*Ilya Aidman**

ANOTHER ROUND OF WHACK-A-MOLE: *YBFZ V MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS* (2024) 419 ALR 457

I Introduction

Since the High Court of Australia's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'),[1] the Minister for Immigration and Citizenship[2] ('Minister') has led substantial efforts to develop alternative schemes to manage what has become known as the *NZYQ* cohort ('cohort'). The cohort is a group of 153 detainees released from detention in November 2023, the majority of whom have serious criminal histories. With detention excluded by the High Court, the *Migration Act 1958* (Cth) ('*Act*') and *Migration Regulations 1994* (Cth) ('*Regulations*') imposed conditions on the cohort's bridging visas. These conditions, namely location monitoring and a curfew, were imposed as an exercise of executive power. Striking down the validity of the two visa conditions 5:2, the Court's four judgments in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*')[3] provide valuable insight into the extent of the Ch III limitation established in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*').[4] It also highlights a greater nuance in the Court's approach following the unanimous joint judgment in *NZYQ*.

This case note will analyse *YBFZ* as follows. Part II will explain the visa regime and conditions enacted following *NZYQ*, and the factual context of *YBFZ*. Part III will extract key statements on the Ch III question. Part IV will step through each of the judgments, identifying key bases and comparing the approach of various Justices. Part V will briefly consider events following the decision. Part VI will conclude.

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* LLB (Hons) Candidate, BA (Adv) (IntRel) Candidate (Adel); Student Editor, *Adelaide Law Review* (2025).

1 (2023) 280 CLR 137 ('*NZYQ*').

2 The relevant Minister's title has changed several times since *NZYQ*. The Minister has previously been known as: Minister for Immigration and Multicultural Affairs (2024), and Minister for Immigration, Citizenship and Multicultural Affairs (2022–2024). This case note will make simple reference to 'the Minister'.

3 (2024) 419 ALR 457 ('*YBFZ*').

4 (1992) 176 CLR 1 ('*Lim*').

II Background

A *The Post-*NZYQ *Regime*

Persons in the cohort who do not hold a substantive visa must rely on a bridging visa to avoid the mandatory detention requirement pursuant to s 189(1) of the *Act*. The Minister is able to grant these bridging visas with various 'specified conditions'.[5] In certain cases, the Minister is authorised to grant a bridging visa without the request or consent of a person.[6]

The first tranche of post-*NZYQ* amendments were effected through the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth). These came into force on 18 November 2023, amending the *Act* and the *Regulations* directly. These amendments extended powers to grant visas without application to the *NZYQ* cohort,[7] and gave powers to grant Bridging R (Class WR) visas ('BVR') to the cohort.[8] Rules 2.25AB and 2.25AA — the new and extant regulation relating to BVRs — were further amended on 8 December 2023 following the publication of reasons for decision.[9]

Four conditions were automatically imposed unless the Minister was satisfied that they were not reasonably necessary.[10] In *YBFZ,* two of the four conditions were in question: the monitoring condition (8621) and the curfew condition (8620) ('relevant conditions'). Sections 76B to 76D of the *Act* made breaches of the relevant conditions a criminal offence where there was no reasonable excuse, with a maximum penalty of five years imprisonment. Section 76DA required courts to 'impose a minimum sentence of imprisonment of at least one year'.

The monitoring condition required a BVR holder to 'wear a monitoring device at all times'.[11] The specific device was not prescribed,[12] but in practice, took the form of an ankle monitor. The plaintiff's monitor had two parts: the monitoring device itself, and a portable charger. The portable charger attached to the monitoring device, was charged from mains power, but could charge the monitoring device without being

5 *Migration Act 1958* (Cth) ss 41, 73, as at 18 November 2023 ('*Migration Act*'). An unrestricted authority to grant bridging visas was provided in s 41(1), while further subsections provided general guidance on the effect of certain conditions, and general non-binding guidance on the potential scope of conditions.

6 *Migration Regulations 1994* (Cth) reg 2.20, as at 8 December 2023 ('*Migration Regulations*').

7 Ibid reg 2.20(18).

8 Ibid reg 2.25AB.

9 *Migration and Other Legislation Amendment (Bridging Visa, Serious Offenders and Other Measures) Act 2023* (Cth).

