condition 8621 on a BVR (the monitoring condition), is that clause invalid because it exceeds the power conferred by s 504 of the *Migration Act* when that power is construed subject to Ch III of the *Constitution*?

Answer: Yes.

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

Answer: The defendant.

The plaintiff

278 The plaintiff is a non-citizen the subject of a BVR unilaterally granted to the plaintiff by the Minister which includes the monitoring condition and the curfew condition.

The constitutional principles

279 The object of the separation of judicial power from legislative and executive power is to ensure that "the life, liberty, and property of the subject [is not] in the hands of arbitrary judges, whose decisions [are] then regulated only by their own

opinions, and not by any fundamental principles of law".[453] As liberty is "not secured merely by the creation of separate institutions, some judicial and some political, but also by separating the judges who constitute the judicial institutions from those who perform executive and legislative functions", the "separation of the judiciary is no mere theoretical construct".[454] The "separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges".[455] The independence of the judiciary provides "checks and balances on the exercise of power by the respective organs of government in which the powers are reposed",[456] and ensures that "cases are decided free from domination by other branches of government and in accordance with judicial process".[457]

280 From the rootstock doctrine of the separation of judicial power as embodied in Ch III of the *Constitution* several inter-related constitutional principles have sprung.

281 First, Ch III of the *Constitution*, by s 71, vests the judicial power of the Commonwealth exclusively in "the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". Accordingly, by negative implication from Ch III, the Commonwealth Parliament cannot make a law conferring judicial power on any other body such as a tribunal exercising non-judicial power or on the executive branch of government. The rationale is that in "a federal form of government a part is necessarily assigned to the judicature ... A federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them. The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal

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453 *Polyukhovich v The Commonwealth* ("*Polyukhovich*") (1991) 172 CLR 501 at 606, quoting Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), vol I at 269.

454 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* ("*Wilson*") (1996) 189 CLR 1 at 12.

455 *Wilson* (1996) 189 CLR 1 at 11.

456 *Wilson* (1996) 189 CLR 1 at 11.

457 *Polyukhovich* (1991) 172 CLR 501 at 685.

judicature."[458] It follows that "[n]o part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III".[459] This is the first aspect of the *Boilermakers* principle.

282 Second, by related negative implication, Ch III of the *Constitution* ensures that the Commonwealth Parliament cannot make a law conferring power on a court other than judicial power (including all of the incidents of judicial power). The reason is that separating judicial power and enabling such power to be conferred only on the judiciary would serve no purpose if by other laws the judiciary could be made an instrument of legislative or executive power and, thereby, lose its defining character as an independent and impartial decision-making body required to decide cases in accordance with the judicial process and by the application of the judicial method. Accordingly, the Commonwealth Parliament cannot make a law conferring purported judicial power on a court if the exercise of that power would be inconsistent with the essential nature of judicial power or with the essential character of a court as a judicial decision-making body.[460] This is a second aspect of the *Boilermakers* principle.

283 Third, "[w]ith reference to the federal judicature, the true contrast in federal powers is not between judicial power lying within Chap III and judicial power lying outside Chap III. That is tenuous and unreal. It is between judicial power within Chap III and other powers. To turn to the provisions of the Constitution dealing with those other powers surely must be to find confirmation for the view that no functions but judicial may be reposed in the judicature."[461] This is a third aspect of the *Boilermakers* principle.

284 Fourth, many powers do not have one exclusive character. Powers of this kind are called "chameleon like" powers, as they "take their colour from their legislative surroundings or their recipient"[462] and can be exercised by the legislature, the executive or the judiciary. If conferred on the judiciary, such a chameleon like power takes a judicial character because its exercise must accord

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458 *R v Kirby; Ex parte Boilermakers' Society of Australia* ("*Boilermakers*") (1956) 94 CLR 254 at 267-268.

459 *Boilermakers* (1956) 94 CLR 254 at 270.

460 *Boilermakers* (1956) 94 CLR 254 at 271-272, 289.

461 *Boilermakers* (1956) 94 CLR 254 at 274-275. See also *Polyukhovich* (1991) 172 CLR 501 at 607, 689, 703-704; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ("*Lim*") (1992) 176 CLR 1 at 26-27.

462 *R v Quinn; Ex parte Consolidated Foods Corporation* ("*Quinn*") (1977) 138 CLR 1 at 18.

with the requirements of the exercise by a court of judicial power.[463] Although "[j]udicial power is an elusive concept; 'it has never been found possible to frame a definition that is at once exclusive and exhaustive'",[464] some powers are exclusively judicial and can be conferred only on a court. Most importantly, in our common law system of justice, the adjudgment and punishment of criminal guilt is at the heart of exclusively judicial power.[465]

285 Fifth, in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ("*Lim*")[466] it was said that "the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts". *Lim* identified that a concomitant of this is that, subject to "exceptional cases", the involuntary detention of a citizen in custody, being penal or punitive in character, "exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[467] The underlying rationale is that "[e]very citizen is 'ruled by the law, and by the law alone' and 'may with us be punished for a breach of law, but ... can be punished for nothing else'".[468] As "[a]ny form of involuntary detention, under any conditions, involves an interference with liberty",[469] the reference in *Lim* to detention "in custody" is to be understood as encompassing deprivations of a person's liberty which are properly characterised as punitive.[470] In this context, the concept of a law being "penal or punitive" or imposing

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463 eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 106; *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305; *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 [74].

464 *Polyukhovich* (1991) 172 CLR 501 at 532, quoting *R v Davison* (1954) 90 CLR 353 at 366.

465 *Lim* (1992) 176 CLR 1 at 27-29; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; *Re Nolan; Ex parte Young* ("*Re Nolan*") (1991) 172 CLR 460 at 497; *Fardon v Attorney-General (Qld)* ("*Fardon*") (2004) 223 CLR 575 at 611 [76].

466 (1992) 176 CLR 1.

467 (1992) 176 CLR 1 at 27-28.

468 *Lim* (1992) 176 CLR 1 at 27-28, quoting Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 202.

469 *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 630 [35].

470 See, eg, *Alexander v Minister for Home Affairs* ("*Alexander*") (2022) 276 CLR 336 at 367-370 [70]-[79], 376-377 [98]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ("*NZYQ*") (2023) 280 CLR 137 at 157 [39].

"punishment" does not extend to every "involuntary hardship or detriment" a law may impose on a person. However, "the particular form of detriment constituted by the deprivation of liberty usually (although not always) follows adjudgment of criminal guilt, and the circumstances in which deprivation of liberty may be imposed upon a citizen by the State otherwise than by way of judicial punishment are limited".[471] Accordingly, "the legitimate purposes of detention – those purposes which are capable of displacing the default characterisation of detention as punitive – must be regarded as exceptional".[472] This is the *Lim* principle.

286 Equally importantly, the *Lim* principle functions by reference to the substance and not the form of the legislation conferring the power under consideration, so that it "would, for example, 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".[473] As will be apparent, the *Lim* principle is a specific implementation of the *Boilermakers* principle.

287 Sixth, and separately from the well-known "exceptional cases" which the *Lim* principle contemplates as enabling involuntary detention for a legitimate and non-punitive purpose (eg, mental illness or infectious disease) or for a legitimate and punitive purpose (Parliament's power to punish its members including for contempt, or military discipline), there is a difference between the constitutional position of a citizen in Australia and an alien (meaning a non-citizen) seeking to enter or remain in Australia. The difference is the susceptibility of the alien to laws made under s 51(xix) of the *Constitution* to exclude the alien, permit the alien to enter only on conditions, expel or deport the alien, and authorise the alien's involuntary detention to the extent reasonably capable of being seen as necessary to enable any one or more of these legitimate and non-punitive purposes to be achieved. Accordingly, a power to involuntarily detain an alien to the extent reasonably necessary to enable any one or more of these purposes to be achieved is not part of exclusive judicial power and may be conferred by a law of the Commonwealth Parliament on the executive branch without infringing Ch III of the *Constitution* and the *Lim* principle. Leaving aside the position in times of war, an alien in Australia is otherwise entitled to the same protections of the law as a citizen of Australia and therefore has "a constitutional immunity from being

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471 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17].

472 *NZYQ* (2023) 280 CLR 137 at 157 [40].

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

imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth".[474]

288 Seventh, given the capacity of the Commonwealth Parliament to vest federal jurisdiction in courts of States under s 71 of the *Constitution* and by reason of covering cl 5 thereof (which provides that the *Constitution* "shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State"), Ch III of the *Constitution*, by positive implication, confines the legislative power of State and Territory Parliaments to make a law conferring power on State and Territory courts if that power would substantially impair the institutional integrity of the court as a repository of federal jurisdiction. This is drawn from *Kable v Director of Public Prosecutions (NSW)* ("*Kable*")[475] and is known as the *Kable* principle. The *Kable* principle is directed to the maintenance of the institutional integrity of State or Territory courts as "courts" rather than as some other form of decision-making body, so as to ensure those courts remain capable of having federal judicial power conferred upon them by the Commonwealth Parliament in accordance with Ch III of the *Constitution*.[476] The *Kable* principle, like the *Lim* principle, involves an implementation of the *Boilermakers* principle.

289 There is clear overlap between and a capacity for further convergence of the *Boilermakers* principle in its application to Commonwealth courts and the *Kable* principle in its application to State and Territory courts, but the principles remain distinct.[477] What cannot be doubted as a matter of logical necessity, however, is that "if a function is non-judicial for the reason that having that function would impair the institutional integrity of a court, legislative conferral of that function must be offensive to the *Kable* restriction on State and Territory legislative power in the same way as it is offensive to the *Boilermakers* restriction on Commonwealth legislative power. In respect of a non-judicial function of that nature, the *Boilermakers* restriction and the *Kable* restriction are indistinguishable."[478]

290 Eighth, by reason of s 73(ii) of the *Constitution* (which provides, amongst other things, that the "High Court shall have jurisdiction ... to hear and determine appeals from all judgments, decrees, orders, and sentences ... of the Supreme Court

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474 *Lim* (1992) 176 CLR 1 at 28-29.

475 (1996) 189 CLR 51.

476 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63].

477 eg, *Garlett v Western Australia* ("*Garlett*") (2022) 277 CLR 1 at 46 [121].

478 *Garlett* (2022) 277 CLR 1 at 46-47 [123].

of any State"), a State Parliament may not abolish its Supreme Court or "alter the constitution or character of its Supreme Court [such] that it ceases to meet the constitutional description", including the "defining characteristic[s]" of such a court as having power to determine and enforce "the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court" exercisable through "the grant of prohibition, certiorari and mandamus (and habeas corpus)".[479] This is the *Kirk* principle.

291 To understand the application of these constitutional principles, it is necessary to understand their common derivation from Ch III of the *Constitution*, the doctrine of the separation of judicial power which Ch III secures, and the function that doctrine performs in the protection of "the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom", the "classic example" of which is the "governance of a trial for the determination of criminal guilt".[480] The reason for this is that conviction for a crime exposes an offender to punishment, most typically in contemporary Australia in the form of deprivation of liberty by imprisonment, where the protection of life, liberty and bodily integrity from arbitrary interference is the imperative value underlying the doctrine of the separation of judicial power and, accordingly, Ch III of the *Constitution*.

