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INDEFINITE DETENTION DEPORTED AT LAST: *NZYQ V MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS* (2023) 415 ALR 254

'For those who've come across the seas
We've boundless plains to share'[1]

I Introduction

The High Court of Australia in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*')[2] unanimously found the executive's power to indefinitely detain unlawful non-citizens that enter Australia — provided for by ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) ('*Migration Act*') — repugnant to ch III of the *Constitution* and thus invalid. In so finding, the High Court overturned its infamous ruling in *Al-Kateb v Godwin* ('*Al-Kateb*').[3]

The separation of powers lies at the heart of this decision. *Al-Kateb* was said to conflict with the well-established principle that migration detention must be 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[4] Otherwise, the detention is punitive in nature and thus within the judiciary's exclusive province.

Part II of this case note sets out the legal background to *NZYQ*, highlighting the High Court's previous decisions on immigration detention. The facts of *NZYQ* are explained in Part III. Part IV then outlines the Court's reasoning, including the slight divergence from Edelman J. Part V comments on the implications of *NZYQ*, ultimately finding that the decision is doctrinally sound, but the federal government's severe legislative response may infringe human rights and raise further issues

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1 'New Lyrics for Verse One', *Australian National Anthem* (Web Page) <https://www.pmc.gov.au/honours-and-symbols/australian-national-symbols/australian-national-anthem>.

2 (2023) 415 ALR 254 ('*NZYQ*').

3 (2004) 219 CLR 562 ('*Al-Kateb*').

4 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ) ('*Lim*').

regarding constitutional validity. This Part also touches on the High Court's recent decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*'),[5] where it was found that part of the government's legislative response to *NZYQ* was itself unconstitutional.

II Legal Background

Under s 51(xix) of the *Constitution*, the legislature can make laws with respect to 'aliens' — generally, although not conclusively,[6] persons that are not Australian citizens (henceforth, 'non-citizens'). The *Migration Act* seeks support from this head of power.[7]

Section 189(1) of the *Migration Act* requires detainment of non-citizens that arrive in Australia 'unlawfully' — that is, without a visa.[8] This detention is mandatory: non-citizens within Australia[9] 'must' be detained if an officer 'knows or reasonably suspects' that they arrived unlawfully. Under s 196(1), this detention ends when the non-citizen is: (a) 'removed from Australia'; (b) 'deported'; or (c) 'granted a visa'. In circumstances where detainees are stateless or have criminal convictions, the occurrence of these events is highly improbable, making the detention potentially indefinite.

Mandatory detention is an exercise of executive power, not a product of judicial pronouncement. This is problematic because ch III of the *Constitution* implicitly prevents an executive body, in this case a government 'officer',[10] from exercising power if its 'dominant purpose and essential functions' are naturally judicial.[11] This restriction is apposite to immigration detention, given it has 'many, if not all, of the physical features and administrative arrangements commonly found in prisons',[12] and ordering punishment 'lies in the heartland of judicial power'.[13] In saying this, the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*')[14] held that ch III permits laws with respect to executive detainment of unlawful non-citizens.[15] But this detention must be 'reasonably

5 [2024] HCA 40 ('*YBFZ*'). See below nn 111–29 and accompanying text.

6 See *Love v Commonwealth* (2020) 270 CLR 152.

7 Explanatory Memorandum, Migration Bill 1958 (Cth) 2519.

8 See *Migration Act 1958* (Cth) s 42(1) ('*Migration Act*').

9 See ibid s 5 (definition of 'migration zone').

10 Ibid s 5 (definition of 'authorised officer').

11 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270, 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

12 *Al-Kateb* (n 3) 650 [264] (Hayne J).

13 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 380 [111] (Gageler J) ('*Alexander*').

14 *Lim* (n 4).

15 Ibid 27 (Brennan, Deane and Dawson JJ).

capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[16] Otherwise, the detention is penal, and thus can only be ordered by a ch III court. Together, these findings constitute the '*Lim* principle'.

The High Court has been willing to characterise immigration detention as non-penal in previous cases,[17] notwithstanding that the matters before the Court were seemingly at odds with the *Lim* principle. These decisions suggested that any freedom from involuntary detention propounded by *Lim* may require reformulation of the principle.[18] *Al-Kateb* best represents this straining of the *Lim* principle. Al-Kateb arrived in Australia unlawfully by boat in late 2000. He was mandatorily detained[19] and his application for a protection visa[20] was refused.[21] Section 198(6) therefore required Al-Kateb be removed from Australia 'as soon as reasonably practicable'. It was uncontested that Al-Kateb was 'stateless';[22] he could not be removed from Australia to a country of nationality, and no other country was willing to accept him.[23]

With no reasonable prospects of removal or the grant of a visa, Al-Kateb was detained indefinitely. His application to the Federal Court for a declaration that his detention was unlawful and a writ of habeas corpus for release from immigration detention was dismissed.[24] Al-Kateb's subsequent appeal was heard by the High Court.