10 *Migration Regulations* (n 6) sch 2 cl 070.612A.

11 Ibid sch 8 condition 8621(1).

12 Ibid sch 8 condition 8621(5).

tethered to mains power. Instructions required the person to charge the monitoring device twice a day for 90 minutes, enforced by threat of imprisonment.[13]

The curfew condition required a BVR holder to remain at a notified address for up to eight hours, ordinarily from 10pm to 6am.[14] This notified address could have been, inter alia, the person's residential address,[15] or any address notified ad hoc by the BVR holder before 12pm the previous day.[16]

B *Facts of* YBFZ

The plaintiff was a stateless Eritrean man who arrived in Australia in 2002 as the holder of a Refugee (Subclass 200) visa.[17] Between 2005 (at which point the plaintiff was aged 17) and 2017, he was convicted of a series of criminal offences. These included inflicting grievous bodily harm and malicious wounding, criminal damage, and making a threat to kill.[18]

During this period, and as a result of his criminal behaviour, his refugee visa was cancelled. Upon his release from prison in 2018, he was taken into immigration detention.[19] Shortly thereafter, he made an application for a Protection (Subclass 866) visa. Despite the application being refused, the Minister's delegate made findings which amounted to a 'protection finding'.[20] This meant that the Commonwealth was not authorised to remove the plaintiff.[21]

The plaintiff remained in immigration detention until shortly after the decision in *NZYQ*, when he was released on the basis that there was 'no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future'.[22] Shortly thereafter, the Minister granted the plaintiff a BVR with the relevant conditions, with a total of six further BVRs granted (variously including the relevant conditions) between 13 December 2023 and 2 April 2024.[23]

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13 Ibid sch 8 condition 8621(3); *Migration Act* (n 5) s 76D(3)(b); *YBFZ* (n 3) 477 [59].

14 *Migration Regulations* (n 6) sch 8 condition 8620(1)–(2).

15 Ibid sch 8 condition 8620(3)(a), which referred to condition 8513, which required notification of the holder's residential address, and condition 8625, which required the notification of several of the holder's details including their address.

16 Ibid sch 8 conditions 8620(3)(b)–(c).

17 *YBFZ* (n 3) 473 [39].

18 Ibid 515 [191].

19 Per *Migration Act* (n 5) s 189(1).

20 *YBFZ* (n 3) 473 [40].

21 See *Migration Act* (n 5) s 198.

22 *YBFZ* (n 3) 474 [41].

23 Ibid 474 [42]–[43].

III Legal Framework

Chapter III of the *Constitution* places a limitation on executive and legislative power by reserving exclusive powers to the judiciary.[24] It is helpful to extract a few of the Court's previous statements verbatim.

Lim stands for the principle that

> involuntary detention … is penal or punitive in character and … exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[25]

So, given the foundational principle that only Ch III courts may exercise Commonwealth judicial power, *Lim* prevents the executive from exercising that power by characterising involuntary detention and other acts that are penal or punitive in character as exclusively judicial functions.

Therefore, to assess the proper limit of the executive's power, we are left with a framework established in *Jones v Commonwealth of Australia*,[26] that asks

> 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.[27]

A law is only 'properly characterised as punitive' if, through 'an assessment of the relationship between means and ends',[28] the Court finds that the law is not 'reasonably capable of being seen to be [reasonably appropriate and adapted] for a legitimate and non-punitive purpose'.[29]

What was new in *YBFZ* was the need to assess the lower limits of 'punitive' actions. Unlike immigration detention — the context in which *Lim* arose — the conditions imposed on BVR holders in this case were not necessarily 'prima facie punitive'. It is on this question that approaches differ.

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24 This is commonly described as one of the two limbs in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers Case*'). That case established that only Ch III courts can exercise the judicial power of the Commonwealth.

25 *Lim* (n 4) 27.

26 (2023) 280 CLR 62 ('*Jones*').

27 Ibid 82 [43].

28 Ibid 94 [78].

29 *NZYQ* (n 1) 157 [39], substituting 'necessary' for the appropriate definition found in *Jones* (n 26) 81 [42].