292 That the imperative value concerns the protection of life, liberty and bodily integrity from arbitrary interference, rather than from any interference, is of cardinal importance. It explains why there is no flaw in the design of Ch III resulting from: (1) involuntary detention of a person ordinarily constituting punishment; and (2) the power to impose punishment on a person being an exclusively judicial power which, other than in exceptional cases, cannot be conferred on a body other than a court as part of the exclusive judicial power to determine and punish for criminal guilt; but that (3) the power to impose punishment on a person cannot be conferred on a Commonwealth court unless the power is judicial power capable of exercise in accordance with the essential characteristics of the judicial process and by applying the judicial method and cannot be conferred on a State or Territory court if the power is repugnant to some essential or indispensable defining characteristic of a "court". These principles mean that a power to punish may be incapable of conferral either as executive power or as judicial power. That such a power may fall between these two stools of executive and judicial power is not Ch III misfiring. An intended function of

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479 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580 [96] (quoting *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]), 580-581 [98].

480 *Quinn* (1977) 138 CLR 1 at 11.

Ch III is to prevent all arbitrary interference with the life, liberty and bodily integrity of the person, be they citizen or non-citizen.

The *NZYQ* extension of the *Lim* principle

293 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ("*NZYQ*")[481] decided that the vulnerability of aliens to involuntary detention (as described above) within the class of "exceptional cases" of legitimate and non-punitive purposes contemplated by the *Lim* principle exists only if and for so long as the legitimate and non-punitive purpose of excluding the alien, permitting the alien to enter only on conditions, or expelling or deporting the alien is "capable of being achieved in fact".[482] Accordingly, if the only remaining purpose of detaining an alien is to facilitate the deportation of the alien, that purpose ceases to be a legitimate and non-punitive purpose "when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future".[483]

294 If, however, there continues to be another legitimate and non-punitive purpose, such as the determination of an alien's undetermined visa application, the fact that there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future does not negative the existence of that other legitimate and non-punitive purpose (so long as it may continue) as an incident of which a law of the Commonwealth may permit the executive branch to detain the alien involuntarily without infringing Ch III of the *Constitution*.[484]

The *YBFZ* application of the *Lim* principle

295 *YBFZ*[485] involved the application of the *Lim* principle to a law requiring the Minister to impose the monitoring condition and the curfew condition on a visa to be issued to members of a class of "eligible non-citizens" unless the Minister was "satisfied that it [was] not reasonably necessary to impose that condition for the protection of any part of the Australian community".[486] The class of "eligible non-citizens" was inaccurately known as the "*NZYQ* cohort". This meant, in effect, a

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481 (2023) 280 CLR 137.

482 (2023) 280 CLR 137 at 157 [40].

483 (2023) 280 CLR 137 at 162 [55].

484 *CZA19 v The Commonwealth* (2025) 99 ALJR 650 at 661-662 [46]; 422 ALR 133 at 145-146.

485 (2024) 99 ALJR 1; 419 ALR 457.

486 (2024) 99 ALJR 1 at 9 [2], 13 [22]; 419 ALR 457 at 464, 469.

non-citizen who did not hold another visa permitting them to be in Australia but the detention of whom was not to facilitate deportation because such deportation was not capable of being achieved in fact. The description "*NZYQ* cohort" was inaccurate because "eligible non-citizens" could come within the scope of that class not merely because they had committed a crime and had their visa cancelled as a consequence, but also because they were "stateless, [were] from disputed territories, or [had] practical health reasons that prevent[ed] their removal to another country (irrespective of the commission of any criminal offence in Australia or elsewhere)".[487]

296 As explained in *YBFZ*, the required analysis to determine the compatibility of the law with Ch III's separation of judicial power 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".[488] The analysis involves asking, first, if the power conferred by the law has a prima facie character as punitive, by default or otherwise. If not punitive by default, the characterisation 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".[489] The analysis then involves asking second whether that power "is reasonably capable of being seen to be ... 'reasonably appropriate and adapted' ... for a legitimate and non-punitive purpose in which event the power's constitutional character is non-punitive".[490] The analysis involves "an assessment of both means and ends [of the law], and the relationship between the two".[491]

297 *YBFZ* decided that the law in that case was to be characterised as "a form of extra-judicial collective punishment based on membership of the class" and therefore involved a purported conferral of judicial power on the Minister, a member of the executive branch, contrary to Ch III of the *Constitution*.[492] In terms

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487 (2024) 99 ALJR 1 at 16 [37]; 419 ALR 457 at 473.

488 (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468, quoting *Jones v The Commonwealth* (2023) 280 CLR 62 at 82 [43].

489 (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468.

490 (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468, quoting *Jones v The Commonwealth* (2023) 280 CLR 62 at 82 [42], in turn quoting *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39].

491 *NZYQ* (2023) 280 CLR 137 at 158 [44]. See also, eg, *Alexander* (2022) 276 CLR 336 at 377 [101], 396 [158], 424 [236].

492 (2024) 99 ALJR 1 at 24 [87]; 419 ALR 457 at 484.

of the constitutional principles described above, the law conflicted with the *Boilermakers* principle and the *Lim* principle.

The Commonwealth's second attempt

Extrinsic material

298 The Explanatory Statement issued by the Minister on 7 November 2024 in respect of the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth) ("the Amendment Regulations") ("the Amendment Regulations Explanatory Statement")[493] (and also the Explanatory Memorandum in respect of related amendments to the *Migration Act*[494]) recorded that on 6 November 2024 the Court delivered reasons for judgment in *YBFZ*. The Amendment Regulations Explanatory Statement then said that:[495]

> "As a result, the Amendment Regulations introduces [sic] a new community protection test to ensure that the Minister can only impose 8621, 8617, 8618 and 8620 conditions using a new confined and specific test listed in the Amendment Regulations, related to protecting any part of the Australian community from serious harm. The new test requires consideration of risk of particular criminal conduct (serious offence) occurring and the nature, degree and extent of harm the BVR holder may pose to any part of the Australian community (poses a substantial risk)."

The terms of the second attempt

299 To understand where and how the Commonwealth's second attempt fits within the overall operation of the constitutional principles it is sufficient to observe that all material legal and practical circumstances remain much as described in *YBFZ* save for two matters. The two material changed circumstances are: the conditions under which the Minister is subject to a duty to impose the monitoring and curfew conditions on a first BVR;[496] and the conditions under which the Minister is subject to a duty to remove the monitoring and curfew

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493 Australia, Minister for Immigration and Multicultural Affairs, *Migration Amendment (Bridging Visa Conditions) Regulations 2024*, Explanatory Statement ("Amendment Regulations Explanatory Statement").

494 Australia, House of Representatives, *Migration Amendment Bill 2024*, Explanatory Memorandum at 3.

495 Amendment Regulations Explanatory Statement at 1-2.

496 *Migration Regulations*, Sch 2, cl 070.612A(1), as amended by the *Migration Amendment (Bridging Visa Conditions) Regulations 2024*.

conditions on a second BVR.[497] Further, and apart from these matters, the Commonwealth no longer contends as it did in *YBFZ* that there is a relevant shared characteristic of members of the class of persons who are or may become subject to the power distinguishing them from any other non-citizen or citizen. To explain, in *YBFZ* the Commonwealth contended that the members of the class of "eligible non-citizens" at that time included a substantial number of non-citizens with serious criminal histories.[498] The relevance of that contention was rejected in *YBFZ* on the basis described above, that the concept of the "*NZYQ* cohort" was itself a misnomer given that the membership of the class would change over time and could include non-citizens with no criminal history, serious or otherwise.

300 Clause 070.612A(1) of the *Migration Regulations*, as held to be invalid in *YBFZ*, provided that if a BVR was granted to 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; (c) 8618; (d) 8620. Condition 8621 is the monitoring condition. Condition 8620 is the curfew condition.[499]

301 Clause 070.612A(1) of the *Migration Regulations* now provides that:[500]

> "For each of conditions 8621, 8617, 8618 and 8620, the Minister must impose the condition if:
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> (a) subclause (3) applies to the visa; and
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> (b) despite the other conditions imposed on the visa by or under this subclause or another provision of this Division, the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and
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> (c) the Minister is satisfied on the balance of probabilities that the imposition of the condition (in addition to the other conditions

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497 *Migration Act 1958* (Cth), s 76E(4) as amended by the *Migration Amendment Act 2024* (Cth).

498 (2024) 99 ALJR 1 at 16 [37]-[38]; 419 ALR 457 at 473.

499 *Migration Regulations*, Sch 2, cl 070.612A(1), before amendment by the *Migration Amendment (Bridging Visa Conditions) Regulations 2024*, Sch 1, item 2.

500 *Migration Regulations*, Sch 2, cl 070.612A(1), as amended by the *Migration Amendment (Bridging Visa Conditions) Regulations 2024*, Sch 1, item 2.

imposed by or under this subclause or another provision of this Division) is:

(i) reasonably necessary; and

(ii) reasonably appropriate and adapted;

for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk."

302 Subclause (3) as amended, as referred to in cl 070.612A(1) above, provides that cl 070.612A 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; or (c) the visa was granted under section 195A of the Act". This continues to accord with the fact that the Minister may grant a BVR to an "eligible non-citizen" with or without application.[501] An "eligible non-citizen" remains a non-citizen "within a prescribed class for the grant of a bridging visa and is taken to meet criteria prescribed for the grant of a BVR without application if there is no real prospect of removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future".[502]

303 Subclause (2) of cl 070.612A continues to require 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. The legal effect of cl 070.612A(2) is that the Minister must first apply the terms of cl 070.612A(1) to the monitoring condition and last apply those terms to the curfew condition. The practical effect of cl 070.612A(2) is that the Minister may impose no prescribed condition, may impose the monitoring condition in isolation, or may impose the monitoring condition and the curfew condition, but the possibility of the Minister imposing the curfew condition without the monitoring condition is almost non-existent.

304 The term "serious offence", appearing in cl 070.612A(1)(b) as amended, is a defined term. It means an offence against a law of the Commonwealth, a State or a Territory where: (a) it is an offence punishable by imprisonment for life or for a period, or maximum period, of at least five years; and (b) the particular conduct constituting the offence involves or would involve: (i) loss of a person's life or serious risk of loss of a person's life; or (ii) serious personal injury or serious risk of serious personal injury; or (iii) sexual assault; or (iv) the production,

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501 *Migration Act*, s 73. See *YBFZ* (2024) 99 ALJR 1 at 13 [21]; 419 ALR 457 at 469.

502 *Migration Regulations*, reg 2.20(1) and (18), reg 2.25AB. See *YBFZ* (2024) 99 ALJR 1 at 9 [2] and fn 3, 13 [21] (footnotes omitted); 419 ALR 457 at 464, 469.

publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Pt 10.6 of the *Criminal Code* given effect by the *Criminal Code Act 1995* (Cth)); or (v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in sub-para (iv) of para (b) of the definition; or (vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or (vii) domestic or family violence (including in the form of coercive control); or (viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or (ix) people smuggling; or (x) human trafficking.

