



HIGH COURT OF AUSTRALIA

6 November 2024

YBFZ v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
& ANOR
[2024] HCA 40

Today, the High Court held that cl 070.612A(1)(a) and (d) of Sch 2 to the *Migration Regulations 1994* (Cth) ("the Regulations") are invalid. The constitutional limit on the legislative power of the Commonwealth Parliament argued to have been transgressed by cl 070.612A(1)(a) and (d) derives from the separation by Ch III of the Constitution of the judicial power of the Commonwealth and from the exclusive assignment to that separated judicial power of authority to impose punishment.

The *Migration Act 1958* (Cth) ("the Act") provides for classes of temporary visas, known as bridging visas, to be granted in such circumstances, by reference to such criteria and on such conditions, as are prescribed by regulation. The relevant class of visa, Bridging R (Class WR) ("BVR"), is a prescribed class of temporary visa which has one subclass: Subclass 070 (Bridging (Removal Pending)). Section 73 of the Act empowers the Minister to grant a bridging visa, with or without application, to an "eligible non-citizen" who the Minister is satisfied meets prescribed criteria. An "eligible non-citizen" includes a non-citizen who is within a prescribed class. Under the Regulations, a non-citizen is within a prescribed class and is taken to meet criteria 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.

Clause 070.612A(1)(a) and (d) formed part of the Commonwealth's legislative response to the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*. Clause 070.612A(1) of Sch 2 to the Regulations concerns the grant of a BVR to eligible non-citizens. By cl 070.612A(1), "each of the ... conditions [as set out in (a)-(d)] must be imposed [on the BVR] by the Minister unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community". The condition in cl 070.612A(1)(a) ("the monitoring condition") enables continuous electronic monitoring of the person's location by requiring the person to wear an electronic monitoring device affixed to the person (in practice, the device is secured around the person's ankle). The condition in cl 070.612A(1)(d) ("the curfew condition") requires the person to remain in a specified location generally between 10.00 pm and 6.00 am. If a condition listed in cl 070.612A(1) is imposed on the grant of a BVR, the condition remains in force for a period of 12 months from the date of the grant. Non-compliance with a curfew condition or monitoring condition of a BVR is an offence against ss 76C or 76D of the Act. Each offence is punishable by a maximum penalty of five years imprisonment or 300 penalty units, or both, subject to s 76DA of the Act which provides for a mandatory minimum sentence of one year in prison.

The plaintiff is a stateless Eritrean who was released from immigration detention on 23 November 2023 based on an assessment that there was no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future. It was common ground that this was so then and remains the case. On 2 April 2024, a delegate of the Minister granted the plaintiff a BVR on conditions including the monitoring and curfew conditions. The plaintiff was subsequently arrested and charged with six offences under ss 76C and 76D of the Act of failing to comply with the monitoring condition and the curfew condition of the BVR. All six charges are presently pending in the Magistrates' Court of Victoria.

The High Court held, by majority, that the imposition of each of the curfew condition and the monitoring condition on a BVR is prima facie punitive and cannot be justified. Clause 070.612A(1)(a) and (d) of Sch 2 to the Regulations infringe Ch III of the Constitution and are invalid.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.