The appeal was dismissed by the majority (McHugh, Hayne, Callinan and Heydon JJ), with Gleeson CJ, Gummow and Kirby JJ dissenting. The High Court addressed two separate issues: first, whether ss 189(1) and 196(1) of the *Migration Act* provide for indefinite detention ('statutory construction holding'); and second, if so, whether this indefinite detention is constitutional ('constitutional holding'). The Court found the *Migration Act* provides for indefinite detention. As to the constitutional issue, the majority construed Al-Kateb's indefinite detention as non-punitive

16 Ibid 33 (Brennan, Deane and Dawson JJ).

17 See, eg: *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 ('*Behrooz*'); *Re Woolley; Ex parte Applications M276/2003* (2004) 225 CLR 1.

18 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) 662, discussing *Behrooz* (n 17).

19 See *Migration Act* (n 8) ss 189, 196.

20 See ibid s 36.

21 *Al-Kateb* (n 3) 602 [100] (Gummow J).

22 Ibid 615 [145] (Kirby J). See also the definition of 'stateless persons' in the *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1.

23 *Al-Kateb* (n 3) 615 [145] (Kirby J).

24 *SHDB v Goodwin* [2003] FCA 300.

and thus consistent with ch III of the *Constitution*. The members of the majority each set out slightly different rationales for this finding.

For Hayne J (with Heydon J agreeing),[25] although a receiving country had not been identified, one may have been found later and s 198(1) would then be met.[26] Al-Kateb's indefinite detention thus provided for 'subsequent removal' when the time came, a function separate to punishment.[27] For this purpose, the power to segregate an unlawful non-citizen 'from the community by detention in the meantime' was said to be constitutionally valid.[28] Justice Callinan similarly held that the *Constitution* supports executive detention in view of an unlawful non-citizen's removal, notwithstanding that 'deportation appears unlikely to be achievable within a foreseeable period'.[29] Justice McHugh proffered an additional characterisation. Instead of being merely auxiliary to deportation, immigration detention also serves a protectionist function.[30] For his Honour, 'a law authorising detention' cannot 'be characterised as imposing punishment' and thus cannot infringe ch III of the *Constitution* 'if its object is purely protective'.[31] In this sense, ss 189(1) and 196(1) have a purely protective purpose because they enable 'unlawful non-citizens to be detained so as to ensure that they do not enter Australia', and prevent them from becoming 'de facto Australian citizens'.[32] This protectionist characterisation echoed previous High Court rulings on deportation of unlawful non-citizens.[33]

Following from these characterisations, the majority dismissed 'the Ch III question',[34] despite McHugh J recognising that Al-Kateb's position was 'tragic'.[35] The Court held that because s 189(1) did not confer a discretion on the executive[36] and the matters condition precedent to detention were amenable to judicial scrutiny,[37] ch III was not infringed.

25 *Al-Kateb* (n 3) 662–3 [303]–[304] (Heydon J).

26 Ibid 640 [231] (Hayne J).

27 Ibid.

28 Ibid 648 [255].

29 Ibid 658 [290].

30 Ibid 584 [44].

31 Ibid.

32 Ibid 584–5 [46].

33 See *O'Keefe v Calwell* (1949) 77 CLR 261, 278 (Latham CJ).

34 *Al-Kateb* (n 3) 648 [256] (Hayne J).

35 Ibid 580–1 [31].

36 Ibid 647 [254] (Hayne J).

37 Ibid 584 [44] (McHugh J).

Although adopting slightly varied reasoning, the *Al-Kateb* majority was clear: indefinite detention is constitutionally valid. For some 20 years, and despite repeated challenge,[38] this remained the law of Australia. That is, until *NZYQ*.

III The Facts of *NZYQ*

The plaintiff was a Myanmar-born, stateless Rohingya man, assigned the pseudonym NZYQ. Escaping persecution in Myanmar, he arrived in Australia by boat in 2012. He was immediately taken into immigration detention in accordance with s 189 of the *Migration Act*. He was granted a bridging visa and released from detention after two years.[39] In 2016, NZYQ pleaded guilty to one count of sexual intercourse with a child and was sentenced to five years imprisonment.[40] NZYQ was released on parole in 2018.[41] He was subsequently taken into immigration detention as he was reasonably suspected of having been an unlawful non-citizen by an officer of the Department of Home Affairs ('Department').[42]

NZYQ had applied for a protection visa while in criminal custody. In 2020, his application was considered by a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ('Minister'). Whilst he had a well-founded fear of persecution in Myanmar and was therefore a refugee in respect of whom Australia had protection obligations, the delegate determined NZYQ's criminal conviction provided reasonable grounds for considering him a danger to the Australian community, and therefore refused his application.[43]

The delegate's decision was affirmed by the Administrative Appeals Tribunal ('AAT').[44] An application for judicial review of the AAT decision was dismissed by the Federal Court of Australia.[45] As a result, officers of the Department were required to remove NZYQ from Australia as soon as reasonably practicable.[46] An identical duty arose when NZYQ formally requested his removal in writing.[47]

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38 See, eg: *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 ('*Plaintiff M76/2013*'); *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285.

