Post-NZYQ Migration Control: Chapter III Limits on Bridging-Visa Restrictions and Third-Country Removal

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The Historical Setting

1. In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, the High Court held that, although ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) on their proper construction authorised the plaintiff's detention, those provisions were beyond power as applied because there was and is no real prospect of removal becoming practicable in the reasonably foreseeable future; accordingly, the Court declared the detention unlawful from 30 May 2023 and issued habeas corpus, with costs against the defendants. The Court declined to reopen *Al-Kateb v Godwin* (2004) 219 CLR 562 on statutory construction but applied *Lim* to reject its constitutional holding insofar as it would permit continuing detention in these circumstances.

2. Although *NZYQ* was a watershed for human rights and constitutional principle in Australia, it precipitated a raft of Commonwealth legislative reforms—many of which have, in practice, diminished protections for non-citizens.

3. The Migration Amendment (Bridging Visa Conditions) Bill 2023 (post-*NZYQ*) sets a community-management regime for non-citizens with no real prospect of removal by replacing existing BVRs with a new BVR carrying strengthened, often mandatory conditions—reporting, interview/notification, curfew (8620) and electronic monitoring (8621)—and creating criminal offences for serious non-compliance with a "reasonable excuse" defence.

4. After notice, holders can make representations and the Minister may issue a second BVR without some conditions; these decisions are reviewable. Government amendments tighten the scheme: curfew and monitoring are mandatory unless the person poses no risk, and new conditions bar work/activities with more than incidental contact with minors or other vulnerable people (8622), impose 200-metre exclusion

zones around schools/childcare (8623), and prohibit contact with victims/families (8624); the prior exclusion of Crimes Act s 4K for continuing offences is removed, and s 76E(4) is revised so a second BVR must omit prescribed conditions if the Minister is satisfied the person does not pose a risk.

5. The Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 tightened management of the *NZYQ*-affected cohort by creating new criminal offences for breaching mandatory BVR conditions that restrict contact with minors/vulnerable people, proximity to schools/child-care, and contact with victims; these offences carry a maximum 5 years' imprisonment (or 300 penalty units) and a mandatory minimum 12 months.

6. Government amendments add a Criminal Code community-safety-orders regime—detention (CSDO) or supervision (CSSO)—for serious violent/sexual offenders with no real prospect of removal, and extend surveillance and telecommunications warrant powers to monitor CSSO compliance and inform CSO applications.

7. New s 76AA provides that when a CSO takes effect any existing visa (other than a criminal-justice visa) ceases and a BVR is taken to be granted and in force; CSO conditions prevail over any inconsistent BVR conditions, and curfew/monitoring-device visa conditions cannot apply while a CSO is in force.

8. The Migration Amendment Bill 2024 tightened the statutory framework for Subclass 070 Bridging (Removal Pending) visas (BVRs). It extends "community protection" conditions (e.g., electronic monitoring and curfew) to BVRs granted under the Minister's personal power in s 195A and brings that cohort within the criminal offence in s 76B for breaching specified monitoring conditions (with a mandatory minimum one-year term of imprisonment upon conviction, and maximum penalties of five years

or 300 penalty units). It also amends s 68(5) so a later BVR ceases an earlier one (displacing “reactivation” under s 68(4)), and revises s 76E(1) so the grant of a BVR with prescribed conditions is not subject to natural justice at the point of grant; instead, a post-imposition representations process applies under s 76E(3)–(7).

9. The Migration Amendment (Removal and Other Measures) Bill 2024 empowers the Minister to issue “removal-pathway directions” to non-citizens on a removal pathway and makes non-compliance an offence (max 5 years/300 penalty units; mandatory minimum 12 months), with limits that bar directions to children, prevent compelling litigation steps, and avoid overlap with BVR monitoring conditions.

10. It also allows the Minister (personally, after consulting the PM and Foreign Minister) to designate a “removal concern country,” rendering new visa applications by its nationals outside Australia invalid subject to exceptions (e.g., dual nationals, close family of Australians, humanitarian cases), with natural justice excluded and each designation sunsetting after three years; the Minister may permit applications in the public interest.

11. Finally, government amendments clarify that a mere request for Ministerial intervention does not suspend s 198 removal; if the Minister decides to consider intervention, removal is paused for up to six months, ending earlier in specified events.