305 Subject to the changed conditions under which the Minister is subject to the duty to remove the monitoring and curfew conditions imposed on a first BVR by the grant of a second BVR free from those conditions (discussed below), the architecture of the *Migration Act* and the *Migration Regulations* remains in the same terms as explained in *YBFZ*. That is, 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 curfew condition "requires the person to remain in a specified location generally between the hours of 10 pm and 6 am".[503]

306 As described in *YBFZ*, the monitoring condition requires the fitting of the monitoring device, which "involves what would otherwise be the commission of the tort of trespass to the person (in the forms of assault and battery)", and requires that the monitoring device "continues in contact with the wearer thereafter, as a direct and immediate continuing consequence of what would otherwise be the tort of trespass".[504] While "not a cause of pain or physical discomfort, [the monitoring device] cannot be described as only a slight or modest interference with bodily integrity".[505] To the contrary, for the reasons given in *YBFZ*, the monitoring condition imposes material and relatively long-term detriments on the bodily integrity of the person subject to the condition and, by reason of the charging and location information disclosure requirements, "also effects an involuntary restraint on the liberty of the person wearing the monitoring device".[506] The curfew condition confines the freedom of movement of the person subject to the condition

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503 (2024) 99 ALJR 1 at 9 [2]; 419 ALR 457 at 464.

504 (2024) 99 ALJR 1 at 19 [57]; 419 ALR 457 at 477.

505 (2024) 99 ALJR 1 at 19 [58]; 419 ALR 457 at 477.

506 (2024) 99 ALJR 1 at 19 [59]-[61]; 419 ALR 457 at 477-478.

"every night, to a single location", a detriment to the person's liberty which cannot be described as "'comparatively slight' or 'modest'" or as trivial or transient.[507]

307 By s 76E of the *Migration Act*, and as when *YBFZ* was decided, the rules of natural justice do not apply to the grant of a BVR subject to one or more conditions under s 73 of that Act. Instead, as in *YBFZ*, if the Minister grants a BVR subject to one or more of the conditions, the Minister must give notice of the decision to the non-citizen and invite the non-citizen to make representations, engaging the Minister's duty thereafter to consider the representations and determine if the Minister is satisfied or not, albeit now within the new terms of s 76E(4) of the *Migration Act* as amended.[508] Section 76E(4) as amended now provides that the Minister must grant the non-citizen another BVR ("the second BVR") that is not subject to any one or more of the conditions if:[509]

> "(a) the non-citizen makes representations in accordance with the invitation; and
>
> (b) either:
>
> (i) the Minister is not satisfied, on the balance of probabilities, that the non-citizen poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; or
>
> (ii) if the Minister is satisfied, on the balance of probabilities, that the non-citizen poses the substantial risk mentioned in subparagraph (i) – the Minister is not satisfied, on the balance of probabilities, that the imposition of that condition, or those conditions, is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk."

308 Section 76E(5) continues to provide that the "Minister must give the non-citizen written notice of the decision and the reasons for the decision" in respect of the decision under s 76E(4).

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507 (2024) 99 ALJR 1 at 17-18 [49]-[51]; 419 ALR 457 at 475-476.

508 That is, as amended by the *Migration Amendment Act 2024* (Cth).

509 Compare *YBFZ* (2024) 99 ALJR 1 at 13 [24]; 419 ALR 457 at 469-470.

309 The second BVR, as when *YBFZ* was decided, supersedes the first BVR.[510]

310 Otherwise, as previously, if a condition in cl 070.612A(1) is imposed on a BVR it remains in force for 12 months and the Minister can grant further BVRs subject to the same conditions thereafter on a rolling 12-month basis if satisfied as to the required matters.[511] Non-compliance with a monitoring or curfew condition remains an offence punishable by a maximum penalty of five years' imprisonment or 300 penalty units, or both, subject, however, to a requirement that if a person is convicted of such an offence the court must impose a mandatory minimum sentence of imprisonment of at least one year.[512]

311 Finally, in contrast to *YBFZ*, no relevant question arises in the present case in respect of the proper construction of the impugned law. As will become apparent, there is no available form of reading down, partial disapplication or severance in accordance with the terms and principled operation of either s 15A of the *Acts Interpretation Act 1901* (Cth) or s 3A(1) of the *Migration Act* (the subject of discussion in *YBFZ*[513]), the effect of which would be to bring cl 070.612A(1) as amended within constitutional limits.

Exploring the constitutional limits

312 As recognised in *YBFZ*, Ch III of the *Constitution* does not "create a constitutional limit applying to every law that imposes a detriment on a person"[514] and 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".[515] The function of the required analysis – the single question of characterisation determining whether the power to impose the detriment conferred by the law is properly characterised as punitive and therefore as exclusively judicial – is to enable the distinction between punitive laws and legitimate and non-punitive laws to be maintained on a clear,

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510 *Migration Act*, s 68(4) and (5).

511 *Migration Regulations*, reg 2.25AE. See *YBFZ* (2024) 99 ALJR 1 at 15 [31]; 419 ALR 457 at 472.

512 *Migration Act*, ss 76C, 76D, 76DA. See *YBFZ* (2024) 99 ALJR 1 at 15 [32]; 419 ALR 457 at 472.

513 (2024) 99 ALJR 1 at 21-22 [75]; 419 ALR 457 at 481.

514 (2024) 99 ALJR 1 at 9 [6]; 419 ALR 457 at 464-465.

515 (2024) 99 ALJR 1 at 11-12 [15]; 419 ALR 457 at 467.

cogent and consistent basis. The required analysis is to be undertaken in the context of certain key principles established by authority not challenged in this matter.

313 First, the *Lim* principle focuses on the substance and not the mere form of the law so that the class of "exceptional cases" enabling executive or judicial detention for a legitimate and non-punitive purpose and other than as judicial punishment for criminal guilt as contemplated by the *Lim* principle is not closed and is capable of incremental development by the common law method.[516] In the application of that method, however, "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".[517] The converse is that the "exceptional cases" for which the *Lim* principle allows also must be "carefully confined",[518] lest the constitutional separation of judicial power be undermined by the "exceptional cases" becoming the rule and not the exception.

314 Second, the well-known "exceptional cases" for which the *Lim* principle allows involve laws which, if a power of detention is conferred on the executive branch, are not characterised as conferring the exclusive judicial power of the imposition of punishment (so that the power may be conferred on the executive branch) and, if conferred on the judiciary, are characterised as within judicial power (be it within exclusive or non-exclusive judicial power) and are not repugnant to the essential character of a court.

315 Third, that the application of the *Lim* principle involves an assessment of the means and ends of a law[519] does not mean that a law conferring the power to deprive a person of their liberty to a lesser extent than detention in custody for a legitimate and non-punitive purpose is other than an "exceptional case" for which the *Lim* principle allows. Rather, the nature and extent of the deprivation of liberty (the means) is relevant to identifying the objective purpose of the law (the ends) and its resulting substantive characterisation as either for a legitimate and non-punitive purpose or for a punitive purpose.

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516 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162; *Fardon* (2004) 223 CLR 575 at 653-654 [213]-[215].

517 *YBFZ* (2024) 99 ALJR 1 at 9 [6]; 419 ALR 457 at 464-465, referring to *Re Nolan* (1991) 172 CLR 460 at 497 and *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.

518 *Thomas v Mowbray* (2007) 233 CLR 307 at 330 [18].

519 *NZYQ* (2023) 280 CLR 137 at 158 [44].

316 For these reasons, the Commonwealth's submission that the imposition of a detriment on a person "less severe than full-time detention in custody", in the exercise of legislative or executive power, "is not – and is not required to be – 'exceptional'", to the extent that the detriment involves involuntary detention, is in conflict with the *Lim* principle.[520] In undertaking the required analysis, therefore, laws enabling the involuntary deprivation of a person's liberty other than in the exercise of judicial power to impose punishment for criminal guilt which have been held to be for a legitimate and non-punitive purpose of protection of persons from serious harm are each to be understood as "exceptional cases" as contemplated by the *Lim* principle.[521]

317 This brings the analysis back to the well-known "exceptional cases" for which the *Lim* principle allows. In *Lim*, Brennan, Deane and Dawson JJ identified these well-known cases as: "the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts"; "[i]nvoluntary detention in cases of mental illness or infectious disease"; "the traditional powers of the Parliament to punish for contempt"; and the power of "military tribunals to punish for breach of military discipline".[522]

318 In each such "exceptional case" the reason the power does not form a part of the exclusively judicial power of imposing punishment on a person is obvious and unmistakeable in terms of both the class of persons subject to the power to impose involuntary detention and either the legitimate and non-punitive purpose of that power or the punitive purpose of that power (in the "exceptional cases" of parliamentary disciplinary powers over its members and military disciplinary powers over its members). Accordingly:

(1) The power to arrest a person and to hold them in custody when charged is essential to the functioning of the criminal justice system, including by ensuring the person can be brought before the courts for trial, and in any event is subject to close judicial supervision (including the power to grant the writ of habeas corpus and to grant bail); such a power is necessary to enable vindication of judicial power and is not punitive.

(2) The power to detain in custody a person suffering a mental illness involving a real risk of serious harm to the person or others ensures that the person

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520 *NZYQ* (2023) 280 CLR 137 at 153 [28].

521 eg, *Minister for Home Affairs v Benbrika* ("*Benbrika (No 1)*") (2021) 272 CLR 68 at 100 [41], 102-103 [46]-[47]; *Garlett* (2022) 277 CLR 1 at 24-25 [46].

522 (1992) 176 CLR 1 at 28-29.

and the community are protected from that risk of serious harm; such a power is protective and not punitive.

(3) The power to quarantine a person suffering an infectious disease including by detaining in custody may be necessary to enable treatment of the person and protection of others from the risk of infection; again, such a power is protective and not punitive.

(4) The power of Parliament over its members, including to punish for contempt of Parliament, embodies the independence and authority of Parliament over its own processes; such a power is punitive, but that Parliament must control its own processes is as fundamental to the constitutional separation of powers as the separation of judicial power.[523]

(5) The power of military tribunals to detain a member in custody is a punitive power, but is essential to the maintenance of the disciplinary hierarchy on which military forces depend for their efficacy.[524]

By their nature and by our history both of the latter two powers stand outside of judicial power, despite being punitive powers.

319 Other cases assist in exposing the limits the constitutional principles impose, recognising that the analysis in each case is calibrated to the substance of the impugned law, including: whether the law conferring the power is a law of the Commonwealth or of a State or Territory; whether the law involves a purported conferral of power on a court or the executive branch; if the law involves a purported conferral of power on a court, whether the court is a court of the Commonwealth or a court of a State or Territory; the legal and practical operation of the law in terms of both the conditions of the exercise of the power and the effects of its exercise; and the checks and balances regulating the legal and practical operation of the law, both procedural and substantive, before, during and after the exercise of the power.

320 Bills of attainder or bills of pains and penalties (the difference between the two depending on the severity of the punishment imposed) purport to confer the exclusive judicial power of punishment on a court but in substance amount to impermissible "legislative punishment" or "trial by legislature" of a person or

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523 *Constitution*, ss 49 and 50; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

524 *Haskins v The Commonwealth* (2011) 244 CLR 22 at 39-40 [37]-[38].

persons.[525] Laws of this kind would "usurp[] judicial power" in contravention of Ch III of the *Constitution* because they involve the legislature purporting to exercise the exclusive judicial power of punishment.[526]

321 Less extreme but no less offensive to the separation of judicial power effected by Ch III of the *Constitution* are laws which do not directly exercise a power of punishment but so interfere in the judicial process as to embody a "legislative plan ... to secure the conviction and enhance the punishment of ... particular individuals".[527] Laws of this kind would also involve the legislature usurping judicial power in contravention of Ch III of the *Constitution*.

