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 - Plaintiff's Outline of oral argument |
| Filing party: | Plaintiff |
| 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

**COMMONWEALTH OF AUSTRALIA**
Second Defendant

# OUTLINE OF ORAL SUBMISSIONS OF THE PLAINTIFF

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## PART I INTERNET PUBLICATION

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

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1 There are four steps to the analysis: **Q1**: Is the power to impose the condition prima facie punitive? **Q2**: Does the power have an identifiable non-punitive purpose? **Q3**: Is that identified non-punitive purpose also "legitimate"? **Q4**: Is the power reasonably capable of being seen as necessary for that purpose?: **PS [10]-[11]**; **Reply [4]-[6]**.

2 The Plaintiff is subject to the curfew condition and the monitoring condition.

- *Migration Regulations 1994* (Cth), regs 2.25AA, 2.20, 2.25AB, 2.25AE, Sch 2 cl 070.612A, Sch 8 items 8620, 8621 (**JBA Vol 1, Tab 5**)
- *Migration Act 1958* (Cth), ss 76F, 76C, 76D, 76DA, 76E (**JBA Vol 1, Tab 4**)
- **SCB 479**, **Addendum 1-2, 107, 118**

### CURFEW POWER

### Question 1: the curfew power is prima facie punitive

3 The concept of "detention" in *Lim* comprehends a broad notion of "imprisonment": **PS [13]-[16]**. The tort of false imprisonment is directed to that same notion.

- *Plaintiff M68* (2016) 257 CLR 42 at [356] (Gordon J) (**JBA Vol 5, Tab 23**)
- *NZYQ* (2023) 97 ALJR 1005 at [39] (the Court) (**JBA Vol 8, Tab 41**)
- *ASF17* (2024) 98 ALJR 782 at [31]-[32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), [58] (Edelman J) (**JBA Vol 8, Tab 33**)
- *Lim* (1992) 176 CLR 1 at 16-19, 27-28 (Brennan, Deane and Dawson JJ) (**JBA Vol 3, Tab 14**)
- Blackstone, *Commentaries,* 17th ed (1830), Bk 1 Ch 1 at 123, 128, 129, 134, 136, 137-138; Bk 3 Ch 8 at 119, 126, 131 (**JBA Vol 10, Tab 47**)

4 The curfew power involves a measure which authorises "detention": **PS [17]-[18]**.

- *Jalloh* [2021] AC 262 at [1], [4], [6], [8]-[10], [24], [26]-[28], [33] (Lady Hale for the Court) (**JBA Vol 8, Tab 37**)
- *Plaintiff M68* (2016) 257 CLR 42 at [30]-[32] (French CJ, Kiefel and Nettle JJ), [91]-[93] (Bell J), [167]-[175] (Gageler J), [237], [239] (Keane J), [352], [354] (Gordon J)

5 The opposing submissions (**Cth [37], SA [11]-[12]**) blur the distinction between what it means to be *detained* and the *conditions* of detention: **Reply [8]**. The essential point is that, for the specified period of time each day, the person is confined to a particular location.

- *Behrooz* (2004) 219 CLR 486 at [19]-[21] (Gleeson CJ), [218] (Callinan J) (**JBA Vol 3, Tab 12**)

6 *Thomas* does not stand for the proposition that it can be concluded, without further analysis, that a curfew power does not offend Ch III (cf **CS [38], SA [19]**). If it does, one strand of the reasoning, not the result, should be reopened if necessary: **PS [23]**; **Reply [9]**.

- *Thomas* (2007) 233 CLR 307 at 311-312 (Merkel QC), [2]-[3], [15]-[18] (Gleeson CJ), [115]-[121] (Gummow and Crennan JJ) (**JBA Vol 7, Tab 28**)
- *Vella* (2019) 269 CLR 219 at [167], [171] (Gageler J), [204] (Gordon J) (**JBA Vol 7, Tab 31**)

7 Alternatively, the curfew power authorises a restriction on liberty that is sufficiently severe to attract characterisation as prima facie punitive: **PS [24]-[25]**.

8 The Commonwealth's array of examples of "curfews" imposed for non-punitive reasons (**Cth [44], [39]**) do not assist at this stage because: (a) the Commonwealth conflates questions of *effect* (Q1) and *purpose* (Q2); and (b) the examples involve measures that are different in nature and severity to the detriment authorised by the curfew power.