IV Decision

The Court delivered four judgments: a joint majority of four justices, including the Chief Justice, which declared the regulations invalid;[30] a sole concurring opinion;[31] and two sole dissents.[32]

A *The Majority: Gageler CJ, Gordon, Gleeson and Jagot JJ*

The majority's decision is grounded in the common law's refusal to 'deny its fundamental protections against … deprivation of … liberty'.[33] Their Honours identified the source of this protection as 'the compact between the individual and the state', which is the context in which our *Constitution* came to exist.[34] Despite acknowledging early on that the *Constitution* does not create a limitation for every law imposing a detriment on a person,[35] their Honours emphasised that 'judicial protection of individual liberty' and the separation of powers 'spring from the same underlying values'.[36]

1 *The Curfew Condition*

The majority (along with the other members of the Court) rejected the plaintiff's submission that the Ch III concept of interference with liberty is aligned with the common law tort of false imprisonment.[37] Concurrently, the majority distinguished *Thomas v Mowbray* ('*Thomas*')[38] on the basis that *Thomas* considered an act of the judiciary, not the executive.[39] Instead, through a practical analysis,[40] their Honours considered how the fact that one-third of a BVR holder's day must be spent in a specific place inherently restricted the BVR holder's liberty during the other two-thirds of the day by preventing them from travelling substantial distances from a notified address. In effect, the majority concluded that the curfew produced a continuous depravation of liberty.

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30 *YBFZ* (n 3) 463–84 [1]–[88] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

31 Ibid 484–510 [89]–[171] (Edelman J).

32 Ibid 511–23 [172]–[226] (Steward J), 523–50 [227]–[327] (Beech-Jones J).

33 Ibid 465 [9] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

34 Ibid 466 [12].

35 Ibid 464–5 [6].

36 Ibid 467 [14], citing *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 276 [141]; *YBFZ* (n 3) 467 [15].

37 While not explicitly rejecting the submissions, the majority emphasised that the correctness of the plaintiff's position did not depend on the correctness of his submissions: *YBFZ* (n 3) 474–5 [46]–[47]. The Court went on to form an alternative argument in favour of the plaintiff's position: *YBFZ* (n 3) 475–7 [47]–[55]. See also at 546–7 [312] (Beech-Jones J).

38 (2007) 233 CLR 307 ('*Thomas*').

39 *YBFZ* (n 3) 476 [53] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

40 Ibid 475–6 [50].

Their Honours could be accused of characterising the curfew condition at its worst. By that logic, a curfew for *any* amount of time had *some* impact on the plaintiff for the entirety of their day. Their Honours also did not give weight to the fact that the BVR holder was entitled to nominate *any* location by midday on the day prior. On the other hand, it remains true that BVR holder's liberty is different to the sort had by an ordinary member of the community — the ability to nominate alternative addresses did not allow the BVR holder to act spontaneously or respond to emergencies. And perhaps that is the precise protective point of the conditions.

In deciding whether the condition had a punitive or merely protective character, their Honours observed that the 'detention imposed by the curfew condition is neither trivial nor transient in nature',[41] concluding that this burden was prima facie punitive.

2 *The Monitoring Condition*

Their Honours described three effects of wearing the monitoring device.[42]

First, that the wearer would have been constantly aware of the device's presence. Their Honours' explanation of the 'real psychological burden and emotional burden'[43] resulting merely from the BVR holder's awareness of the physical presence of the monitoring device is brief. It is unclear whether the mere breach of bodily autonomy was the crux of the issue,[44] or whether the deterrence from visiting lawful places through the indirect awareness of monitoring was contributory.[45] The majority's affirmation of the BVR holder's fear that the Commonwealth would impose a detriment resulting from attending places that divulge their religious or sexual characteristics is also unusual. Assuming their Honours did not intend to suggest that there was a general risk that the Commonwealth Government would cause a person to suffer harm based on their religious, sexual, or political identity, the majority appears to have been sympathetic to a BVR holder's *subjective* anxiety resulting from location monitoring as indicative of the prima facie punitive nature of the burden.