322 A key feature of these two kinds of laws is their lack of general application. They are laws directed not to persons generally but to a particular person or particular persons, whether identified individually or as a member of a class, who are subjected to punishment other than by the criminal trial process and a court's adjudgment of guilt.[528] A law of either kind conferring the same power on the executive branch to so punish a person or persons would usurp judicial power in Ch III of the *Constitution* because it could not be said that any such law, as a matter of substance, had a legitimate and non-punitive purpose analogous to the "exceptional cases" for which the *Lim* principle allows. Such laws fall between two stools. On the one hand, they involve the exclusively judicial power of punishment and therefore cannot be conferred on the executive branch without usurping judicial power. On the other hand, a power of punishment of that kind also cannot be conferred on the judiciary because the nature and exercise of the power involves the antithesis of judicial decision-making.

323 *Kable*[529] involved such a law. A key feature of the law in *Kable* was its specificity to one named person. The selection from all prisoners in the State of that one person for potential court imposed continued detention in custody for the purpose of protection of other persons was manifestly arbitrary.[530] The operation of the law was "not part of a system of preventive detention with appropriate safeguards, consequent upon or ancillary to the adjudication of guilt" and was not

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525 *Polyukhovich* (1991) 172 CLR 501 at 536, quoting Tribe, *American Constitutional Law*, 2nd ed (1988) at 643 and *United States v Brown* (1965) 381 US 437 at 442.

526 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250.

527 *Liyanage v The Queen* [1967] 1 AC 259 at 290.

528 eg, *Polyukhovich* (1991) 172 CLR 501 at 651, 686, 721.

529 (1996) 189 CLR 51.

530 (1996) 189 CLR 51 at 106-107, 122.

comparable to the "exceptional cases" for which the *Lim* principle allows.[531] The law was the "antithesis of the judicial process", which has as one of its "central purposes" the protection of "the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained".[532]

324 In contrast to laws at these extremes, other preventive detention laws have been held not to infringe the separation of judicial power effected by Ch III of the *Constitution*. Reflecting that, excluding parliamentary and military discipline, the *Lim* principle allows only "exceptional cases" of involuntary detention for a legitimate and non-punitive purpose, it has been said that:[533]

> "Demonstration that [the law] is non-punitive is essential to a conclusion that the regime that it establishes can validly be conferred on a Ch III court, but that conclusion does not suffice. As a matter of substance, the power must have as its object the protection of the community from harm."

325 History matters but is not determinative of the validity of such laws. So much was made clear in *Lim*, in which Brennan, Deane and Dawson JJ explained that "some functions ... by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character", punishment for criminal guilt being exclusively judicial by reason of both the nature of the power and its history.[534] As Jacobs J had earlier put it:[535]

> "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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531 (1996) 189 CLR 51 at 98.

532 (1996) 189 CLR 51 at 106-107, quoting *Re Nolan* (1991) 172 CLR 460 at 497.

533 *Benbrika (No 1)* (2021) 272 CLR 68 at 97 [36].

534 (1992) 176 CLR 1 at 27.

535 *Quinn* (1977) 138 CLR 1 at 11-12. See also, eg, *R v Davison* (1954) 90 CLR 353 at 382; *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [17], 356-357 [116]-[121]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 236-238 [29]-[31]; *Jones v The Commonwealth* (2023) 280 CLR 62 at 82-83 [45]; *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at 18 [44].

> historically, are judged by that independent judiciary which is the bulwark of freedom. ...
>
> On the other hand the course of legislation in comparatively recent times does not, in itself, provide a foundation for the historical approach. If the legislation requires the exercise of a power to determine questions the determination of which will affect what are traditionally regarded as basic legal rights, the judicial nature of the power springs from the effect which the exercise of the decision-making function under the legislation will have upon the legal rights rather than from the history of similar legislation reposing the function in a judicial tribunal."

326 Because the constitutional validity of a law is tested by reference to the substance and not the form of the law, a conferral of a power to impose involuntary detention on a person for a stated purpose of protecting other people rather than as punishment of the person detained is not determinative. If such a conferral of power is on a court it will carry with it the inherent requirement that, at least as far as the terms of the law allow, the power will be exercised judicially: that is, by an independent and impartial judge consistent with the requirements of natural justice, based on at least cogent evidence, for reasons which will be made clear, and subject to appellate and supervisory jurisdiction of courts higher in the judicial hierarchy. The focus in testing the validity of such a law would include the extent to which the terms of the law constrain the essential aspects of the judicial process and the judicial method inherent in any exercise of judicial power.[536] A conferral of the same power on the executive branch, by contrast, would not impart those inherent characteristics to the exercise of the power so that the validity of the law would be determined in that different context.

327 For example, in *Chester v The Queen* ("*Chester*")[537] the power to involuntarily detain a person was conferred by a State law on State courts. The power enabled the court to order that an offender be subjected to indefinite detention after completion of their sentence terminable by executive parole order. The power was exercisable only against a person who had been convicted of an indictable offence. Before saying that "it is now firmly established that our common law does not sanction preventive detention"[538] (an observation to be understood in context, as explained below), Mason CJ, Brennan, Deane, Toohey and Gaudron JJ observed in *Chester* that as the criterion for application of the law (a person convicted of an indictable offence) was so broad and the power was

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536 eg, *Fardon* (2004) 223 CLR 575 at 592 [20]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 257-261 [83]-[90].

537 (1988) 165 CLR 611.

538 (1988) 165 CLR 611 at 618.

otherwise conditioned only by an expansive discretion (in effect, if the court thinks fit in the circumstances), the law was to be construed as conferring an "extraordinary power".[539] As such, their Honours considered that the law had to be construed as "confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm", available only where "the sentencing judge [can] be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community in the sense" of the convicted person being "so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community".[540] By this process of statutory construction, the power conferred on the court was aligned to the "exceptional cases" for which the *Lim* principle allows.

328 In saying that "our common law does not sanction preventive detention", their Honours meant that, in the context of the criminal law, the punishment must fit the crime. As their Honours explained, the "fundamental principle of proportionality [in criminal sentencing] does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender".[541] This fundamental principle, operative in its specific criminal law context, is to be recognised as another manifestation of the common law's protection of the individual against arbitrary punishment. For the law in *Chester* to be valid, therefore, it had to be construed as a power available only in the exceptional circumstances their Honours described rather than as a power available to be applied to any person convicted of any indictable offence. It was that construction of the power that ensured it was a power for a substantively legitimate protective and non-punitive purpose and therefore was characterised as an "exceptional case" as contemplated by the *Lim* principle.

329 Other laws enabling the involuntary and indefinite detention of a person in custody have been held to be within the class of "exceptional cases" contemplated by the *Lim* principle and thereby not to infringe the separation of judicial power effected by Ch III of the *Constitution* because they have been characterised as being for a legitimate protective and non-punitive purpose. These laws exhibit certain shared characteristics which informed the process of construction in *Chester*. Laws of this kind include laws empowering a court to impose indefinite detention on a person convicted of certain kinds of serious offences and considered to represent a real risk of inflicting serious physical harm on others if released either at the time of sentence (a *Chester* style power) or before release from

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539 (1988) 165 CLR 611 at 616-617.

540 (1988) 165 CLR 611 at 618-619.

541 (1988) 165 CLR 611 at 618.

imprisonment (a *Fardon v Attorney-General (Qld)*[542] style power). The kinds of serious offences subject to these laws have been conviction for a sexual offence involving violence or against children;[543] conviction for a terrorism offence;[544] and conviction for a "serious offence" by a person found to be a "high risk serious offender".[545]

330 Other laws empowering interferences with the liberty of the person but not amounting to the full-time detention in custody of a person also have been held to be within the class of "exceptional cases" contemplated by the *Lim* principle and thereby not to infringe the separation of judicial power effected by Ch III of the *Constitution*. These laws include: (1) a Commonwealth law conferring on Commonwealth courts a power to make an "interim control order" against a person if satisfied on the balance of probabilities "that making the order would substantially assist in preventing a terrorist act" or "that the person has provided training to, or received training from, a listed terrorist organisation" and that "each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act";[546] (2) a State law conferring power on a State Supreme Court to make a control order against a person if the Court was satisfied that the person had engaged in serious criminal activity and the person "associates with any member of a criminal organisation for the purpose of engaging in, or conspiring to engage in, serious criminal activity", the criminal organisation being "an unacceptable risk to the safety, welfare or order of the community";[547] and (3) a State law conferring power on certain State courts to make a "serious crime prevention order" against a person if the court was satisfied that the person had been convicted of a serious criminal offence or that the person had been involved in serious crime related activity for which the person had not been convicted of a serious criminal offence provided that, in either case, the court was satisfied that there were reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.[548]

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542 (2004) 223 CLR 575.

543 *Fardon* (2004) 223 CLR 575.

544 *Benbrika (No 1)* (2021) 272 CLR 68.

545 *Garlett* (2022) 277 CLR 1.

546 *Thomas v Mowbray* (2007) 233 CLR 307.

547 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

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

331 These laws held to be within the class of "exceptional cases" contemplated by the *Lim* principle and thereby not to infringe the separation of judicial power effected by Ch III of the *Constitution*: conferred the power to impose involuntary detention on a court so that the law was construed, so far as possible, to require the exercise of the power to be in accordance with the essential features of the judicial process and the judicial method; identified a person or class of persons to whom the law could be applied bearing an obvious rational relationship to the objectively ascertained purpose of the power, the nature of the power, and the nature and extent of the interference with a person's liberty; and contained checks and balances apart from those inherent in the conferral of the power on a court. Those checks and balances included, variously: identifying the person able to make the application; requiring that the application be supported by information on oath or affirmation; if an order interfering with liberty was made ex parte, requiring that the person applying for the order would have to fully and frankly disclose all facts relevant to the question whether the order should be made and that the matter would be returned before the court within a confined period of time to enable the person the subject of the order to be heard on whether the order should continue, be varied or be revoked; a capacity or requirement that the court satisfy itself that it has sufficient information to make the order; whether or not the rules of evidence apply, requiring that the court be satisfied by cogent evidence at least on the balance of probabilities that each interference with liberty was reasonably necessary for the specified protective purpose; and requiring that the court had to give reasons for the decision.[549] These checks and safeguards were such as to prevent any abuse of the power, whether it be by intention, excess of zeal, neglect, mere inadvertence or otherwise.

Applying the constitutional limits in this case

332 The foundation of the invalidity of cl 070.612A(1) as amended can be reduced to the existence of five essential features of the terms of the law and its resulting legal and practical operation. These features suffice to require the conclusion that the impugned law not only is prima facie punitive but also is not "reasonably capable of being seen to be necessary (in the relevant sense of 'reasonably appropriate and adapted' rather than essential or indispensable) for a legitimate and non-punitive purpose".[550] Because the question is one of the substance and not the mere form of the law, the impugned law is invalid despite the apparently avowed purpose of the law being the protecting of any part of the Australian community from serious harm by addressing the substantial risk that the member of the class poses by inflicting such serious harm on any part of the community by committing a serious offence (as defined). Clause 070.612A(1) as amended, therefore, is to be characterised as a law conferring a punitive power

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549 cf *Wainohu v New South Wales* (2011) 243 CLR 181 at 192 [7].

550 *YBFZ* (2024) 99 ALJR 1 at 12 [18] (footnote omitted); 419 ALR 457 at 468.

within the scope of exclusive judicial power which, by reason of Ch III of the *Constitution*, cannot be conferred on the Minister, being a member of the executive branch.