12. The Home Affairs Legislation Amendment (2025 Measures No. 1) Bill 2025 removes natural justice for third-country reception arrangements and for specified powers—information-sharing with foreign governments (s 198AAA), removal-pathway directions (s 199C), and criminal-history checks (s 501M)—and validates past acts done without it, with the exclusions applying before, on, or after commencement.

13. It also retrospectively validates visa decisions made on or before 8 Nov 2023 that

depended on the pre-*NZYQ Al-Kateb* position and deems related detention/removal actions valid.

14. In sum, *NZYQ* reset the constitutional floor by confirming that executive detention under ss 189/196 cannot persist where there is no real prospect of removal in the reasonably foreseeable future; Parliament's response has been to pivot from indefinite detention to a layered control architecture—first, strengthened bridging-visa regimes with new, often mandatory, conditions backed by criminal offences and mandatory minimum terms; second, a complementary "removal-pathway" framework of ministerial directions, country designations and offence provisions; and, third, third-country reception mechanisms with broadened information-sharing, criminal-history checks and extensive exclusions of natural justice coupled with retrospective validations.

15. That legislative arc enhances the Executive's levers but narrows process rights, so its constitutional validity turns on characterisation in operation: controls must remain genuinely directed to removal or active visa processing, not punishment (the *Lim* constraint), and measures that are punitive in substance—such as curfew and continuous electronic monitoring for Subclass 070—cannot be revived by proportionality formulas or validation clauses.

16. Natural-justice exclusions and retrospective validations may cure procedural defects, but they cannot authorise what Chapter III forbids. Practically, the legality of post-*NZYQ* administration will continue to hinge on purpose, duration and intensity: when removal is realistically in train, detention and ancillary controls may be sustained; when it is not, or when criminal-style restraints are used to manage risk rather than to progress removal or processing, the scheme again edges into constitutional danger

notwithstanding its broadened statutory scaffolding.

The Jurisprudential Response

17. In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, the High Court for the first time considered aspects of the post-*NZYQ* legislative reforms.

18. The High Court (Gageler CJ, Gordon, Gleeson and Jagot JJ; Edelman J agreeing in the result) held that the "monitoring" and "curfew" conditions for Bridging R (Subclass 070) visas—cl 070.612A(1)(a) and (d) of the *Migration Regulations 1994* (Cth)—are invalid because they infringe Ch III.

19. The Court answered "Yes" to both validity questions, declared the clauses invalid, and ordered the defendants to pay costs (orders made 6 Nov 2024). The joint reasons state at the outset that imposing each condition by executive decision is "prima facie punitive and cannot be justified" under the Ch III separation of judicial power ([5]).

20. The scheme targeted non-citizens who cannot presently be removed and thus must be released into the community on a Bridging R visa ([2]–[4], [20]–[22]). The Minister must impose four listed conditions unless satisfied a condition is "not reasonably necessary … for the protection of any part of the Australian community"; the two impugned ones are: an ankle-worn electronic-monitoring device ([26]) and an overnight curfew, typically 10 pm–6 am ([30]).

21. The Act disapplies natural justice at the point of grant but provides a post-grant invitation for representations and a further visa if the Minister is then satisfied the conditions are not reasonably necessary ([24]–[25]). Breach of the curfew or monitoring condition is a criminal offence carrying a mandatory minimum of one year's imprisonment ([51]).

22. On principle, the joint judgment re-affirmed that Ch III reserves to courts the authority to impose punishment and that executive interferences with liberty or bodily integrity are invalid unless they are reasonably capable of being seen as necessary for a legitimate, non-punitive purpose ([4], [8], [16]–[18]). The task is one of characterisation: if a detriment is prima facie punitive, the law remains valid only if so justified.

23. Applying that framework, the curfew condition was held prima facie punitive because it deprives liberty for a material, relatively long-term period (one-third of every day) across a defined class and is backed by a mandatory minimum prison term ([52]–[54]). Arguments analogising to judicial control orders or to ECHR "restriction" jurisprudence were rejected as inapposite: this case concerns executive, not judicial, orders ([53]–[55]).