The majority's second concern — that the visible mark 'conveying [the wearer's] status as an unworthy or dangerous person' exposed the wearer to a degradation of autonomy — is consistent with the indirect effect of the first.[46] Their Honours sought to recognise the subjective shame that may have resulted from the average passer-by acting in a certain way towards the BVR holder. Further, their Honours appear to have contemplated that the apprehension of negative treatment by the

41 Ibid 476 [51].

42 Ibid 477–8 [60].

43 Ibid.

44 Ibid 477 [57].

45 Ibid 478 [61].

46 Ibid 478 [62].

community meant that the BVR holder would avoid placing themselves in certain lawful situations. Their Honours' consistent emphasis on social or self-imposed restrictions resulting indirectly from the monitoring equipment, as opposed to the limitations plainly imposed by the scheme, demonstrates the majority's desire to consider the maximal practical impact of burdens.

Their Honours' third concern about the need to access mains power emphasises that the monitoring condition placed a further restraint on freedom of movement, exacerbating the impact of the curfew condition.[47]

Their Honours therefore found that both conditions were prima facie punitive.

3 *Justification*

Their Honours noted that the stated purpose of 'protection of any part of the Australian community' was very general and did not speak to the specific function of the scheme.[48] They also noted that the scheme was not necessarily limited to the existing *NZYQ* cohort,[49] and could capture persons without a criminal record.[50] The Minister submitted that the purpose should be read as protecting Australians 'from the risk of harm arising from future offending'.[51] Unlike all other justices (concurring and dissenting),[52] the majority took the most literal approach.[53]

Further, the majority did not consider the role of the Community Protection Board (and its guidelines) in the Minister's decision-making,[54] a view shared by Beech-Jones J (dissenting),[55] in contrast with Edelman J who took limited account for the purpose of understanding legislative intent.[56] The majority concluded that the analysis of whether there is a legitimate non-punitive purpose must be based on the most general purpose.[57]

As a result, the majority found that the scheme extended beyond protection from harm arising from persons committing future offences, and noted especially that

47 Ibid 477 [59].

48 Ibid 479 [65].

49 Ibid 473 [38].

50 Ibid 473 [37]. See also *Migration Regulations* (n 6) reg 2.20(18). Recall that this bridging visa could be granted on the Minister's initiative, without the person's involvement.

51 *YBFZ* (n 3) 479 [66] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

52 Justice Edelman made amusing criticism of the majority's interpretation: ibid 492 [113], [115]. See also at 529–30 [245]–[249] (Beech-Jones J).

53 Ibid 481 [75] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

54 Ibid 482–3 [80].

55 Ibid 543 [296] (Beech-Jones J).

56 Ibid 492 [113], 493 [117] (Edelman J).

57 Ibid 482 [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

the scheme did not require the Minister to reach a 'required state of satisfaction' *before* imposing the conditions.[58]

The majority's judgment thus concluded that the scheme was: (1) not for a legitimate non-punitive purpose;[59] and (2) even if it were, could not be reasonably necessary for that purpose.[60]

B *Concurring Judgment: Edelman J*

Justice Edelman's reasons resolved the matter through a simpler inquiry by addressing what his Honour called the '*Lim* fiction'.[61] His Honour's further practical contribution is a deeper analysis of the concept of punishment and a differing view on the scheme's purpose.

1 *The Lim Fiction*

His Honour's view was that a certain act is either punitive, or it is not, in contrast with the premise of *Lim* that a specific act *becomes* punitive by being disproportionate to a certain legitimate aim.[62] Therefore, Edelman J narrowed the legal question to whether the purpose of the regulations is punishment.[63] His Honour concluded this portion of his judgment by folding the *Lim* analysis into a far more general rule: that there is 'no head of power to impose [punishment]' to the extent that a detriment is not reasonably necessary, or in other words, part of a proportionate legislative regime.[64]

2 *Purpose*

Justice Edelman resisted the majority's broad reading. To demonstrate this point, he tested the extremes of the majority's view that the scope of 'protection of any part of the Australian community' is unbounded.[65] His Honour jested that parliament could not rationally be concerned with persons 'who sneeze a lot'[66] — though that, so his Honour implied, could be moulded to protect against some cursory concern of the Australian community within the 'free-floating' interpretation of the majority.[67] Instead, his Honour looked to: (1) the combination of cls 070.612A and 070.612B

