HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S27/2024
File Title:	YBFZ v. Minister for Immigration, Citizenship and Multicultu
Registry:	Sydney
Document filed:	Form 27F - A-G SA - Outline of oral argument
Filing party:	Intervener
Date filed:	06 Aug 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **YBFZ**
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Defendant

and

COMMONWEALTH OF AUSTRALIA
Second Defendant

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

Part I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: OUTLINE OF ORAL SUBMISSIONS

2. An important consideration that bears upon whether a power should be characterised as punitive is the extent to which it authorises incursions upon liberty. The safest guide by which the severity of the detriment imposed by an impugned measure may be assessed is by comparison with incursions that attend traditionally recognised forms of punishment. The most pertinent comparison by which the conditions impugned in the present case may be assessed is with the paradigm form of punishment, namely "detention in custody": SA, [6]-[9].

3. Upon undertaking that comparison, the detrimental incursions upon liberty that attend the imposition of the impugned conditions can be seen to be of a different order of magnitude to those that occasion detention in custody. The notion of custody connotes more than confinement to a particular location or monitoring of positions. Inherent in that notion is a loss of autonomy and privacy: SA, [10]-[15], [21]-[23]; M Groves, "Immigration Detention vs Imprisonment; Differences Explored" (2004) 29 *Alternative Law Journal* 228, 229-230 (V10, T50).

4. The Plaintiff submits that the extent to which detention in custody entails incursions upon autonomy and privacy "over and above" detention itself is "irrelevant to the Ch III question": PR, [8], fn 17. That submission is inconsistent with recent authority of this Court which has focussed upon the "nature and severity" of the consequences of an exercise of power in discerning its character: eg, *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899, [21]-[22], [63], [101], [109] (V8, T34). It also appears to be contrary to the Plaintiff's own submissions concerning characterisation: eg, PS, [39] (see also: DS, [35]).

5. Should the Court accept the Plaintiff's invitation to reopen *Thomas v Mowbray* (PS, [23]), then consistently with the "strongly conservative cautionary principle" affirmed in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, 1011 [17]-[18], 1014-1015 [35] (the Court) (V8, T41), it should only do so if it can *now* be said to be "manifestly wrong": *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (the Court) (V4, T19). Such a conclusion may be reached where an authority becomes an outlier in the stream of authority such that "the error … has been made manifest by later cases": *Queensland v The Commonwealth* (1977) 139 CLR 585, 630 (Aickin J).

Dated: 6 August 2024

MJ Wait SC
Solicitor-General for South Australia

B Garnaut
Counsel for the Attorney-General (SA)