24. The monitoring condition was likewise characterised as prima facie punitive because it materially interferes with bodily integrity and liberty over a sustained period. The device is a conspicuous, "chunky" ankle cuff that cannot be mistaken for jewellery; it must be charged twice daily; and failure to keep it in good working order is an offence attracting a mandatory minimum sentence. These burdens are physical, psychological and long-term (12 months, with possible re-imposition) ([58]–[63]).

25. On justification, the Court rejected reading down the statutory purpose to "preventing future offending." The text ("protection of any part of the Australian community") is broader; the structure and context (including the presence of financial-reporting conditions) do not compel that limitation. The result is an open-textured, default-imposition scheme that is not calibrated to the constitutional test, so the prima facie punitive character is not displaced ([64]–[68], [86]). The joint reasons describe

the regime as "extra-judicial collective punishment" of a class for the price of community presence and therefore invalid ([87]–[88]).

26. Edelman J agreed that both clauses are invalid but emphasised that "protection" and "punishment" are not mutually exclusive: where a regime's purpose (assessed by text, context and extrinsic materials) includes a punitive purpose—such as retribution or deterrence—executive imposition of that regime transgresses Ch III. He stressed the significance of the mandatory criminal sanctions and the executive, rather than judicial, application of conditions ([131], [140]–[141], [169]–[171]).

27. By contrast, Steward J and Beech-Jones J would have upheld validity. Steward J considered the powers non-punitive within modern Ch III doctrine and answered the questions "No," "No," "None," and "The plaintiff" (for costs) in dissent. Beech-Jones J accepted the curfew is a significant restraint but not akin to detention, and—while acknowledging a prima facie punitive character—concluded each power pursued legitimate, non-punitive protective purposes and was therefore valid ([225]–[226]; [316]–[319]).

28. Overall, the majority's core holding is that executive-imposed curfew and ankle-monitor conditions of this kind, backed by mandatory imprisonment and applied by default to a class of non-removable aliens, are prima facie punitive interferences with liberty and bodily integrity that are not constitutionally justified—so cl 070.612A(1)(a) and (d) are invalid ([5], [52]–[54], [58]–[68], [86]–[88]).

29. In *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540, Moshinsky J dismissed TCXM's application and refused leave to add a late "ground 2A", with costs to the respondents and a short suppression on the reasons (orders dated 26 May 2025).

30. After setting out the legislative context inserted by the *Migration Amendment Act 2024* (Cth)—namely s 198AHB (third-country reception arrangements) and s 76AAA (BVR cessation when a person has "permission" to enter/remain elsewhere)—the Court recorded the sequence: an interim Australia–Nauru arrangement via exchanged letters; the Commonwealth's application for a Nauruan long-term stay visa; the visa's grant; and the Minister's s 76AAA notice ([3]–[12]).

31. The Court's conclusions are collected at [17]–[18]. First, on Grounds 1–2, the Interim Arrangement was made under non-statutory executive (prerogative) power, and in the circumstances there was no implied obligation to afford procedural fairness to the applicant; both grounds failed ([17(a)]). This followed a detailed analysis rejecting the applicant's characterisation of the arrangement as statutory, and explaining why procedural fairness conditions could not sensibly attach to this type of high-level, foreign-relations arrangement ([126]–[131]). The Court also found the exchange of ministerial/presidential letters did constitute an "agreement or arrangement" (albeit interim) ([50])—relevant to s 198AHB and s 76AAA.

32. Secondly, on Grounds 3–4, while the act of applying to Nauru for the visa did involve the exercise of a statutory power under s 198AHB(2), that power was not impliedly conditioned by a requirement to afford the applicant procedural fairness; these grounds were therefore not made out ([17(b)]).

33. Thirdly, Ground 5 failed for two independent reasons. The Court rejected the contention that no valid "permission" existed: by Nauruan regulation 4(2), the Director "shall grant" a long-term stay visa for persons covered by the relevant arrangement, and a visa had in fact been issued ([52], [54], [17(c)]). The Court also rejected the applicant's reliance on the s 76AAA(1)(d)(ii) exception (via s 197C(3)), finding on the evidence

there was no real risk of "indirect refoulement" if removed to Nauru; Attachment A to the Interim Arrangement expressly committed to international obligations and "no risk of chain refoulement" ([176]–[178]).