58 Ibid 482 [79].

59 Ibid 475 [47], 478 [63].

60 Ibid 483 [84].

61 See *NZYQ* (n 1) 160–2 [51]–[54].

62 See generally *YBFZ* (n 3) 502 [142]–[144].

63 Ibid 487 [95] (Edelman J).

64 Ibid 508 [161].

65 See, e.g., ibid 479 [65] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

66 Ibid 492 [113] (Edelman J).

67 Ibid 482 [79] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

(i.e., statutory context);[68] (2) the executive government's interpretation as evident from the non-statutory establishment of the Community Protection Board and its guidelines;[69] and (3) the broader *NZYQ* context, which he viewed as inseparable from the context of the *Regulations*. Considering these factors, his Honour found the purpose of the relevant regulations to be a response to 'the prospect of future offending in very general terms'.[70]

3 *Characterisation of Conditions*

His Honour described this condition as 'home detention', as it constricted location rather than movement and could do so during daytime.[71] After stating his conclusion in favour of the plaintiff,[72] the judgment went on in the abstract. Justice Edelman started with a 'core or standard' purpose linked to retribution and deterrence.[73] His Honour joined with Beech-Jones J to prioritise harshness and severity as a relevant factor in constituting punishment,[74] but also emphasised, together with Steward J, the historical delineation between the judiciary, executive and legislature at the time of Federation.[75] In doing the latter, Edelman J reinforced that the start and end of the constitutional limitation must be the protection of judicial power.

In this sense, his Honour finished on a simple position: protective punishment is semantic description;[76] a sufficiently harsh condition imposed in a backwards-looking inquiry relating to previous criminal conduct must be punishment.[77]

Justice Edelman summarised four bases for his conclusion: (1) the effect of the decision in *NZYQ* is that the cohort is entitled to release from detention — the circumstances do not reflect a blank slate onto which any conditions can be added to substitute a sub-detention regime; (2) the purpose of the curfew condition was to deter crime based on a pattern of past criminal activity; (3) the conditions were not imposed through a merely forward-looking inquiry — the assessment of the need for conditions, despite resulting in 'protective punishment', was based on past criminal

68 The former used the general test of 'harm' resulting in the subject provisions, while the latter related to a specific group of criminal offences linked to a separate group of conditions.

69 *YBFZ* (n 3) 494 [120] (Edelman J).

70 Ibid 493 [117].

71 Ibid 489 [104].

72 Ibid 485–6 [92].

73 Ibid 500 [136]. See also at 495–6 [124]–[125], citing HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968).

74 *YBFZ* (n 3) 499 [135] (Edelman J), 525 [242] (Beech-Jones J).

75 Ibid 514 [187] (Steward J).

76 Ibid 497–8 [130]–[132].

77 Synthesising Edelman J's views expressed inter alia at ibid 497–8 [130], 502–3 [145]–[147], 504 [150], 508 [161].

activity; and (4) the curfew rose to a harshness described as 'home detention', suggesting this as a prima facie indicator of the purpose being punishment.[78]

C *First Dissent: Steward J*

Justice Steward's reasons are comparatively short. Like Edelman J, Steward J took issue with the modern application of *Lim* and adopted a somewhat revisionist approach. His Honour concluded that the conditions were not prima facie punitive,[79] and avoided comprehensively assessing reasonable necessity.[80]

The crux of Steward J's disagreement is what he viewed as the overextension of *Lim* to strike down laws granting power to the executive 'concerning matters which have not ever, historically or otherwise, been the exclusive preserve of the courts'.[81] Justice Steward returned frequently to *Falzon v Minister for Border Protection*,[82] which his Honour suggested captured the proper application of the *Lim* doctrine prior to its overextension. Justice Steward explored the distinction between punishment 'in the relevant sense' and the broader category of 'punitive' acts, applying a substantial degree of historical determinism to suggest that unless courts have historically exercised a specific power, there should be significant resistance to adding that to their exclusive domain per Ch III.[83] His Honour further emphasised the 'vulnerability … of an alien to exclusion',[84] to demonstrate the overarching right of the executive to permit non-punitive extreme outcomes.

It is at this point that Steward J may have 'over-egged the omelette',[85] leaving himself an easy path to characterise the curfew and monitoring conditions as outside the 'core' of punishment historically reserved to courts. By enforcing historical determinism, his Honour limited the scope of executive action that informs the definition of punishment to a time where the government played a fundamentally different role in society. As at Federation, the Commonwealth Government had a lesser capacity to involve itself comprehensively with the lives of its constituents; the scale of government administration was smaller; geographies more intensely bounded the administration of justice (e.g., through the significant role of local courts in criminal punishment); and the volume of immigration we see today was technologically impossible. For the same reason that strictly originalistic constitutional

78 Ibid 508–9 [164]–[167].

79 Ibid 522 [215] (Steward J).

80 See ibid 524 [223]–[224].

81 Ibid 511–12 [176].

82 (2018) 262 CLR 333 ('*Falzon*').