39 *NZYQ* (n 2) 256 [1].

40 Ibid 256 [2].

41 Ibid.

42 See *Migration Act* (n 8) s 189(1).

43 *NZYQ* (n 2) 256 [3].

44 *NZYQ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 378.

45 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 976.

46 See *Migration Act* (n 8) s 198(6).

47 See ibid s 198(1).

However, removing him from Australia proved challenging. The *Migration Act* did not require or authorise an officer to remove NZYQ to Myanmar, and even if it did, he had no right of entry or residence there. There was no real prospect of another country providing him with a right to enter or reside. Further, the Department has never succeeded in removing any individuals convicted of a sexual offence against a child to a country of which they are not a citizen.[48]

NZYQ began proceedings in the original jurisdiction of the High Court against the Minister and the Commonwealth of Australia.[49] NZYQ presented two arguments that mirrored the statutory construction and constitutional issues raised by Al-Kateb. The High Court heard the matter in November 2023, with the Australian Human Rights Commission, the Human Rights Law Centre ('HRLC'), and the Kaldor Centre for International Refugee Law ('KCIRL') appearing as amici curiae. The Court made its orders on 8 November 2023, prior to publishing reasons.

IV The Decision

The High Court decided *per curiam* to reopen and overrule the constitutional holding in *Al-Kateb*. NZYQ's detention was deemed unconstitutional from 30 May 2023, when there was no real prospect of his removal becoming practicable in the reasonably foreseeable future.

A *Reopening Al-Kateb*

As *Al-Kateb* presented 'an implacable obstacle' to NZYQ's claims, leave was sought to reopen the decision.[50] In deciding whether to grant leave, the Court was 'informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law'.[51] Applying this principle, the Court was quick to refuse leave to open the statutory construction holding in *Al-Kateb*, determining the proper construction of ss 189 and 196 of the *Migration Act* authorised NZYQ's indefinite detention. Emphasis was placed on the legislative reliance on, and implicit endorsement of, *Al-Kateb* on this point, as well as the recent endorsement of this construction in *Commonwealth v AJL20*.[52] In light of the *Lim* principle's application in numerous cases since *Al-Kateb*,[53] the Court described the constitutional holding in *Al-Kateb* as 'an outlier in the stream of authority which has flowed from *Lim*'[54] and thus found it difficult to reconcile the two. The conclusion was that

48 *NZYQ* (n 2) 257 [5].

49 See: *Constitution* s 75(v); *Judiciary Act 1903* (Cth) s 30.

50 *NZYQ* (n 2) 259 [15].

51 Ibid 259 [17], quoting *Wurridjal v Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

52 (2021) 273 CLR 43.

53 See, eg: *Alexander* (n 13); *Benbrika v Minister for Home Affairs* (2023) 415 ALR 1; *Jones v Commonwealth* (2023) 415 ALR 46.

54 *NZYQ* (n 2) 264 [35].

'continuity and consistency in the application of constitutional principle' obliged the Court to reopen the constitutional holding.[55]

B *Overruling Al-Kateb*

In determining whether the constitutional holding in *Al-Kateb* should be overruled, the Court considered the decision's consistency with the *Lim* principle. It was expressed that for detention to be constitutionally valid, the legislative purpose behind it must be non-punitive, legitimate, and capable of being achieved in fact.[56] Consistency with the *Lim* principle would thus require limiting the detention's duration to a period that is reasonably capable of being seen as necessary to achieve its statutory purpose.[57]

As previously discussed, the majority in *Al-Kateb* observed that laws in relation to detaining unlawful non-citizens are characterised by their purpose — detention is non-punitive if its purpose is to make an unlawful non-citizen available for deportation or prevent them from entering the Australian community.[58] The *NZYQ* Court described this as 'an incomplete and … inaccurate statement of the applicable principle' and consequently overruled the constitutional holding in *Al-Kateb*.[59] In reaching this conclusion, Edelman J took a slightly different approach to the remaining six members of the Court.

C *Chief Justice Gageler, Gordon, Steward, Gleeson, Jagot, and Beech-Jones JJ*

The six members noted the *Lim* principle would have no substance if it enabled detention where there was no real prospect of achieving the detention's purpose in the reasonably foreseeable future.[60] In such circumstances, the first purpose outlined by the *Al-Kateb* majority — availability for deportation — would be void. As to the second purpose, the Court concluded that separating an unlawful non-citizen from the Australian community is not within the limited range of executive detention's legitimate purposes identified in *Lim*.[61] There, this purpose was found

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55 Ibid 264 [37].

56 Ibid 264–5 [40].

57 Ibid 265 [41], quoting *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 625 [374] (Gageler J).

58 *NZYQ* (n 2) 265 [42], quoting *Al-Kateb* (n 3) 584 [45] (McHugh J).

59 *NZYQ* (n 2) 265 [43].