34. Fourthly, Ground 6 (said removal is not authorised/required by s 198 because it is not "reasonably practicable") was not made out. The Court reiterated that "reasonable practicability" in s 198 does not require officers to consider what may befall a person after removal is complete; fitness to travel is to be assessed at the time of travel, and it was not established that removal to Nauru was necessarily not reasonably practicable ([179]–[182], [17(d)]).

35. Finally, the Court refused the late amendment to add ground 2A (challenging whether the arrangement truly rested on non-statutory executive power) because it raised substantial factual issues not foreshadowed and would prejudice the respondents; leave was refused ([138]–[140], [18]).

36. Taken together, *YBFZ* and *TCXM* mark a calibrated judicial response to the post-*NZYQ* landscape: the High Court polices the separation of powers by striking down default, class-wide curfew and ankle-monitor conditions as prima facie punitive executive measures (their mandatory criminal sanctions and sustained restraints on liberty/bodily integrity could not be justified by a loosely framed "protection" purpose), while the Federal Court simultaneously confirms ample room for migration control via non-statutory foreign-relations arrangements and the s 76AAA "permission" pathway without implied procedural fairness, provided indirect-refoulement risks are not shown and removal remains reasonably practicable.

37. The upshot is that punitive, domestically imposed restraints are constitutionally vulnerable, especially where backed by mandatory imprisonment, but executive

coordination with third countries to secure lawful presence elsewhere—and to trigger statutory cessation/removal consequences—remains a legally durable strategy.

Constitutional Risk Assessment

38. General. On the authorities, the most robust constitutional guardrails are: (1) the *Lim*/*NZYQ* principle that executive detention or restraints upon liberty are only valid if reasonably necessary for a legitimate, non-punitive purpose; and (2) *YBFZ*'s clarification that curfew and electronic-monitoring conditions imposed administratively on a bridging visa are prima facie punitive and therefore invalid.

39. Read against those principles, ss 76E, 76AAA, 198AHB and 198AHAA are not facially unconstitutional. Section 198AHA presents the sharpest textual risk because its definition of 'action' includes 'exercising restraint over the liberty of a person'. Properly construed to avoid authorising Commonwealth-executed detention, it can be upheld; but if officials were to rely on it to restrain liberty themselves, an as-applied Ch III challenge would be strong.

40. Across all provisions, the primary ground for challenge remains 'as applied'—for example, where there is in truth no real prospect of removal becoming practicable notwithstanding a status change under s 76AAA.

41. Section 76E — natural justice and the grant of Bridging R visas. The invalidity found in *YBFZ* concerned specific bridging-visa conditions (curfew and electronic monitoring) that were characterised as punitive when imposed by executive decision. Section 76E itself is a procedural framework: it removes the rules of natural justice from an initial grant decision but requires notice, invites representations, and provides for a second grant pathway without unnecessary conditions where safety risks do not require them. Section 76E does not itself authorise punishment or detention.

42. On the reasoning in *YBFZ*, the constitutional vice lay in the punitive content of certain conditions, not in this procedural section. Accordingly, s 76E is unlikely to be invalid on its face; regulations or decisions that attempt to implement punitive restraints remain vulnerable.

43. Section 76AAA — cessation of certain bridging visas upon foreign 'permission to enter and remain'. The provision effects a status change when an objective factual condition is satisfied (permission to enter and remain in another country). As *TCXM* explains in the context of the third-country reception framework, this kind of mechanism is designed to facilitate a practical pathway to removal under the ordinary detention/removal machinery of the Act.

44. Read with *ASF17 v Commonwealth of Australia* [2024] HCA 19 focus on whether there is a real, practicable prospect of removal in the reasonably foreseeable future, s 76AAA is not facially problematic: it does not itself authorise detention or punitive restraint. The constitutional exposure arises in application—if, despite a cessation notice, there is in truth no realistic pathway to effect removal. In that circumstance, continuing executive detention would exceed the *Lim*/*NZYQ*/*ASF17* limit.

45. Section 198AHB — action in relation to a third-country reception arrangement. Section 198AHB is drafted to avoid Ch III concerns: it permits taking action in relation to a third-country reception arrangement but expressly excludes 'exercising restraint over the liberty of a person'.

46. *TCXM* treats the statutory steps taken under this provision (for example, facilitating or lodging a foreign visa application) as justiciable statutory acts while not implying a general duty to afford procedural fairness for those steps. Because the text withholds any Commonwealth power to restrain liberty, the provision aligns with *YBFZ* and

ASF17 and is constitutionally robust on its face.