83 *YBFZ* (n 3) 514 [187].

84 Ibid 521 [212], citing *Falzon* (n 82) 346 [39].

85 To borrow Kerr J's choice words in: *CHVS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 34, [78].

interpretation has subsided in Australia in favour of legalism and realism,[86] Steward J's assertion that judicial functions end at adjudging and punishing guilt '*simpliciter*' does not do justice to his Honour's basic proposition that the modern High Court has overextended its powers to set limits on all legislation.[87]

Effectively, by making such a confident position on the nature of punishment, supposedly to exclude 'free-ranging [judicial] investigation',[88] his Honour avoided the obligation of considering the effect of the substance of the conditions. His Honour's judgment completed only one half of the *Lim* analysis. Meanwhile, his Honour's view on whether the conditions were reasonably capable of being seen as necessary for a non-punitive purpose would have been informative. If Steward J had expressed a view on this issue, his Honour could have formed a practical alternative — together with Beech-Jones J — to the negative, conceptual characterisation by the majority and Edelman J to produce a complete two-judge dissent.

D *Second Dissent: Beech-Jones J*

In the absence of Steward J's assistance on the characterisation of the conditions, Beech-Jones J's approach has substantial weight as *the* alternative assessment of the relevant burden of curfews and monitoring. Critical to Beech-Jones J's analysis was an acknowledgement that 'the more severe the detriment … the more difficult it will be to characterise the power [as valid]'.[89] Justice Beech-Jones joined Steward J in emphasising that any protection of individual rights cannot be more than incidental to the source of the separation of powers — Ch III.[90] Detriment beyond punishment is ordinary.[91] Additionally, his Honour weighed the frequency with which a detriment is imposed other than by courts (e.g., cancellation of a visa), and whether the power is imposed selectively on the individual or society at large (e.g., COVID-19 lockdowns).[92]

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86 The scope for interpreting the *Constitution* was notably expanded in *Cole v Whitfield* (1988) 165 CLR 360. See also Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5(2) *Constitutional Law and Policy Review* 21, cited in Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(1) *Federal Law Review* 455. Cf the textualism attributed to Gleeson Court: Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989–2004' (2008) 30(1) *Sydney Law Review* 5, 21–5.

87 *YBFZ* (n 3) 513 [182] (Steward J) (emphasis in original).

88 Ibid 513 [183].

89 Ibid 527 [239] (Beech-Jones J).

90 Ibid 527–8 [240] (Beech-Jones J), 511 [175] (Steward J).

91 Ibid 527–8 [240]. Taken together, Beech-Jones J identified these two factors — severity and historic use — as the established factors for identifying punishment: at 528 [242], citing *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 367–8 [72], 368–9 [75] (Kiefel CJ, Keane and Gleeson JJ), 397 [159] (Gordon J), 428 [250] (Edelman J).

92 *YBFZ* (n 3) 528 [242], 528–9 [244] (Beech-Jones J).

On the curfew condition, his Honour explained that surveillance creates deterrence merely because the person is aware of a greater risk of detection, thereby reducing the likelihood of a person entering a problematic area. As this is not in line with the 'deterrence by example' at the core of criminal punishment, Beech-Jones J concluded that it can be a non-punitive form of protection. Justice Beech-Jones spent time rejecting the majority's concerns in relation to the 'stigma' associated with wearing the monitoring device,[93] combatting this both practically — highlighting that the device was not actually so large as to be unable to be covered by ordinary clothing, and theoretically — emphasising 'the difficulty with using an inferred incidental consequence' as a basis to declare the condition punitive.[94]

His Honour went on, perhaps too quickly, to conclude that curfews have a similar operation and purpose to the monitoring condition.[95] Justice Beech-Jones pointed to their combined use in bail and post-incarceration regimes without much dedicated analysis of the material effect of the monitoring condition on BVR holders.[96] In doing so, Beech-Jones J seems not to have differentiated between global and specific restraints on freedom of movement. Whereas a monitoring condition ostensibly prevents a BVR holder from attending an unlawful place, a curfew condition prevents a BVR holder from attending *any* place, whether lawful or not. His Honour's approach did not engage with the effect of this evident restriction of liberty, nor evaluate the curfew condition against detention — the standard against which the majority and Edelman J defined the condition as prima facie punitive. In this sense, despite the three alternative perspectives in *YBFZ*, the combined decision does not present an independent characterisation of the curfew condition as non-punitive.