333 First, while it may be accepted that "[d]etention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of"[551] the monitoring and curfew conditions, it is not the degree of hardship involved in the detention which is relevant. What is relevant is the nature, extent and duration of the interference with liberty (in the sense of a person's freedom of movement). If the nature, extent and duration of the interference with liberty is such as to amount to detention (being confinement to a location under pain of sanction), then "[w]hatever the conditions of detention, the detention itself involves involuntary deprivation of liberty"[552] and "it is the involuntary deprivation of liberty itself that ordinarily constitutes punishment".[553]

334 In any event, the "in custody" element of detention in custody has been said to involve "the notion of dominance and control of the liberty of the person, and the state of being guarded and watched to prevent escape"[554] so that to be held or detained in custody, the person must be "in the charge of" a "representative of authority", meaning that the person's "freedom of movement" must be under the "direct control" of another, even if the person is not "physically confined".[555] As the machinery provisions for the implementation of the monitoring condition[556] expose, technological developments mean that a person in contemporary society may be "in the charge of" or under the "direct control" of another person even if that other person is not physically present at the location of the detention. The capacity for continuous electronic monitoring of a person's location under the monitoring condition, if operating in conjunction with the curfew condition, is not far from imposing nightly detention in custody even if the detention so effected is

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551 *Thomas v Mowbray* (2007) 233 CLR 307 at 356 [116].

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

553 *NZYQ* (2023) 280 CLR 137 at 153 [28].

554 *Eatts v Dawson* (1990) 21 FCR 166 at 179.

555 *R v Montgomery* [2008] 1 WLR 636 at 639-641 [9]-[15]; [2008] 2 All ER 924 at 927-929.

556 *Migration Regulations*, cl 070.612A(1)-(4); *YBFZ* (2024) 99 ALJR 1 at 13-14 [26]-[27], 18-19 [56]-[61]; 419 ALR 457 at 470-471, 477-478; Special Case, agreed facts at [43]-[51].

in other respects not comparable to the strictures involved in imprisonment in a correctional facility.[557]

335 The impugned law therefore is one enabling a deprivation of a person's liberty, involving involuntary detention of the person which is material in both kind and duration.

336 Second, the impugned law confers the power to impose such involuntary detention on the Minister as a member of the executive branch and not on a court. As such, the exercise of the power is not inherently constrained by either the nature of judicial power or the demands of the judicial process.

337 Third, contravention of the monitoring condition or curfew condition is a criminal offence punishable by imprisonment of up to five years including a mandatory minimum sentence of imprisonment for at least one year.[558] That is, the conditions are enforceable by the criminal sanction of imprisonment without scope for any exercise of judicial discretion as to the materiality of the contravention.

338 Fourth, the Commonwealth correctly disavowed any submission that the members of the class to whom the impugned law applies share any characteristic distinguishing them from any other non-citizen or citizen relevant to the avowed purpose of the law of protecting any part of the Australian community from serious harm by addressing the substantial risk that the member of the class poses by inflicting such serious harm on any part of the community by committing a serious offence (as defined). As noted, the Commonwealth's disavowal is correct because it accords with the reasoning in *YBFZ* as to the misnomer of the "*NZYQ* cohort" and the fact that the operation of the law over time means that the constitution of the class will change.[559] That is, the only characteristic which members of the class of "eligible non-citizens" share is that they are a non-citizen, they do not hold a visa other than a BVR, and they cannot practically be removed from Australia in the reasonably foreseeable future (in accordance with the *NZYQ* extension of the *Lim* principle).

339 That, as the Commonwealth submitted, "eligible non-citizens" able to be granted a BVR cannot be sanctioned for committing a criminal offence by the cancellation of their visa and deportation from Australia may be accepted. It may also be accepted that the *Constitution* does not impose a constraint of "substantive

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557 *Thomas v Mowbray* (2007) 233 CLR 307 at 356 [116].

558 *Migration Act*, ss 76C, 76D, 76DA. See *YBFZ* (2024) 99 ALJR 1 at 15 [32]; 419 ALR 457 at 472.

559 (2024) 99 ALJR 1 at 16 [37]; 419 ALR 457 at 473.

equality" on Commonwealth law-making.[560] Nor does the *Constitution* impose a constraint on Commonwealth law-making prohibiting laws which select identified groups of persons for regulation,[561] and certainly not where the identified group is within the class of aliens subject to specific constitutional power as explained in *Lim*.[562] But permissible State sanctioned punishment for the commission of a crime is always and only punishment by a court in the exercise of judicial power. The executive power to cancel a non-citizen's visa and to deport them from the country as a consequence of the non-citizen having committed a crime is not a punitive power. It is a power protective of the Australian community and of the integrity of the Commonwealth's control over the presence of aliens within Australia. That members of the class of "eligible non-citizens" subject to the impugned law in this case hold no other visa which can be cancelled and cannot practically be deported from Australia therefore provides no rational connection between such membership and the substance of the law.

340 Fifth, s 76E of the *Migration Act* excludes the rules of natural justice in the operation of the impugned law. That is, on the Minister unilaterally granting a first BVR to any person the Minister must impose the monitoring and curfew conditions if the terms of cl 070.612A(1) as amended are met. There is no obligation on the Minister to notify the person to be granted the BVR that they will be subjected to the screening that cl 070.612A(1) requires or to give the person an opportunity to make representations as to whether the Minister should not reach the mandated states of satisfaction in respect of them. The notification requirement and opportunity to make submissions arises under the statutory scheme only after the screening that cl 070.612A(1) requires is complete. The impugned law therefore operates so that the monitoring and curfew conditions may be imposed on a person, with the consequential material deprivation of bodily integrity and liberty this would entail, in circumstances where the Minister could not or would not have been satisfied in respect of the mandated criteria had the person been on notice of the information made available to the Minister in respect of them and able to make representations before the grant of the first BVR subject to the conditions.

341 It follows that, while the impugned law avows a purpose that in the abstract is capable of characterisation as a legitimate and non-punitive purpose in the constitutional context (to protect any part of the Australian community from a substantial risk of serious harm by a person subject to the conditions committing a serious offence), the law cannot be objectively and substantively characterised as being for that purpose. In means and ends terms, the impugned law's means

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560 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 44-45, 63-68, 153-155.

561 *Brown v Tasmania* (2017) 261 CLR 328 at 415-416 [276], 462-463 [422].

562 (1992) 176 CLR 1 at 28-29; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 35 [2].

significantly exceed the scope of its avowed ends. The impugned law is materially over-inclusive. The measures to ensure the law does not operate over-inclusively are engaged too late (after imposition of the conditions) and are in substance too little (the Minister's required satisfaction being on the balance of probabilities on the basis of information perhaps known only to the Minister and not required to be sworn or affirmed to be true, correct, complete or up to date) to enable the law to be characterised, objectively and substantively, as effecting other than "extra-judicial collective punishment based on membership of the class".[563]

342 Accordingly, the impugned law is prima facie punitive and is not reasonably capable of being seen to be reasonably appropriate and adapted for its stated legitimate and non-punitive purpose. Therefore, it is a law to be characterised as substantively punitive within the scope of exclusive judicial power purportedly but impermissibly conferred on the executive branch of government in contravention of the separation of judicial power effected by Ch III of the *Constitution*.

343 Other features of the impugned law reinforce this conclusion. The impugned law does not regulate any aspect of the information that the Minister must obtain in order to perform the Minister's duty under cl 070.612A(1) as amended. The person may then be subject to the monitoring and curfew conditions when, based on accurate, complete and up-to-date information, the Minister could not lawfully have formed the required states of satisfaction. Further, both the capacity of the person to make meaningful representations to the Minister after being notified of the grant of the first BVR subject to the monitoring and curfew conditions and the jurisdiction of the courts in respect of their supervision of the legality of the Minister's discharge of the Minister's duties in respect of the first BVR subject to those conditions are circumscribed by the fact that the Minister need not give any reasons for the decision to impose the conditions on the first BVR (as the duty to give reasons only applies to the decision in respect of the second BVR under s 76E(5) of the *Migration Act*). Finally, the statutory scheme does not impose any time limits within which the Minister must consider representations the person may make after being notified of the grant of the first BVR even if that first BVR is subject to the monitoring and curfew conditions. While the Minister would be amenable to an order for mandamus requiring the Minister to consider such representations to perform the duty under s 76E(4) of the *Migration Act*, it is likely that weeks, even months, could pass between the subjection of the person to the monitoring and curfew conditions and the crystallisation of the Minister's duty of consideration under s 76E(4).

344 Otherwise, and as noted in *YBFZ*, Div 395 of the *Criminal Code* confers power on 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

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563 *YBFZ* (2024) 99 ALJR 1 at 24 [87]; 419 ALR 457 at 484.

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".[564] While more than one law may be made to achieve the same or an overlapping purpose, the "contrast between cl 070.612A(1) [as amended] and the community safety order regime [remains] stark"[565] when analysed against the *Lim* principle understood in the broader context of the other constitutional principles.

345 For these reasons questions (1) and (2) as stated in the special case must both be answered in the affirmative.

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564 (2024) 99 ALJR 1 at 15 [34]-[35], 21 [71]; 419 ALR 457 at 472-473, 480.

565 *YBFZ* (2024) 99 ALJR 1 at 21 [72]; 419 ALR 457 at 480.

346 BEECH-JONES J. The questions of law stated for the opinion of the Full Court of this Court concern the validity of so much of a regulation, purportedly made under s 504 of the *Migration Act 1958* (Cth) (being cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth)), that purports to confer power on the Minister to relevantly impose two particular conditions on Bridging R (Class WR) Subclass 070 visas (the "BVR visa"). If imposed, the first of those two conditions requires that the BVR visa holder be fitted with an electronic monitoring device ("the monitoring condition"). If imposed, the second of those conditions requires the BVR visa holder to be confined to a specified address for eight hours a day ("the curfew condition").

347 BVR visas are granted to unlawful non-citizens who do not otherwise have permission to remain in Australia and whose removal from Australia has no real prospect of becoming practicable in the reasonably foreseeable future.[566] As a result of the decision of this Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[567] such persons cannot be detained in immigration detention after the point at which there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future.[568]

348 The exercise of the regulation making power conferred by the *Migration Act* must conform with Ch III of the *Constitution.* It follows that if the impugned aspect of cl 070.612A(1) of Sch 2 to the *Migration Regulations* is inconsistent with Ch III it will not be authorised by s 504 of the *Migration Act* and will be invalid to the extent of the inconsistency. Drawing on previous authority of this Court,[569] in *NZYQ* six members of this Court,[570] including Steward J, subscribed to a principle sourced in Ch III of the *Constitution* to the effect that a legislative attempt to confer on the executive a power to impose a detriment or burden on a person contravenes Ch III and is invalid if the power is "properly characterised as punitive".[571] The application of this principle involves "a single question of characterisation", the answer to which "requires an assessment of both means and ends, and the relationship between the two".[572] That assessment involves two inquiries: the first

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566 See *Migration Regulations 1994* (Cth), regs 2.20(18)-(19), 2.25AA, 2.25AB.

567 (2023) 280 CLR 137.

568 *NZYQ* (2023) 280 CLR 137 at 162 [55].

569 *Jones v The Commonwealth* (2023) 280 CLR 62 at 82 [43], 93-94 [78], 120-121 [154]-[155], 130 [188].

570 Myself and Gageler CJ, Gordon, Steward, Gleeson and Jagot JJ.

571 *NZYQ* (2023) 280 CLR 137 at 158 [44].