60 Ibid 265–6 [45].

61 Ibid 266 [48], citing: *Plaintiff M76/2013* (n 38) 369–70 [138]–[140] (Crennan, Bell and Gageler JJ); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 231 [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 593 [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Commonwealth v AJL20* (2021) 273 CLR 43, 64–5 [27]–[28] (Kiefel CJ, Gageler, Keane and Steward JJ), 85–6 [85] (Gordon and Gleeson JJ), 102–3 [128]–[129] (Edelman J).

to be permissible only if it was incidental to the legitimate purpose of deportation, or determination of whether the unlawful non-citizen should be granted a visa.[62]

By extension of the *Lim* principle, for the purpose behind detention to be legitimate, it must be a purpose that is distinct from the detention itself.[63] The Court firmly rejected the defendants' assertion that 'separation from the Australian community' was a legitimate purpose for executive detention.[64] This was said to 'impermissibly [conflate] detention with the purpose of detention', resulting in a 'circular and self-fulfilling' inquiry.[65] Further, the defendants' assertion that the detention of unlawful non-citizens is incidental to the executive power to exclude such non-citizens was said to be 'misconceived'.[66]

D *Justice Edelman*

Justice Edelman 'disaggregate[d] the concept of punishment as used in *Lim*' into two distinct ideas.[67] The first is a classicalist conception of criminal detention, with a view of 'just desert' and community protection.[68] The second concerned '"prima facie" punitive detention', encompassing detention that, under a *Lim* analysis, is disproportionate to its legitimate, non-punitive purpose.[69] Justice Edelman held the purpose of ss 189(1) and 196(1) of the *Migration Act* — 'detention pending removal to ensure that the unlawful non-citizen will remain "available for deportation when that becomes practicable"' — to be legitimate.[70] The unattainability of this goal did not matter.[71] However, indefinite detainment of an unlawful non-citizen was deemed disproportionate — that is, not 'reasonably capable of being seen as necessary'[72] — to ensure the unlawful non-citizen is available for removal, and thus punitive under his Honour's second conception of punishment.[73]

E *The Constitutional Limitation on Executive Detention*

Following the above reasoning, the Court held that the constitutionally permissible period of executive detention for an unlawful non-citizen ends when there is no real

62 *Lim* (n 4) 10 (Mason CJ), 27, 32–3 (Brennan, Deane, Dawson JJ).

63 *NZYQ* (n 2) 266 [49].

64 Ibid.

65 Ibid.

66 Ibid 267 [50].

67 Ibid 267 [51].

68 Ibid.

69 Ibid 267 [52].

70 Ibid 267–8 [53].

71 Ibid.

72 Ibid 268 [54], quoting *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 30–1 [71] (McHugh J).

73 *NZYQ* (n 2) 268 [54].

prospect of their removal from Australia becoming practicable in the reasonably foreseeable future.[74]

The defendants and amici curiae provided two alternatives to the expression of this constitutional limitation. The defendants asserted that the constitutionally permissible period should end when there is no real prospect of the non-citizen's removal from Australia.[75] The Court rejected this, emphasising that the elements of 'practicability' and 'reasonably foreseeable future' are 'essential to anchoring the expression of the constitutional limitation in factual reality'.[76] The submission from the HRLC and the KCIRL — that the period should end 'at any point when it can be determined to be more probable than not that the [non-citizen] will not be removed from Australia in the foreseeable future' — was also rejected for being too expansive and unstable.[77]

The Court commended the defendants for correctly conceding that they had the burden of proving the constitutional limitation had not been surpassed. Their Honours held that where a detainee seeks a writ of habeas corpus and provides sufficient evidence supporting the fact that their detention transgresses the constitutional limitation, the burden of proving the limitation is not exceeded falls on the detainer.[78] Thus, proof of a real prospect of NZYQ's removal becoming practicable in the reasonably foreseeable future was required. The parties agreed: (1) NZYQ had cooperated with officers; (2) he could not be removed from Australia as at 30 May 2023; and (3) there was no real prospect of him being removed in the reasonably foreseeable future.[79] While there was a possibility of NZYQ's removal to the United States, there was no evidence that this possibility was realistic.[80] Consequently, NZYQ's detention was unlawful from 30 May 2023 onwards and the defendants were obliged to release him.

The Court did not address whether the outcome would be different if a detainee refused to cooperate. This was dealt with in *ASF17 v Commonwealth of Australia*,[81] with the High Court finding that processes for removal were practicably available, but untenable because of the non-citizen's failure to cooperate. Regardless, these processes remained available, in theory, and thus the constitutional limitation from *NZYQ* did not apply.[82]

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74 Ibid 268 [55].

75 Ibid 268 [57].

76 Ibid.

77 Ibid 269 [58].

78 Ibid 269 [59].

79 Ibid 270 [62]–[63].

80 Ibid 270–1 [64]–[70].

81 (2024) 98 ALJR 782.