Justice Beech-Jones also devoted significant attention to the question of how the scheme 'ensures [its] power[s] [are] only exercised to pursue the relevant legitimate … purpose'.[97] His Honour was able to respond to many criticisms of the scheme: (1) despite the conditions arising automatically, the necessity of the conditions was assessed on a 12-month basis;[98] (2) while rules of natural justice were excluded (i.e., there was no right to be heard), there was a right to have submissions considered;[99] and (3) there remained a right for the court to review the Minister's absence of satisfaction.[100]

In concluding, Beech-Jones J generally rejected many of the secondary detriments submitted by the plaintiff, including the stigma, and the equation between detention in

93 See above Part IV(A)(2).

94 *YBFZ* (n 3) 545 [308] (Beech-Jones J).

95 Ibid 538–9 [278].

96 Ibid 539 [279].

97 Ibid 531 [254].

98 Ibid 533 [261], 542 [292]–[293].

99 Ibid 542 [295].

100 Ibid 542 [294].

custody and the curfew condition.[101] For his Honour, this case concerned a far lesser restraint on liberty, whereas *Lim* and *NZYQ* spoke to the 'involuntary detention of a [person] in custody'.[102] On that basis, and noting the existence of several elements of due process, his Honour found against the plaintiff on all questions.

V Beyond *YBFZ*

YBFZ was handed down on 6 November 2024 with the prima facie effect of ending the mandatory monitoring and curfew regime. The next day, the Minister amended the *Regulations* to reinstate the practical effect of the scheme rejected in *YBFZ*.[103]

Of course, the amendments addressed the Court's concerns. The new scheme: (1) reversed the state of satisfaction requirement so that the Minister must reach a certain state of mind *before* being required to impose the relevant conditions, above and beyond any other conditions;[104] (2) specified that the relevant risk is the 'substantial risk of seriously harming … by committing a serious offence';[105] and (3) added language about an assessment of reasonable necessity being reasonably appropriate and adapted.[106]

But, for all of the majority's choice words on the strength of Ch III in protecting individual liberties against punitive measures, the same conditions are now able to be imposed by meeting similar standards of satisfaction — albeit within a slightly revised framework. Chapter III has lost the first round of whack-a-mole. Advocacy organisations like the Australian Human Rights Commission and Human Rights Law Centre remain as concerned as they were before.[107]

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101 See, e.g., ibid 545 [308], 547 [314]–[315].

102 Ibid 547 [313], citing *Lim* (n 4) 27.

103 *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth).

104 *Migration Regulations 1994* (Cth) cls 070.612A(1)(b)–(c), as at 8 November 2024 ('*Amended Migration Regulations*'). See also *YBFZ* (n 3) 483–4 [85] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

105 *Amended Migration Regulations* (n 104) cl 070.612A(1)(b). See also *YBFZ* (n 3) 479–82 [64]–[76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

106 *Amended Migration Regulations* (n 104) cls 070.612A(c)(i)–(ii). See also *YBFZ* (n 3) 483 [84].

107 'Explainer: Labor's Brutal Deportation and Surveillance Bill', *Human Rights Law Centre* (Web Page, 8 November 2024) <https://www.hrlc.org.au/explainers/2024-11-8-deportation-surveillance/>; Australian Human Rights Commission, Submission No 25 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Migration Amendment Bill 2024* (21 November 2024). See also Adriana Boisen, 'The Government Must Respect the High Court's Decision in YBFZ v Minister for Immigration' (Media Release, New South Wales Council for Civil Liberties, 11 November 2024) <https://www.nswccl.org.au/high_court_decision_ybfz/>.