572 *NZYQ* (2023) 280 CLR 137 at 158 [44].

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 means and the ends).[573]

349 In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*, five judges adhered to this principle but disagreed over its application. The plurality (Gageler CJ, Gordon, Gleeson and Jagot JJ) applied the principle to invalidate the predecessor to cl 070.612A(1) insofar as it authorised the imposition of the monitoring condition and the curfew condition on BVR visas.[574] I also applied the principle but upheld the validity of so much of the predecessor to cl 070.612A(1) that authorised the imposition of those conditions on BVR visas.[575]

350 So far as the holding and reasoning of the plurality in *YBFZ* are concerned, there are material differences between cl 070.612A(1) and its predecessor such that fidelity to that holding does not require me to find that cl 070.612A(1) is invalid. However, there is no difference between cl 070.612A(1) and its predecessor that is material to my reasoning in *YBFZ* for upholding the validity of that predecessor. For similar reasons, I reach the same conclusion in this case that I did in that case; namely that cl 070.612A(1) is not contrary to Ch III and is valid.

Background

351 The plaintiff is a citizen of Papua New Guinea. He arrived in Australia in 2000 when he was 11 years old. He left Australia with his family in 2002 and returned with them to Australia in 2004. While still a juvenile, in 2006 he was convicted of murder and sentenced to a lengthy term of imprisonment. In January 2018, he was released from prison on parole but was then taken into immigration detention under s 189 of the *Migration Act*. On 26 October 2022, the plaintiff was released from custody after having been granted a protection visa and made the subject of a "protection finding" for the purpose of s 197C of the *Migration Act*.

352 Between 6 and 8 May 2023, the plaintiff committed offences involving domestic violence against his partner and her father, including stalking or intimidating her father with the intention of causing him to fear physical or mental harm contrary to s 13(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). In April 2024 the plaintiff was convicted of that offence and sentenced to three months' imprisonment. On 3 July 2024, the plaintiff was convicted of a further four offences against his partner and sentenced to an

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573 *NZYQ* (2023) 280 CLR 137 at 158 [44].

574 *YBFZ* (2024) 99 ALJR 1 at 24 [86]-[88]; 419 ALR 457 at 484.

575 *YBFZ* (2024) 99 ALJR 1 at 73 [326]-[327]; 419 ALR 457 at 550.

aggregate term of 18 months' imprisonment with a non-parole period of 10 months. In the meantime, the plaintiff's protection visa was cancelled pursuant to s 501(3A) of the *Migration Act*.

353 On 22 December 2024, the plaintiff was released from custody on the expiry of his non-parole period but was taken into immigration detention. On 1 April 2025, a delegate of the Minister declined to revoke the decision to cancel the plaintiff's protection visa but decided to grant the plaintiff a BVR visa on the basis of an assessment that there was no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future.[576] In accordance with cl 070.612A, the Minister's delegate also imposed conditions 8621 (ie, the monitoring condition) and 8620 (ie, the curfew condition) on the plaintiff's visa. Having been granted a BVR visa, the plaintiff was released from immigration detention.

The means: the monitoring condition

354 If applicable, the obligations imposed by the monitoring condition in its present form are the same as those obligations imposed by the monitoring condition considered in *YBFZ*. The monitoring condition requires the BVR visa holder to: 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.[577] 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"[578] and "related monitoring equipment" for a monitoring device is "any electronic equipment necessary for operating the monitoring device".[579]

355 While no particular form of "monitoring device" or "related monitoring equipment" has been designated for use, the equipment used on the plaintiff, which is the same as that applied to the plaintiff in *YBFZ*, can be taken as typical of the equipment envisaged by the monitoring condition.[580] This equipment consists of a

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576 *Migration Regulations*, regs 2.20(18)-(19), 2.25AB(1).

577 *Migration Regulations*, Sch 8 cl 8621(1)-(4).

578 *Migration Regulations*, Sch 8 cl 8621(5) (definition of "monitoring device").

579 *Migration Regulations*, Sch 8 cl 8621(5) (definition of "related monitoring equipment").

580 *YBFZ* (2024) 99 ALJR 1 at 68 [299], [302]; 419 ALR 457 at 543, 544.

"smart tag" fitted to the visa holder's ankle, which transmits data concerning their location within a range of 7m to 35m with that data stored for at least 15 years.[581] The smart tag is recharged by attaching an on-body charger while the tag remains attached to the visa holder. The dimensions and weight of the smart tag and the recharger are such that, depending on what clothing is worn by the visa holder, the smart tag without the on-body charger may or may not be visible. However, when the on-body charger is attached to the smart tag, the equipment is likely to be visible, regardless of the type of clothing that is worn.

356 It is an offence punishable by a maximum penalty of five years' imprisonment or a fine of 300 "penalty units" or both for a BVR visa holder to fail, without reasonable excuse, to comply with the monitoring condition.[582] The offence also carries a mandatory minimum punishment of imprisonment for at least one year.[583] The imposition of criminal sanctions for breaches of the monitoring condition is said to be justified because, as a result of *NZYQ*, the persons the subject of the monitoring condition cannot be detained as a consequence of having their visas cancelled for breach of conditions.[584] The Explanatory Statement to the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth) ("the Explanatory Statement") accompanying the introduction of cl 070.612A in its current form confirms that the purpose of the monitoring condition is to reduce the risk of BVR visa holders committing further offences on the basis that BVR visa holders will know that their movements will be monitored.[585]

357 In *YBFZ*, I addressed and rejected a submission that the imposition of the monitoring condition was prima facie punitive by reason of its interference with a BVR visa holder's right to "bodily integrity",[586] privacy[587] or freedom of

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581 *YBFZ* (2024) 99 ALJR 1 at 68 [301]; 419 ALR 457 at 543.

582 *Migration Act 1958* (Cth), s 76D.

583 *Migration Act*, s 76DA.

584 *YBFZ* (2024) 99 ALJR 1 at 62 [267]; 419 ALR 457 at 535; see also Australia, Minister for Immigration and Multicultural Affairs, *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth), Explanatory Statement ("Explanatory Statement") at 7.

585 Explanatory Statement at 11.

586 *YBFZ* (2024) 99 ALJR 1 at 68-69 [303]; 419 ALR 457 at 544.

587 *YBFZ* (2024) 99 ALJR 1 at 69 [304]-[306]; 419 ALR 457 at 544-545.

movement,[588] or the stigmatising effect of the monitoring condition.[589] However, in this case the Commonwealth accepted that the monitoring condition is to be characterised as prima facie punitive.[590] As that concession is consistent with the reasoning of the plurality in *YBFZ*, I will act on it. However, the concession does not advance the case for invalidity too far because determining whether a measure imposed by the executive is punitive in the requisite sense still requires a consideration of the extent of the detriment the measure imposes and the closeness of the measure's historical association with criminal punishment.[591] In that respect, I repeat my analysis in *YBFZ* of the nature of the detriment imposed by the monitoring condition and its association with other measures that either do or do not amount to punishment.[592] In any event, for the reasons set out below, the monitoring condition is reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose.

The means: the curfew condition

358 If applicable, the obligations imposed by the curfew condition in its present form are the same as those requirements that were imposed by the curfew condition considered in *YBFZ*. The BVR visa holder must 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.[593] A "notified address" is any of: a residential address notified by the BVR 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 BVR visa holder to the Department no later than 12.00pm on the day before the visa holder proposes to stay at that address.[594] Like the monitoring condition, it is an offence punishable by the same maximum and minimum penalty for a BVR visa holder, without reasonable excuse, to fail to comply with the requirements of the curfew

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588 *YBFZ* (2024) 99 ALJR 1 at 70 [309]; 419 ALR 457 at 546.

589 *YBFZ* (2024) 99 ALJR 1 at 69-70 [307]-[308]; 419 ALR 457 at 545.

590 See *YBFZ* (2024) 99 ALJR 1 at 18 [52], 20 [63]; 419 ALR 457 at 476, 478.

591 *YBFZ* (2024) 99 ALJR 1 at 56 [239]; 419 ALR 457 at 527.

592 *YBFZ* (2024) 99 ALJR 1 at 68-70 [297]-[310]; 419 ALR 457 at 543-546.

593 *Migration Regulations*, Sch 8 cl 8620(1)-(2).

594 *Migration Regulations*, reg 1.03 (meaning of "Immigration"), Sch 8 cll 8513, 8620(3), 8625.

condition.[595] The Explanatory Statement confirms that the stated purpose of the curfew condition is to regulate the behaviour of BVR visa holders.[596]

359 In *YBFZ*, I noted that there are a number of features of the restrictions on the plaintiff's liberty effected by the curfew condition that are different to the detention in custody that was the factual predicate of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[597] and *NZYQ*.[598] I also noted that the restrictions on the plaintiff's liberty effected by the curfew condition are different to aspects of the forms of house arrest imposed under legislation of the United Kingdom and the subject of consideration by both the European Court of Human Rights and the House of Lords as to whether the relevant legislative scheme involved a breach of Art 5 of the European Convention on Human Rights.[599] Those features include that: it is the BVR visa holder and not the Commonwealth that chooses the address of "confinement"; the Commonwealth does not exercise any control over who else may reside at or enter that address; the Commonwealth does not exercise any control over what occurs at that address; and the Commonwealth does not reserve any power to enter that address 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 otherwise be absent from their home address and there is no restriction on the BVR visa holder's movements when not subject to the curfew (although they are likely to be monitored).

360 In *YBFZ*, I concluded that these differences meant that such a curfew did not, like full time detention, attract a "default characterisation" as punitive. However, I nevertheless accepted, and still accept, that such a restriction on "liberty and movement for a third of the day, supported by the threat of criminal prosecution and mandatory imprisonment", is prima facie punitive.[600]

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595 *Migration Act*, ss 76C, 76DA.

596 Explanatory Statement at 14.

597 (1992) 176 CLR 1.

598 *YBFZ* (2024) 99 ALJR 1 at 71 [316]; 419 ALR 457 at 548.

599 *YBFZ* (2024) 99 ALJR 1 at 71-72 [314]-[317]; 419 ALR 457 at 547-548, citing *Secretary of State for the Home Department v JJ* [2008] AC 385, *Secretary of State for the Home Department v E* [2008] AC 499 and *R (Jalloh) v Secretary of State for the Home Department* [2021] AC 262. See also the cases cited in *JJ* [2008] AC 385 at 410 [14].

600 *YBFZ* (2024) 99 ALJR 1 at 72 [317]; 419 ALR 457 at 548; see also (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468.

The ends: the purpose of the power to impose the monitoring condition and curfew condition

361 To be justified and valid, a law authorising the executive to impose a sanction that is otherwise punitive must do so for a legitimate and non-punitive purpose.[601] Such a purpose can be the protection of the community or a part of the community from harm,[602] although there is scope for debate about the types of harm against which a law can protect and the degree of precision by which the harm must be identified.