82 Ibid [41] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

V Comment

NZYQ is notable for its brevity. Decisions on constitutional issues are often extensive; *Al-Kateb* spans 102 pages. *NZYQ* is a mere 20 pages. This concision may point to the High Court's desire to solidify its position on the politically charged topic of immigration detention. Against this wider political backdrop, '[i]t is desirable that the Court's reasons themselves be accessible and readable by members of the public'.[83] Moreover, the perceived legitimacy of the Court's overruling of *Al-Kateb* is arguably reinforced by a unanimous judgment (albeit with slight divergence in one step of the reasoning from Edelman J). The Court emphasised the importance of the *Lim* principle as a mechanism for maintaining the separation of powers; it did not proffer a new application of this principle.

Given the discrete nature of this determination and the brevity with which it was expressed, *NZYQ* is important for its conclusion, not so much its legal reasoning. The Court was unequivocal: *Lim* survives, *Al-Kateb* does not. What does warrant attention are the policy implications stemming from this decision; this comment will therefore focus on these.

A *The Aftermath of NZYQ*

Following *NZYQ*, some 150 detainees were released into the community.[84] Panic ensued, with fears that 'the Government was releasing "hardened criminals" and "predators"', even though the released non-citizens who had a criminal conviction had all served their time.[85] The fact that numerous released detainees were charged with criminal offences shortly after their release intensified fears, with the media further fuelling these fires.[86]

In response to these growing concerns for safety, the federal government passed the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) ('*Migration Amendment Act*') and the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) ('*Other Measures Act*').

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83 Stephen McDonald, 'NZYQ: A New Style of Unanimous Judgment for the High Court of Australia', *Australian Public Law* (Web Page, 31 January 2024) <https://www.auspublaw.org/blog/2024/1/nzyq-a-new-style-of-unanimous-judgment-for-the-high-court-of-australia>.

84 Commonwealth, *Parliamentary Debates*, Senate, 20 March 2024, 973 (James Paterson, Senator).

85 Anne Twomey, 'Constitutional Law: NZYQ v Minister for Immigration and Its Legislative Progeny' (2024) 98(2) *Australian Law Journal* 103, 105.

86 Georgia Roberts, 'Fourth Non-Citizen Arrested After High Court Decision', *ABC News* (Web Page, 6 December 2023) <https://www.abc.net.au/news/2023-12-06/fourth-person-arrested-after-detainee-released/103197184>; Brett Worthington, 'The Bloodied and Bruised Image That Puts a Human Face on the High Court Fallout', *ABC News* (Web Page, 30 April 2024) <https://www.abc.net.au/news/2024-04-30/nzyq-high-court-immigration-detainees-albanese-government/103785094>.

These laws have been described as 'hasty', 'rushed' and 'reactive',[87] with the former being passed by the Houses of Parliament only eight days after *NZYQ*, and the latter being passed less than a month after the decision.

The *Migration Amendment Act* introduced a new bridging visa for non-citizens for whom there is no real prospect of removal becoming practicable in the reasonably foreseeable future.[88] The new visa, called a 'Bridging R visa', could be accompanied by highly restrictive requirements, including mandatory monitoring conditions that required the visa holder to notify the Minister or Department of certain matters and report to them at certain times.[89] It could also impose a curfew,[90] and/or require the wearing of monitoring devices at all times.[91] Breaching any of these conditions was an offence with its own penalty,[92] with a mandatory period of imprisonment of one year.[93] These curfew and monitoring restrictions were later found to be unconstitutional in *YBFZ*.[94]

At the conclusion of their judgment, the *NZYQ* Court noted their decision did not prevent NZYQ from being detained on another statutory basis, 'such as under a law providing for preventive detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody'.[95] The *Other Measures Act* became this law. In addition to introducing further visa restrictions and offences, it introduced a preventive detention regime, under which the Minister may apply to a court for a community safety detention order or supervision order (with a duration of up to three years). The court may grant such an order if satisfied 'to a high degree of probability' that the individual 'poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence'.[96]

The government has sought to impose far harsher measures with the Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) ('Migration

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87 Lorraine Finlay, 'Hasty Detainee Laws Raise Human Rights Concerns', *Australian Human Rights Commission* (Web Page, 7 December 2023) <https://humanrights.gov.au/about/news/opinions/hasty-detainee-laws-raise-human-rights-concerns>.

88 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) sch 1 item 2 ('*Migration Amendment Act*'), inserting *Migration Act* (n 8) ss 68(5)–(6).

89 *Migration Amendment Act* (n 88) sch 1 item 4, inserting *Migration Act* (n 8) s 76B.

90 *Migration Amendment Act* (n 88) sch 2 items 8, 13, inserting *Migration Regulations 1994* (Cth) cl 070.612A(1), referring to visa condition 8620 ('*Migration Regulations*').

91 *Migration Amendment Act* (n 88) sch 2 items 8, 13, inserting *Migration Regulations* (n 90) cl 070.612A(2), referring to visa condition 8621.

92 *Migration Amendment Act* (n 88) sch 1 item 4, inserting *Migration Act* (n 8) ss 76B–76D.

93 *Migration Amendment Act* (n 88) sch 1 item 4, inserting *Migration Act* (n 8) s 76DA.