- *Falzon* (2018) 262 CLR 333 at [23]-[24] (Kiefel CJ, Bell, Keane and Edelman JJ) (**JBA Vol 3, Tab 16**)
- *Benbrika [No 2]* (2023) 97 ALJR 899 at [63]-[64] (Gordon J) (**JBA Vol 8, Tab 34**)

**Question 2: curfew power does not have a non-punitive purpose**

9 The Commonwealth's identification of the purpose of "protecting the Australian community *from harm*" (**Cth [45]**) is so broad and elastic that it is not meaningfully separated from punishment: **PS [26]-[28]**. The information about the criminal records of the "NZYQ cohort" does not assist the identification of a protective purpose: **PS [29]**. A different standard does not apply to non-citizens: **PS [8]**; cf **Cth [48]**.

- *Alexander* (2022) 276 CLR 336 at [111], [113] (Gageler J).

**Question 3: curfew power does not have a legitimate purpose**

10 The "protection of the community" from unspecified and abstract "harm" is not a legitimate purpose: **PS [33]-[34]**. That purpose is so diffuse and routine that if it were "legitimate", it would render the legitimacy requirement pointless: **PS [31]-[32]**; **Reply [5]-[6]**. In addition, the requirement for any harm to be "grave and specific" should be adopted: **PS [35]**; **Reply [13]**.

- *Benbrika [No 1]* (2021) 272 CLR 68 at [32], [36], [47] (Kiefel CJ, Bell, Keane and Steward JJ) (**JBA Vol 5, Tab 21**)
- *Garlett* (2022) 277 CLR 1 at [46] (Kiefel CJ, Keane and Steward JJ), [127]-[128], [139], [150], [152] (Gageler J), [174], [179], [187]-[189], [195] (Gordon J) (**JBA Vol 3, Tab 17**)

**Question 4: the curfew power is not reasonably capable of being seen as necessary**

11 The curfew power is not reasonably capable of being seen as necessary because: (a) the default position is that the condition must be imposed; (b) the power does not involve a genuine balancing process because the parameters of the type of harm, and level of risk, are not specified; (c) the condition is automatically imposed for one year; (d) the power lacks procedural safeguards: **Reply [14]**; **PS [37]-[42]**.

- *Vella* (2019) 269 CLR 219 at [34]-[51] (Bell, Keane, Nettle and Edelman JJ), [129], [165]-[167], [169] (Gageler J), [179], [187] (Gordon J)

**MONITORING POWER**

**Question 1: the monitoring power is prima facie punitive**

12 Electronic monitoring involves interferences with the fundamental rights of bodily integrity *and* privacy. The common law tradition informs the evaluation of the nature and severity of a form of detriment that was historically unknown: **PS [44]-[48]**.

- *Marion's Case* (1992) 175 CLR 218 at 233-234, 253 (Mason CJ, Dawson, Toohey and Gaudron JJ), 265 (Brennan J), 309 (McHugh J) (**JBA Vol 6, Tab 25**)
- *Smethurst* (2020) 272 CLR 177 at [124]-[125] (Gageler J) (**JBA Vol 6, Tab 26**)

13 The interference with bodily integrity and privacy authorised by the monitoring power is severe having regard to: (a) the interference with bodily integrity would otherwise be a battery; (b) that interference is constant; (c) that interference must be understood in light of the values underlying the right (self-determination and dignity); (d) the constant interference with bodily integrity results in constant surveillance; and (e) there are broad authorisations for use and disclosure of data: **PS [49]-[52]**; **Reply [10]-[12]**.

- *Migration Act 1958* (Cth), ss 76F(1)-(3).
- **SCB 76-84 [81]-[109], 188-190, 538**

**Questions 2 and 3: monitoring power does not have a non-punitive or legitimate purpose**

14 The analysis of the curfew power on Questions 2 and 3 applies to the monitoring power: **PS [53]**.

**Question 4: monitoring power does not have a non-punitive or legitimate purpose**

15 The analysis of the curfew power on Question 4 applies to the monitoring power: **PS [54]**. Additionally, there is no rational connection between the monitoring power and the purpose of protecting the community: **PS [55]-[57]**. That too is a sufficient reason for invalidity.

**Dated:** 6 August 2024

**Craig Lenehan** **Thomas Wood** **Kate Bones**