362 The predecessor to cl 070.612A(1) that was the subject of *YBFZ* provided that, if a BVR visa was granted to a non-citizen within the class of persons whom *NZYQ* precluded from being detained, each of four conditions had to be imposed by the Minister unless the Minister was "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 the relevant Division of the *Migration Regulations*.[603] Two of those conditions were the monitoring condition and curfew condition. The other two conditions, conditions 8617 and 8618, required the BVR visa holder to notify the Department in respect of their receipt or transfer of currency and their incurring of debts respectively.[604]

363 In *YBFZ*, I drew on the effect of all four conditions to conclude that the purpose of the predecessor to cl 070.612A was "to provid[e] protection against the risk of the commission of criminal offences by the [BVR] visa holder and the creation of impediments to their removal from Australia".[605] I also concluded that, because both the monitoring condition and curfew condition sought to effect that protection not by imposing a detriment as a deterrent from engaging in the relevant form of anti-social conduct but by simply increasing the likelihood of detection or minimising BVR visa holders' opportunity to offend, the purpose of the

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601 *NZYQ* (2023) 280 CLR 137 at 157 [39].

602 See the cases cited at *YBFZ* (2024) 99 ALJR 1 at 58 [248]; 419 ALR 457 at 530.

603 See *YBFZ* (2024) 99 ALJR 1 at 61 [260]; 419 ALR 457 at 533.

604 See *YBFZ* (2024) 99 ALJR 1 at 62 [268]; 419 ALR 457 at 535.

605 *YBFZ* (2024) 99 ALJR 1 at 66 [282]; 419 ALR 457 at 540.

predecessor to cl 070.612A was not punitive.[606] I concluded that the purpose of the power was "purely protective"[607] and thus was legitimate and non-punitive.

364 By contrast, the plurality in *YBFZ* did not conclude that the harm against which the predecessor to cl 070.612A(1) sought to protect was so confined. Their Honours identified a "fundamental difficulty" with the predecessor to cl 070.612A(1), being that "protection of every part of the Australian community from any harm at all ... 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 ...'".[608] Their Honours also reasoned that if "protection from any harm of any nature, degree, or extent were a legitimate non-punitive purpose, [then] the very point of the legitimacy requirement would be undermined".[609] Their Honours concluded that, as the power to impose the monitoring condition and the curfew condition was not exercisable for a legitimate and non-punitive purpose, the power was to be characterised as punitive and therefore exclusively judicial, and thus its conferral on the Minister was inconsistent with Ch III.[610]

365 The revised version of cl 070.612A(1) is far more explicit in identifying the harm against which the monitoring condition and curfew condition seek to protect. It relevantly provides:

> "For each of conditions 8621 [ie, the monitoring condition], 8617, 8618 and 8620 [ie, the curfew condition], the Minister must impose the condition if:
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> ...
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> (b) despite the other conditions imposed on the visa by or under this subclause or another provision of this Division, the Minister is satisfied on the balance of probabilities that the holder poses *a substantial risk of seriously harming any part of the Australian community by committing a serious offence*; and
>
> (c) the Minister is satisfied on the balance of probabilities that the imposition of the condition (in addition to the other conditions

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606 *YBFZ* (2024) 99 ALJR 1 at 58-59 [249], 66 [286]; 419 ALR 457 at 530, 541.

607 *YBFZ* (2024) 99 ALJR 1 at 66 [287]; 419 ALR 457 at 541.

608 *YBFZ* (2024) 99 ALJR 1 at 23 [81]; 419 ALR 457 at 483, quoting *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 380 [111].

609 *YBFZ* (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483.

610 *YBFZ* (2024) 99 ALJR 1 at 23 [83]; 419 ALR 457 at 483.

imposed by or under this subclause or another provision of this Division) is:

(i) reasonably necessary; and

(ii) reasonably appropriate and adapted;

for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk." (emphasis added)

366 Conditions 8617 and 8618 are the same notification requirements in respect of the receipt or transfer of currency and the incurring of debts by the BVR visa holder as were referred to in the predecessor to cl 070.612A, the subject of *YBFZ*.[611] Clause 070.612A(2) obliges the Minister to decide whether or not to impose each of the four conditions in the order in which they are listed.

367 The term "serious offence" is defined in cl 070.111 of Sch 2 to the *Migration Regulations* as "mean[ing] an offence against a law of the Commonwealth, a State or a Territory where":

"(a) it is an offence punishable by imprisonment for life or for a period, or maximum period, of at least 5 years; and

(b) the *particular conduct* constituting the *offence involves or would involve*:

(i) loss of a person's life or serious risk of loss of a person's life; or

(ii) serious personal injury or serious risk of serious personal injury; or

(iii) sexual assault; or

(iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code*); or

(v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv); or

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611 See above at [362]. See also *YBFZ* (2024) 99 ALJR 1 at 62-63 [268]; 419 ALR 457 at 535-536.

(vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or

(vii) domestic or family violence (including in the form of coercive control); or

(viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or

(ix) people smuggling; or

(x) human trafficking." (emphasis added)

368 The effect of cl 070.612A(1)(b), when read with the definition of "serious offence", is to require the Minister to undertake a forward-looking assessment to identify a "particular [form of anti-social] conduct"[612] or a range of such conduct which a BVR visa holder presents a substantial risk of engaging in. No doubt that assessment will often involve a consideration of the BVR visa holder's past conduct, including any record of past convictions, in that past events can often be a reliable guide to the future.[613] To form the state of satisfaction referred to in cl 070.612A(1)(b), the Minister must conclude that (future) particular conduct constitutes an offence punishable by imprisonment for life or for a period of at least five years,[614] and "involves" one or more of the matters in para (b)(i)-(x) of the definition of "serious offence". In this respect sub-paras (i)-(x) of para (b) of that definition are not purporting to identify a particular class of offences or their elements. Instead, those sub-paragraphs are describing whether the gravamen or overall circumstances of the particular conduct that constitutes an offence would involve one or more of the matters in para (b)(i)-(x).[615]

369 It is doubtful that the phrase "part of the Australian community" in cl 070.612A(1)(b) when considered in the context of the forms of conduct listed in para (b) of the definition of "serious offence" adds anything of substance to the

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612 See above at [363].

613 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574.

614 *Migration Regulations*, Sch 2 cl 070.111(a).

615 See, eg, *ABC v Victims of Crime Assistance Tribunal* (2021) 66 VR 381 at 396-397 [78]-[84], cited in *Waters v Diesel Holdings Pty Ltd* [2024] VSCA 77 at [53]; see also *Australian Securities Commission v Lord* (1991) 33 FCR 144 at 149; *Rimanic v Business Licensing Authority* (2001) 34 MVR 539 at 550 [48]; *Wotton v Queensland [No 5]* (2016) 352 ALR 146 at 289-291 [556]-[561]; cf *Director of Public Prosecutions (Vic) v Verigos* (2004) 145 A Crim R 82.

task of applying cl 070.612A other than perhaps to make it clear that the risk of committing offences that have no connection with Australia is irrelevant. Even if, by some strained interpretation of these provisions, a single adult or child putative victim did not constitute "part" of the community, a substantial risk of violence towards that adult or child diminishes the safety of at least a segment of the community of which they form a part.

370 The plaintiff contended that the definition of "serious offence" extended to conduct of varying degrees of seriousness and was untethered to specific offences such that it might be satisfied by some relatively innocuous or minor forms of criminal behaviour. The plaintiff contended that, when those matters are taken with the undefined nature of "serious harm", they rob the impugned provisions of any legitimate non-punitive purpose.

371 I do not accept the plaintiff's contention. The submission fails to read all the components of cl 070.612A(1)(b) and the definition of "serious offence" together. All of sub-paras (i)-(x) of para (b) of the definition of "serious offence" describe types of conduct that have serious adverse effects on the personal safety of at least some part of the Australian community. In most if not all cases in which there is a substantial risk of the BVR visa holder engaging in conduct that satisfies the definition of "serious offence", cl 070.612A(1)(b) will be satisfied. However, even if there are some residual circumstances in which there is a substantial risk of the BVR visa holder engaging in some less harmful conduct which nevertheless answered the definition of "serious offence", then so much of para (b) that refers to the "risk of seriously harming any part of the Australian community" will have work to do. In such a case the Minister might not be satisfied that the BVR visa holder poses a substantial risk of seriously harming any part of the Australian community "by" committing that offence (and the Minister might not otherwise be satisfied under cl 070.612A(1)(c) that the BVR visa holder poses a relevant "substantial risk").

372 The end result is that this revised version of cl 070.612A(1) explicitly identifies the forms of harm against which the monitoring condition and curfew condition seek to protect, namely the "substantial risk" posed by the BVR visa holder's release from custody into the community and their "seriously harming any part of the Australian community by committing a serious offence". This degree of precision in the form of harm being protected against takes the provision outside the "designedly unparticularised and indeterminate" risk of harm with which the predecessor to cl 070.612A(1) was concerned according to the plurality in *YBFZ*.[616]

373 Moreover, when so construed the purpose just described is not relevantly different to the purpose of the provisions upheld in *Minister for Home Affairs v*

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616 (2024) 99 ALJR 1 at 22 [76]; 419 ALR 457 at 482.

Benbrika ("*Benbrika [No 1]*").[617] In *Benbrika [No 1]*, a majority of this Court upheld the validity of a legislative scheme empowering a Supreme Court of a State or Territory to order the preventative detention of those who posed an "unacceptable risk" of committing an offence against "[Pt 5.3 of the *Criminal Code*], the maximum penalty for which is 7 or more years of imprisonment".[618] Such offences included engaging in a terrorist act,[619] but also included a range of other activities such as possessing things connected with terrorist acts,[620] and "preparatory or anticipatory acts that would not usually fall within the range of conduct generally regarded as criminal".[621] Thus these offences embraced a "wide range of conduct".[622] The plurality held that the purpose of these provisions was "protective and not punitive", and that a law "that has as its purpose the protection of the community is not punishment".[623]

374 At least so far as considering whether the purpose of cl 070.612A(1) of Sch 2 to the *Migration Regulations* is legitimate and non-punitive, there is no relevant difference between assessing whether a risk is "unacceptable", as was the case in *Benbrika [No 1]*, and assessing whether such a risk is "substantial", as is the case here.[624] Both involve assessments of future risk, and it is difficult to envisage how a risk that is substantial is not also unacceptable. *Benbrika [No 1]* compels the conclusion that cl 070.612A authorises the imposition of the curfew and monitoring conditions for a legitimate and non-punitive purpose.

375 Finally, I note that, during the course of oral argument, the Commonwealth accepted that it did not rely on any characteristic of the class of persons who were within the potential ambit of the impugned provisions as supporting their validity.

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617 (2021) 272 CLR 68.

618 *Benbrika [No 1]* (2021) 272 CLR 68 at 106 [58], 121 [104], 126 [117], citing *Criminal Code* (Cth), s 105A.2 (definition of "serious Part 5.3 offence").

619 *Benbrika [No 1]* (2021) 272 CLR 68 at 143 [163], citing *Criminal Code* (Cth), s 101.1.

620 *Benbrika [No 1]* (2021) 272 CLR 68 at 143 [163], citing *Criminal Code* (Cth), s 101.4.

621 *Benbrika [No 1]* (2021) 272 CLR 68 at 144 [166], citing *R v Abdirahman-Khalif* (2020) 271 CLR 265 at 292-293 [44].

622 *Benbrika [No 1]* (2021) 272 CLR 68 at 144 [166].

623 *Benbrika [No 1]* (2021) 272 CLR 68 at 98-100 [39]-[41].