94 See below nn 111–29 and accompanying text.

95 *NZYQ* (n 2) 271–2 [72].

96 *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) sch 2 item 5, inserting *Criminal Code Act 1995* (Cth) s 395.12.

Amendment Bill'), which introduces a duty for 'removal pathway non-citizens' to cooperate in relation to their removal and criminalises non-cooperation.[97] It also enables the Minister to designate a country as a 'removal concern country', with the consequence that visa applications from nationals of that country will be considered invalid.[98] This draconian proposal resembles Donald Trump's 'Muslim travel ban' from 2017.[99] The Migration Amendment Bill passed through the House of Representatives on 26 March 2024, but was referred to the Legal and Constitutional Affairs Legislation Committee ('Committee') for further scrutiny by the Senate in May 2024. Whilst the Committee's ultimate recommendation was that the Senate pass the Migration Amendment Bill,[100] the backlash from human rights organisations, refugee and asylum seeker representatives and members of the public has halted its progress.[101]

The Migration Amendment Bill and the *Other Measures Act* were swiftly introduced with the aim of protecting the Australian community, although it is unclear from what exactly, given all of the released immigration detainees with criminal convictions have served their sentences. Regardless, any purported protectionist aim

97 Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) sch 1 item 3 ('Migration Amendment Bill'), inserting *Migration Act* (n 8) ss 199B–199E.

98 Migration Amendment Bill (n 97) sch 1 item 3, inserting *Migration Act* (n 8) ss 199F–199G.

99 See: Exec Order No 13769 'Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States', 82 Fed Reg 8977 (27 January 2017); Exec Order No 13780 'Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States', 82 Fed Reg 13209 (6 March 2017).

100 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (Report, May 2024) 43.

101 See, eg: Kaldor Centre for International Refugee Law, Submission No 11 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (9 April 2024); Human Rights Law Centre, Submission No 18 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (10 April 2024); Médecins Sans Frontières Australia, Submission No 20 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (11 April 2024); Amnesty International Australia, Submission No 26 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (11 April 2024); Migrant Workers Centre, Submission No 29 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (April 2024); Anne Cawsey, Submission No 230 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (2024); Gemma Prior, Submission No 250 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (2024).

should not come at the cost of human rights, nor should it overstep constitutional limitations.

B *Human Rights Concerns*

It is uncontroversial that placing curfews on individuals, monitoring their movements, and subjecting them to preventive detention orders are all significant restrictions on liberty — a right enshrined in the *Universal Declaration of Human Rights*.[102] The new laws engage numerous human rights,[103] with concerns raised that they violate many of these.[104] The Statement of Compatibility with Human Rights released together with the *Other Measures Act* concluded that the laws are only 'partially compatible with Australia's human rights obligations'.[105] Whilst the restrictions imposed by the *Migration Amendment Act* are similar to existing parole regimes applicable to those subject to a custodial sentence, these laws are concerning as they are 'imposed … through a unilateral grant of a visa, with no periodic review and no assessment of necessity, effectiveness or impact on the person'.[106] Further scrutiny of the laws is therefore required to ensure they meet human rights standards.

These laws are not only restrictive, but also discriminatory. Consequently, they may violate the right to equality and non-discrimination.[107] Australian citizens with criminal convictions get released from prison every day. Some may indeed pose 'an unacceptable risk of seriously harming the community' after they are released.[108] But regardless, no Australian government has ever sought to impose such harsh and widespread restrictions on them. The only distinguishing factor between the released immigration detainees and Australian citizens with a criminal record is their visa status. Ultimately, this double standard highlights the inherent injustice of these laws, which infringe the rights of non-citizens and perpetuate a system of

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102 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 3.

103 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 2, 6, 13 ('*ICESCR*'); *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 6, 9, 10, 12, 14, 15, 17, 19, 22, 26 ('*ICCPR*').

104 Supplementary Explanatory Memorandum, Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (Cth) 7 ('Supplementary Explanatory Memorandum').

105 Ibid.

106 Laura John, Josephine Langbien and Sanmati Vermo, 'Liberty, Punishment and the Power to Detain: The Fallout from NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs', *Australian Public Law* (Web Page, 6 December 2023) <https://www.auspublaw.org/blog/2023/12/liberty-punishment-and-the-power-to-detain-the-fallout-from-nzyq-v-minister-for-immigration-citizenship-and-multicultural-affairs>.

107 See *ICESCR* (n 103) art 2; *ICCPR* (n 103) arts 2, 26.

108 See above n 96 and accompanying text.

discrimination, raising critical questions about Australia's commitment to upholding human rights obligations.

C *Constitutional Concerns*

Given the haste with which the government's legislative response to *NZYQ* was passed, many raised concerns about the constitutionality of these reforms.[109] These concerns proved perceptive, as a case against the validity of curfew and monitoring conditions was brought to the High Court in *YBFZ*, in which the majority of the Court found that the conditions were punitive and thus unconstitutional.[110] It is foreseeable that the preventive detention regime may similarly be called into question.