Instead, noting the continued challenges in relation to the criminal behaviour of the *NZYQ* cohort,[108] the Minister continues to explore more creative solutions — including third country reception arrangements such as those with Nauru,[109] more extreme (and yet unused) powers to re-detain members of the cohort, and the ability to revisit protection findings.[110] Many of these 'solutions' present more serious issues than even the original *YBFZ* scheme, including, for example, the potential indirect breach of non-refoulment obligations.[111]

Finally, it is interesting to reflect on the variety of approaches to Ch III now evident in the Court. Despite each having unique disagreements, Edelman, Steward, and Beech-Jones JJ have each resisted extending *Lim* beyond *NZYQ*. Each set a very different philosophical starting point to that of the majority. Their Honours raised the importance of a narrow historical context in constitutional interpretation and affirmed that interpretation of Ch III is no place to create individual liberties except those incidental to the inherent function and duties of courts. While Steward J may be alone in his resistance to other limitations in the *Constitution*,[112] there remains a real possibility that the unanimous position in *NZYQ* will further fragment as Australia's evolving immigration scheme is tested.

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108 See, e.g., Shannon Schubert, 'Man Charged Over Serious Footscray Assault Was Released Immigration Detainee', *Australian Broadcasting Corporation* (online, 16 June 2025 <https://www.abc.net.au/news/2025-06-16/immigration-detention-high-court-ruling-footscray-assault/105423632/>.

109 *Migration Act 1958* (Cth), as amended by *Migration Amendment Act 2024* (Cth); Tony Burke, 'Statement on NZYQ' (Media Release, Department of Home Affairs, 15 February 2025) <https://minister.homeaffairs.gov.au/TonyBurke/Pages/statement-on-nzyq.aspx/>.

110 Jake Evans, 'New Powers Allow NZYQ Group To Be Re-Detained, and a Foreign Nation To Be Paid to Accept Them', *Australian Broadcasting Corporation* (online, 7 November 2024) <https://www.abc.net.au/news/2024-11-07/new-powers-allow-nzyq-group-to-be-re-detained/104572456/>; Daniel Ghezelbash and Anna Talbot, 'Another Rushed Migration Bill Would Give the Government Sweeping Powers To Deport Potentially Thousands of People', *The Conversation* (online, 18 November 2024) <https://theconversation.com/another-rushed-migration-bill-would-give-the-government-sweeping-powers-to-deport-potentially-thousands-of-people-243365/>.

111 See 'Labor's Secret Nauru Deal: A Concerning Precedent for Back-Door Deportations', *Amensty International* (Web Page, 18 February 2025) <https://www.amnesty.org.au/labors-secret-nauru-deal-a-concerning-precedent-for-back-door-deportations/>. For an older but comprehensive discussion on non-refoulement obligations in relation to third-party transfers see: Australian Human Rights Commission, *Human Rights Issues Raised by the Transfer of Asylm Seekers to Third Countries* (Report, 15 November 2012).

112 See *Ravbar v Commonwealth* (2025) 423 ALR 241, 254 [25] (Gageler CJ), 321–8 [272]–[296] (Steward J).

VI Conclusion

YBFZ has extended *Lim* beyond detention in custody. There is now a general opportunity for judicial inquiry into detriments against persons authorised by parliament. The four-justice majority, grounded in the role of the judiciary as the protector of personal liberty, set and met a low constitutional bar for a punishment to be punitive. Further, the majority endorsed a strict reading of the purpose of the scheme. At the high level of generality that the majority interpreted the purpose, it found that it was not a 'legitimate non-punitive purpose'. This interpretative approach was inter alia resisted by both the concurring and dissenting justices. Several points of contention — some practical and others philosophical — are now live on the Ch III question. These include a stark disagreement between the majority and all others on the correct approach to the interpretation of broadly stated statutory powers; the continued evolution of Edelman J's reconceptualisation of *Lim*; a growing disagreement over the general capacity of the Court to make even preliminary inquiries into executive burdens on personal freedom; and a diverging view on the relevance of inherent common law protections of liberty in constitutional interpretation. Despite the apparent judicial intervention, in practice, the Minister has amended the *Regulations* to maintain the substantive effect of the existing scheme. It is yet to be seen whether the majority has left *Lim* and Ch III barking at the end of their leash, or whether the majority's philosophical basis will sustain further challenges to new measures implemented to deal with the fallout of *NZYQ*.