624 See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 246-247 [57], 253 [74].

The purported imposition of what appears to be collective punishment will more readily engage the *Lim* principle, such as where the detriment is directed to members of a particular race or social group.[625] However, that proposition does not assist the plaintiff in this case. The monitoring condition and curfew condition are potentially applicable to unlawful non-citizens liable to deportation and whose removal from Australia has no real prospect of becoming practicable in the reasonably foreseeable future.[626] The most that could relevantly be said is that the measures are directed against a sub-group of aliens who were previously detained in custody but following *NZYQ* can no longer be detained. Thus, these measures involve no more, and no less, than the Commonwealth seeking to address the risk of harm to the Australian community arising from that change in circumstance. While that change does not provide a constitutional justification for the validity of the power to impose those conditions in their own right, the absence of some common characteristic shared by the category of persons potentially subject to the effect of these conditions, other than the risk of harm they represent, does not affect the characterisation of the purpose of the provision as legitimate and non-punitive.

Reasonably appropriate and adapted: the relationship between the means and the ends

376 The remaining issue is whether the power to impose the monitoring condition and curfew condition is reasonably capable of being seen as reasonably necessary and reasonably appropriate and adapted for the identified legitimate and non-punitive purpose,[627] being protecting the Australian community or part of it from harm by the commission of serious offences.

377 Six features of the scheme for the imposition of the monitoring condition and curfew condition should be noted. First, as was the case with *YBFZ*,[628] if those conditions are imposed the visa will be subject to those conditions for a period of 12 months from the date the visa was granted.[629]

378 Second, unlike *YBFZ*, the Minister must reach a positive state of satisfaction as to the existence of the relevant "substantial risk" before the conditions are

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625 *YBFZ* (2024) 99 ALJR 1 at 57 [244]; 419 ALR 457 at 528-529.

626 *NZYQ* (2023) 280 CLR 137 at 162 [55]; see also *Migration Act*, Pt 2, Div 3, Subdiv AF, and *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth).

627 *YBFZ* (2024) 99 ALJR 1 at 12 [18], 72 [319]; 419 ALR 457 at 468, 548.

628 (2024) 99 ALJR 1 at 15 [31]; 419 ALR 457 at 472.

629 *Migration Regulations*, reg 2.25AE.

imposed[630] and then must be positively satisfied that the imposition of the relevant condition is "reasonably necessary" and "reasonably appropriate and adapted" for the "purpose of ... addressing that substantial risk".[631]

379 Third, as was the case in *YBFZ*, the Minister must decide whether to impose the four conditions referred to in cl 070.612A(1) in the order in which they are listed.[632] Only after the Minister has first considered whether the monitoring condition is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing the relevant substantial risk can the Minister consider the appropriateness of the curfew condition. Thus, if the monitoring condition is imposed, then the Minister must consider that condition's mitigating effect on the risk posed by the BVR visa holder in determining whether to impose the curfew condition.

380 Fourth, as was the case in *YBFZ*,[633] in deciding whether or not to impose the monitoring or curfew condition the Minister must consider the effect of any other conditions imposed by or under the relevant Division.[634] This includes specific conditions that are imposed on the visa of BVR visa holders convicted of offences involving a minor or other vulnerable person, or of offences involving violence or sexual assault, which are designed to protect against that class of victim or the particular victim.[635]

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630 *Migration Regulations*, Sch 2 cl 070.612A(1)(b).

631 *Migration Regulations*, Sch 2 cl 070.612A(1)(c); cf *YBFZ* (2024) 99 ALJR 1 at 23 [85], 29 [110]; 419 ALR 457 at 483, 491, where the Minister needed to reach a state of mind about a "negative stipulation", such that "the provision resolve[d] all doubt and uncertainty in favour of the imposition of the conditions".

632 *YBFZ* (2024) 99 ALJR 1 at 13 [23]; 419 ALR 457 at 469; *Migration Regulations*, Sch 2 cl 070.612A(2).

633 (2024) 99 ALJR 1 at 63 [270]; 419 ALR 457 at 536.

634 *Migration Regulations*, Sch 2 cl 070.612A(2A).

635 *Migration Regulations*, Sch 2 cl 070.612B. If a BVR visa holder has been convicted of an offence involving a minor or any other vulnerable person, those conditions are conditions 8612 (notification of residential addresses), 8615 (notification of association with certain organisations), 8622 (restrictions on work), 8623 (restrictions on going near schools) and 8626 (notification of online profiles): *Migration Regulations*, Sch 2 cl 070.612B(1). If a BVR visa holder has been convicted of an offence involving violence or sexual assault, condition 8624 (non-

381 Fifth, as was the case in *YBFZ*, natural justice is not required to be afforded prior to the making of a decision to grant a BVR visa subject to the monitoring or curfew condition.[636] However, as soon as practicable after making the decision, the Minister must give the relevant BVR visa holder notice of the decision and the opportunity to make submissions seeking revocation of the conditions.[637] The Minister must engage with those submissions.[638]

382 Sixth, as was the case in *YBFZ*,[639] there is no obligation to provide reasons for the imposition of the conditions. However, in proceedings seeking judicial review of the decision to impose the conditions, there would be scope for any court exercising a judicial review function to require the production of documents and perhaps enable the administration of interrogatories to the decision maker should that be necessary.[640]

383 In *YBFZ*, the plurality observed that the predecessor to cl 070.612A(1) was not reasonably capable of being seen as necessary for any legitimate purpose of protecting against future offending.[641] In so concluding, their Honours referred to (i) the default imposition of the condition, (ii) the fact that the BVR visa holder's right to make representations only arises after the conditions are imposed, and (iii) the 12 months duration of the conditions.[642] The second and third of those considerations are present with the revised cl 070.612A but the first is not. Even so, as acknowledged by their Honours, that aspect of their reasoning was "not essential"[643] and does not form part of any binding ratio of *YBFZ*.[644]

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contact with the victim or the victim's family) must be imposed: *Migration Regulations*, Sch 2 cl 070.612B(2).

636 *Migration Act*, s 76E(2).

637 *Migration Act*, s 76E(3); see also *YBFZ* (2024) 99 ALJR 1 at 13 [24]; 419 ALR 457 at 469-470.

638 See, eg, *YBFZ* (2024) 99 ALJR 1 at 72-73 [323]; 419 ALR 457 at 549.

639 (2024) 99 ALJR 1 at 73 [324]; 419 ALR 457 at 549.

640 *YBFZ* (2024) 99 ALJR 1 at 73 [324]; 419 ALR 457 at 549.

641 *YBFZ* (2024) 99 ALJR 1 at 23 [84]; 419 ALR 457 at 483.

642 *YBFZ* (2024) 99 ALJR 1 at 23-24 [85]; 419 ALR 457 at 483-484.

643 *YBFZ* (2024) 99 ALJR 1 at 23 [84]; 419 ALR 457 at 483.

644 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56].

384 As *NZYQ* establishes, this aspect of the inquiry looks to the relationship between means and ends.[645] Whether a power to impose a detriment that is prima facie punitive is reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose requires an assessment of the extent (and duration) of the detriment imposed by the measure. It also requires consideration of whether the limits on that power, and the means of scrutinising the exercise of that power, are such as to provide sufficient certainty that the manner and effect of that exercise of power does not stray beyond that legitimate and non-punitive purpose. Thus, to be valid, severe detriments require both a strong justification in terms of purpose and strong means of ensuring that both the reason for their imposition and the effect of their imposition do not stray beyond that purpose. Hence, in *YBFZ* I observed that: [646]

> "it may be ... 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".

385 No such concern arises in this case. Although both the monitoring condition and the curfew condition are to be treated as prima facie punitive and the extent of the detriment effected by them is significant, the various features of the scheme described above provide sufficient certainty that their imposition is reasonably appropriate and adapted to achieve, and does not stray beyond, the provision's legitimate and non-punitive purpose. Accordingly, the conferral of power to impose those detriments on the executive is not inconsistent with Ch III of the *Constitution*.

386 Lastly, the plaintiff relied upon the fact that the Commonwealth has also enacted Div 395 of the *Criminal Code* (Cth). Similar to the scheme the subject of *Benbrika [No 1]*, Div 395 provides for the Supreme Court of a State or Territory to make a "community safety detention order" or a "community safety supervision order" in relation to a "serious offender".[647] A community safety detention order or a community safety supervision order can be made if, amongst other things, a

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645 *NZYQ* (2023) 280 CLR 137 at 158 [44], citing *Jones v The Commonwealth* (2023) 280 CLR 62 at 82 [43], 93-94 [78], 120-121 [154]-[155], 130 [188].

646 *YBFZ* (2024) 99 ALJR 1 at 60 [256]; 419 ALR 457 at 532.

647 *Criminal Code* (Cth), ss 395.12, 395.13.

person has been convicted of a serious violent or sexual offence[648] (or serious foreign violent or sexual offence[649]), is a non-citizen,[650] is at least 18 years old,[651] and for whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future.[652] It is a precondition to making either form of order that the Court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence.[653]

387 By pointing to the existence of another legislative scheme that seeks to achieve similar ends to cl 070.612A(1) by different means, the plaintiff's argument seeks to introduce a form of proportionality[654] analysis into the determination of whether a power to impose the monitoring condition and curfew condition is properly characterised as punitive and is contrary to Ch III of the *Constitution*. However, in *Falzon v Minister for Immigration and Border Protection* a majority of this Court stated that "[w]hether a legislative power of detention is necessary in the Ch III sense is an enquiry as to the true purpose of the law authorising detention, it is not an enquiry as to whether that law is necessary to the achievement of a relevant legislative purpose", and thus held that "[q]uestions of proportionality cannot arise under Ch III".[655] While there is room for debate as to the scope of that statement, it is not confined to challenges to the validity of a power to detain and is equally applicable to challenges to the validity of a power to impose other detriments. The statement precludes reasoning to a conclusion that such a power is not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose because a different power conferred on a different body exercisable in different circumstances might achieve the same or a similar result.

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

649 *Criminal Code* (Cth), s 395.5(2)(a).

650 *Criminal Code* (Cth), s 395.5(1)(b), (2)(b).

651 *Criminal Code* (Cth), s 395.5(1)(e), (2)(e).

652 *Criminal Code* (Cth), s 395.5(1)(c), (2)(c).

653 *Criminal Code* (Cth), ss 395.12(1)(b), 395.13(1)(b).

654 Namely, the aspect of proportionality analysis with respect to certain constitutional freedoms which assesses whether there are "alternative, reasonably practicable, means of achieving the same object" with a "less restrictive effect on the freedom": *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139], citing *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [44].

655 *Falzon* (2018) 262 CLR 333 at 344 [31]-[32].

The plaintiff's submission is inconsistent with this aspect of *Falzon* and no application was made for *Falzon* to be reopened. Accordingly, the submission must be rejected.

Section 51(xix): aliens power

388 The plaintiff's submissions also contended that the revised cl 070.612A(1) was invalid because, insofar as s 504 of the *Migration Act* was said to support the making of cl 070.612A(1), s 504 was not supported by s 51(xix) of the *Constitution* (ie, the aliens power). This contention was not reflected in the agreed questions posed by the special case. It need not be considered further.

Answers to questions stated

389 The questions of law stated for the opinion of the Full Court should be answered as follows:

Question 1: To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) authorises the imposition of condition 8620 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the *Migration Act 1958* (Cth) when that power is construed subject to Ch III of the *Constitution*?

Answer: No.

Question 2: To the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) authorises the imposition of condition 8621 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the *Migration Act 1958* (Cth) when that power is construed subject to Ch III of the *Constitution*?

Answer: No.

Question 3: Who should pay the costs of the Special Case?

Answer: The plaintiff.