1 *Curfews and Monitoring*

YBFZ was a stateless refugee who arrived in Australia in 2002 and was convicted of serious offences between 2006 and 2017.[111] Following *NZYQ*, YBFZ was released from immigration detention and was granted a Bridging R visa subject to curfews and monitoring via an electronic ankle bracelet, which he was alleged to have breached.[112] YBFZ argued that these conditions were unconstitutional, relying in essence on similar arguments to those successfully run in *NZYQ*: the restrictions are punitive in nature, and thus within the judiciary's exclusive province by virtue of ch III of the *Constitution*.[113]

The majority — Gageler CJ, Gordon, Gleeson, and Jagot JJ — found both the curfew and monitoring conditions to be prima facie punitive. The detriments imposed by the curfew condition, such as the restriction of movement within the bounds of a particular address between certain hours, along with the psychological burden of those detriments, were not 'comparatively slight' or 'modest'.[114] Further, the detention imposed by this condition was 'neither trivial nor transient in nature'.[115] The curfew restrictions involved a material and long-term deprivation of liberty

109 John, Langbien and Vermo (n 106); Anne Twomey, 'New Laws to Deal with Immigration Detainees Were Rushed, Leading to Legal Risks', *The Conversation* (Web Page, 13 December 2023) <https://theconversation.com/new-laws-to-deal-with-immigration-detainees-were-rushed-leading-to-legal-risks-219384> ('New Laws to Deal with Immigration Detainees').

110 Chief Justice Gageler, Gordon, Gleeson, Jagot and Edelman JJ all came to this conclusion, with a separate judgment by Edelman J. Justices Steward and Beech-Jones dissented, both writing judgments of their own.

111 *YBFZ* (n 5) [39].

112 Ibid [41].

113 YBFZ, 'Submissions of the Plaintiff', Submission in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*, S27/2024, 27 May 2024, 3 [2].

114 *YBFZ* (n 5) [50].

115 Ibid [51].

which applied to all persons with a particular visa condition, unless the Minister was satisfied otherwise, making them prima facie punitive.[116]

As to the monitoring condition, the majority stated that whilst the continued presence of a monitoring device would not cause pain or physical discomfort, it nonetheless imposed long-term and material detriments, including both physical and psychological burdens.[117] Further, the requirement that the device be charged twice per day and be maintained in good condition essentially forced individuals into remaining in places that had access to a mains power supply, and the fact that individuals were tracked deterred them from going to certain locations out of fear of consequences or shame.[118] In addition, the monitoring device, unless covered by clothing, may have conveyed that an individual wearing it was 'an unworthy or dangerous person or a criminal', which was 'likely to expose the wearer to a degradation of autonomy', further restricting their liberty.[119] These all led to the conclusion that the monitoring condition was prima facie punitive.

However, the query did not end once the conditions were found to be prima facie punitive as such laws could nonetheless be valid if they are 'reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose'.[120] This threshold was not met in this case. The Court found that the stated purpose of these laws, being the 'protection of any part of the Australian community'[121] was 'expressed at a high level of generality'.[122] Further, there was no specificity as to what was required for the Minister to be satisfied that a curfew or monitoring condition did not need to be imposed on an individual.[123] The Court vehemently rejected the defendants' submission that the legislation should be interpreted to mean that the Minister may refuse to impose the conditions if satisfied that doing so is not reasonably necessary for protecting the Australian community 'from the risk of harm arising from future offending'.[124] It was found that such words could not be read into the relevant provisions. The law that enabled the imposition of the curfew and monitoring conditions was thus very broad and could result in uncertain and unpredictable outcomes.[125]

This broad purpose was found to be 'a concept of such elasticity that it is not necessarily inconsistent with the imposition … of a criminal punishment following an adjudication of criminal guilt — a function which lies in the heartland of judicial

116 Ibid [53].

117 Ibid [58], [60].

118 Ibid [61].

119 Ibid [62].

120 Ibid [64].

121 *Migration Regulations* (n 90) cl 070.612A(1).

122 *YBFZ* (n 5) [65].

123 Ibid.

124 See ibid [66]–[76].

125 Ibid [79].

power'.[126] It could not be said to be a legitimate non-punitive purpose because '[i]f protection from any harm of any nature, degree, or extent were a legitimate non-punitive purpose, the very point of the legitimacy requirement would be undermined.'[127] Consequently, the majority of the High Court found that the Minister's broad and flexible power to impose curfew and monitoring restrictions on certain visa holders was punitive and thus infringed upon the exclusive power of the judiciary under ch III of the *Constitution*.[128] Justice Edelman came to a similar conclusion, but with significantly different reasoning.[129]

2 *Preventive Detention*

The preventive detention regime introduced by the *Other Measures Act*, which mirrors the existing post-sentence regime applicable to terrorism offenders,[130] is yet to face judicial scrutiny, perhaps because no one has been subjected to it yet. The existing regime covering terrorism offenders is supported by the federal parliament's defence power,[131] and its constitutionality was recently affirmed by the High Court.[132] In contrast, the preventive detention regime applicable to unlawful non-citizens likely seeks support from s 51(xix) of the *Constitution*. There is no authority on whether s 51(xix) can support a law about criminal matters that are distinct from a person's status as a non-citizen.[133] Even if s 51(xix) does extend this far, questions arise as to the legitimacy of preventive detention's non-punitive purpose — 'keep[ing] the community safe'[134] — given the scheme applies to individuals who have served their criminal punishment. In this regard, it may be argued that the *Other Measures Act*'s preventive detention relies on the same 'circular and self-fulfilling' purpose rejected in *NZYQ*.[135] That is, detention justified by community protection through means of detention, or, put another way, 'detention … for the purpose of detention'.[136] In light of these concerns, preventive detention's constitutional validity is dubious.

