HIGH COURT OF AUSTRALIA

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Details of Filing

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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

COMMONWEALTH OF AUSTRALIA
Second Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANTS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Context of this proceeding (DS [6]-[10])

2. The risk to the Australian community posed by non-citizens who have a substantial criminal record is ordinarily addressed by preventing them from entering or remaining in the Australian community through refusal or cancellation of a visa. Those are not punitive measures: *Falzon* (2018) 262 CLR 333. However, for members of the cohort of non-citizens released from immigration detention following *NZYQ* (2023) 97 ALJR 1005, a significant majority of whom have a substantial criminal record, the option of removing the non-citizen from Australia is not available: **SCB 70-72 [55]-[58], 75 [73]**; DS [6]-[9].

3. The power in cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) to impose the curfew and EM conditions responds to that reality, by providing a means to reduce the risk to the Australian community posed by members of the *NZYQ* cohort.

4. The Plaintiff's argument that the power to impose the curfew and EM conditions is invalid invites a dramatic expansion of the kinds of executive action that must be scrutinised against Ch III, and which will be invalid unless a court is satisfied that the executive action is reasonably necessary for a legitimate purpose. If accepted, that argument would bring about a significant rebalancing between the courts, the Parliament and the Executive in a constitutional setting which purposefully does not include a Bill of Rights.

Construction of cl 070.612A (DS [11]-[22])

5. Although cast in negative terms, cl 070.612A(1) **(Vol 1, Tab 5)** imposes a positive duty on the Minister to consider whether or not the curfew and EM conditions are reasonably necessary for the protection of any part of the Australian community: DS [14].

6. Properly construed, cl 070.612A requires the Minister to address five factors: (i) the nature of the harm the visa holder may cause; (ii) the likelihood of that harm eventuating; (iii) the extent to which the condition in question is likely to protect the relevant part of the Australian community from that harm; (iv) the effect the condition will have on the visa holder; and (v) whether there are less restrictive measures that could adequately protect that part of the Australian community: compare *Vella* (2019) 269 CLR 219 at [34]-[35], [43]-[44], [47], [51], [53], [57], [84] **(Vol 7, Tab 31)**; DS [16]-[17].

7. That construction of cl 070.612A(1) is consistent with how the scheme is administered in practice: **SCB 70 [54], 73-75 [63]-[73], 191-192, 197-199, 210, 523-529**; DS [21].

The constitutional framework (DS [23]-[35])

8. The "single question of characterisation" that determines whether a power is properly characterised as punitive involves two steps: DS [25]. **Step 1** asks whether the power is prima facie punitive, whether by way of default characterisation, or by consideration of all relevant circumstances. If it is, **Step 2** asks whether that prima facie characterisation is displaced because the power is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. The single question of characterisation is asked to determine whether the power in question is one that can be exercised only by a court and only as an incident of the adjudging and punishing of criminal guilt: *Lim* (1992) 176 CLR
10 1 at 27.

9. The Plaintiff's argument departs from the reasoning in *Lim*, and seeks to treat the imposition of any hardship or detriment by the State as prima facie punitive and therefore exclusively judicial unless shown otherwise: cf *Re Woolley* (2004) 225 CLR 1 at [17] **(Vol 5, Tab 24)**; DS [26]. Specifically, the Plaintiff attempts to introduce through Ch III a requirement that any law that authorises interference with liberty, privacy or bodily integrity must be characterised as conferring an exclusively judicial function unless it can be shown to be reasonably capable of being seen to be necessary for a legitimate purpose. That argument pays insufficient regard to history: DS [26], [31]; cf PS [10], Reply [4].

The power to impose the curfew condition (DS [36]-[51])

20 10. ***Step 1: Not prima facie punitive.*** The detriment imposed by the curfew condition is qualitatively different, and markedly less severe, than full-time detention in custody: *Regulations*, Sch 8, Condition 8620 **(Vol 1, Tab 5)**; DS [37]; cf PS [17], Reply [8]. In an analysis that is about substance over form, the Court cannot ignore the significant differences between the two: *Vella* at [53]; DS [38]; cf PS [10], Reply [4]. The Plaintiff's argument is irreconcilable with *Thomas* (2007) 233 CLR 307 at [15], [18], [114], [116], [121] **(Vol 7, Tab 28)**; DS [38]. The Plaintiff requires leave to re-open *Thomas*, and there is no basis for that leave to be granted: DS [39].

11. The Plaintiff's attempt to equate "imprisonment" at common law with "detention" in the context of Ch III should be rejected: DS [40]. His argument takes cases concerned to
30 identify restrictions on liberty for which authorisation is required, and treats them as if they identify conduct that cannot be authorised other than in exceptional circumstances.

12. In addition, curfews are commonly imposed for a range of non-punitive reasons: **SCB 89-94 [131]-[148]**; *Stay at Home Directions* (Vic) **(Vol 2, Tab 10)**; DS [43]-[44].

13. ***Step 2: Justification.*** If reached, this step is satisfied. The text, practical operation and the statutory context all support the conclusion that the purpose of cl 070.612A is to protect the Australian community from harm: Explanatory Statement, *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth) **(Vol 10, Tab 48)**; DS [45]-[48]. That purpose is non-punitive and legitimate, there being no requirement that a detriment which falls short of detention in custody be justified as "exceptional": *Benbrika [No 1]* (2021) 272 CLR 68 at [33], [36], [39], [41] **(Vol 5, Tab 21)**; DS [49].

14. On the proper construction of cl 070.612A(1), the curfew condition is reasonably capable of being seen as necessary for that legitimate and non-punitive purpose: DS [50]-[51].

10 **The power to impose the EM condition (DS [52]-[61])**

15. ***Step 1: Not prima facie punitive.*** The Plaintiff contends that the power to impose the EM condition is prima facie punitive having regard to its effect on two interests: privacy and bodily integrity.

16. As to **privacy**, there is no authority supporting the proposition that a law which empowers Executive interference with privacy is capable of offending Ch III. Many Commonwealth laws empower the Executive to interfere with privacy, without any suggestion that they require scrutiny against Ch III: DS [31], [55]. Those laws have often enabled a far greater interference with privacy than the EM condition: **SCB 77-82 [84]-[100]**; DS [58].

17. As to **bodily integrity**, while serious interferences with bodily integrity (such as capital
20 and corporal punishment) may be punitive, the vast majority of conduct which interferes with bodily integrity will not be: DS [56]. That includes the EM condition, which effects only a modest interference of that kind: **SCB 76 [82]-[83], 78 [86], 538**. Again, other Commonwealth laws authorise greater interferences with bodily integrity, without any suggestion that they are punitive: DS [56]-[57]. Further, electronic monitoring is used by the Executive in Australia and other Western liberal democracies in the immigration context for similarly non-punitive purposes: **SCB 85-88 [114]-[129], 630**; DS [59].

18. ***Step 2: Justification.*** If this step is reached, the EM condition is reasonably capable of being seen as necessary for the purpose of protecting the Australian community from harm, for the same reasons as those advanced in respect of the curfew condition: DS [61].

30 Dated: 6 August 2024

Stephen Donaghue | Mark Hosking | Sarah Zeleznikow