D *Looking Forward*

In response to *NZYQ* and more recently *YBFZ*, the federal government has tabled yet another bill pertaining to unlawful non-citizens: the Migration Amendment

126 Ibid [81], quoting *Alexander* (n 13) 380 [111].

127 Ibid [82].

128 Ibid [83].

129 See ibid [89]–[171].

130 See *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth), amending *Criminal Code Act 1995* (Cth).

131 *Constitution* s 51(vi).

132 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68.

133 Twomey, 'New Laws to Deal with Immigration Detainees' (n 109).

134 Supplementary Explanatory Memorandum (n 104) 2.

135 *NZYQ* (n 2) 266 [49].

136 Ibid.

(Removal and Other Measures) Bill 2024 (Cth) ('Bill'). The Bill would permit the Australian government to fund 'third country reception arrangements', whereby unlawful non-citizens in Australia are sent to a foreign country.[137] In effect, this expands the current off-shore detention regime.[138] Indeed, the Bill specifically contemplates detention of Australia's unlawful non-citizens by foreign countries.[139] The Bill also immunises the Australian government against civil claims arising from an unlawful non-citizen's removal to a 'third country'.[140] Moreover, a new test for curfews and ankle monitoring conditions is imparted, that these conditions will not be imposed if the Minister, on the balance of probabilities: (1) is not satisfied that 'the non-citizen poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence'; or (2) is satisfied that 'the non-citizen poses the substantial risk', but 'is not satisfied … that the imposition of that condition, or those conditions, is reasonably necessary, and reasonably appropriate and adapted, for the purposes of protecting any part of the Australian community'.[141] This is reminiscent of the test that the Minister in *YBFZ* submitted (unsuccessfully) should have been read into the *Migration Amendment Act*.[142] The government must now wait and see whether third time really is the charm for its desired regime on unlawful non-citizens.

VI Conclusion

NZYQ led to the historic overturning of *Al-Kateb*, a decision that had left scholars and human rights activists frustrated for almost 20 years.[143] The High Court's succinct, unanimous judgment provided an unequivocal answer to the constitutional question: executive detention of unlawful non-citizens is only constitutionally permissible up to the point where there is no real prospect of their removal from

137 See Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) cl 198AHB ('MA Bill').

138 'Explainer: Labor's Brutal Deportation and Surveillance Bill', *Human Rights Law Centre* (Web Page, 8 November 2024) <https://www.hrlc.org.au/reports-news-commentary/2024/11/8/deportation-surveillance#:~:text=Expanding%20offshore%20detention,from%20indefinite%20detention%20in%20Australia>.

139 MA Bill (n 137) sch 5 item 1.

140 Ibid sch 2 item 1.

141 Ibid sch 6 item 2.

142 See above n 125 and accompanying text.

143 See generally: Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb Have Been Any Different if Australia Had a Bill of Rights Like Victoria?' (2007) 18(2) *Public Law Review* 119; Australian Human Rights Commission, 'Commission Commends High Court Ruling on Indefinite Immigration Detention' (Media Release, 9 November 2023) <https://humanrights.gov.au/about/news/media-releases/commission-commends-high-court-ruling-indefinite-immigration-detention>; 'High Court Rules Indefinite Immigration Detention Unlawful', *Human Rights Law Centre* (Web Page, 13 November 2023) <https://www.hrlc.org.au/reports-news-commentary/indefinite-detention-ends>.

Australia becoming practicable in the reasonably foreseeable future. Beyond that point, executive detention is unconstitutional.

The legal reasoning behind *NZYQ* is undoubtedly sound. The High Court has finally resolved the tension between *Al-Kateb* and *Lim* and, in doing so, maintained some important constitutional protections against tyranny. But *NZYQ* is no panacea for all the ills of a mandatory detention regime. People like NZYQ now walk an unclear line between freedom and detention. In this sense, *NZYQ* may have resulted in the substitution of 'one impermissible punitive regime — indefinite immigration detention — with another'.[144] Time will tell whether this new regime will withstand judicial testing.

144 'Imprisonment of Migrants Without Charge Would Be a Cruel and Costly Mistake' *Human Rights Law Centre* (Web Page, 6 December 2023) <https://www.hrlc.org.au/news/2023/12/6/imprisonment-of-migrants-without-charge-costly-mistake>.