47. Section 198AHAA — natural justice does not apply to entering/doing things in relation to a third-country reception arrangement. Disapplying the rules of natural justice for decisions of a political/arrangements character is orthodox in Australian public law. *TCXM* characterises entry into such arrangements as executive/political in nature. Chapter III does not constitutionalise a general procedural-fairness guarantee for executive action; its constraint is upon punitive detention and the usurpation of judicial power. On that footing, s 198AHAA is not facially vulnerable to a Ch III challenge.

48. Section 198AHA — action in relation to regional processing functions. This is the provision with the clearest textual exposure. Its definition of 'action' includes 'exercising restraint over the liberty of a person' in relation to a regional-processing arrangement or a country's regional-processing functions.

49. Post-*YBFZ*, any Commonwealth-executed restraint upon liberty outside judicial order is prima facie punitive and must be justified as reasonably necessary for a legitimate, non-punitive purpose. The better constitutional construction confines s 198AHA to facilitative and funding actions that support a foreign state's functions, not to Commonwealth officers themselves restraining liberty. So read, the section avoids Ch III invalidity. If, however, it were relied upon as authority for Commonwealth-executed restraint, an as-applied challenge would be strong.

50. Cross-cutting caveats from the cases. The following is noted:

    i. ***YBFZ***: executive-imposed curfew and monitoring conditions were invalid because they were punitive in character; the constitutional problem was in the substance of those restraints, not in the procedural grant machinery.

ii. ***ASF17***: continued executive detention is only valid where there is a real prospect of removal becoming practicable in the reasonably foreseeable future; the assessment turns on purpose and practical pathway, not formal labels.

iii. ***CZA19 v Commonwealth of Australia / DBD24 v Minister for Immigration and Multicultural Affairs* [2025] HCA 8**: where a person has lawful permission to remain (e.g., because a visa application is pending under the statutory scheme), the *NZYQ* limitation aimed at persons without such permission does not operate in the same way; this can blunt certain NZYQ-based challenges.

iv. ***TCXM***: Parliament has structured the 'third-country reception' framework to channel Commonwealth action toward arrangements, payments and facilitation, while withholding a power to restrain liberty under s 198AHB; statutory steps like making a foreign visa application are justiciable but are not accompanied by a general implication of procedural-fairness obligations.

Executive Punishment by Removal: s 76AAA and the Limits of Power

51. The starting point is constitutional characterisation as restated in *YBFZ*. Chapter III guards against executive punishment. Character is assessed by substance rather than form, looking to text, context, practical operation, and end.

52. In *YBFZ* the Court treated executive curfew and electronic monitoring on a bridging visa as prima facie punitive and invalid because they were not shown to be reasonably necessary for a legitimate, non-punitive purpose. That template supports an argument that the executive practice of banishing a non-citizen to a third country under s 76AAA is likewise punitive in substance.

53. The practical operation of s 76AAA exhibits hallmark features of punishment. Once the Minister is aware that a foreign country has granted the person permission to enter and

remain, the Minister must notify; on deemed receipt the Bridging R visa immediately ceases; natural justice does not apply to giving the notice; the person becomes unlawful, must be detained, and is then liable to removal. These consequences are automatic and severe.

54. The chain—status flip without a hearing, followed by detention and expulsion—resembles the imposition of a grave detriment which, under *YBFZ's* framework, requires justification as non-punitive but in operation has the severity and immediacy typical of penal measures.

55. *TCXM* illustrates how the Executive can engineer the trigger condition for s 76AAA's operation. In that case, an Australian officer applied for and obtained a third-country 'long-term stay' visa for the non-citizen. The next day, a s 76AAA notice issued, the visa ceased, and detention for removal followed.

56. When the Executive can itself procure the foreign 'permission' that activates mandatory cessation, re-detention and expulsion, the substance looks less like neutral migration management and more like a penal banishment imposed by executive action. On *YBFZ's* substance-over-form approach, the combination of an Executive-caused trigger, mandatory cessation without natural justice, and transfer to a foreign regime for an extended period supports a punitive characterisation.

57. It is accepted that deportation and detention pending removal can, in principle, be non-punitive incidents of the aliens power. But *YBFZ* cautions that the label is not determinative: deprivations of liberty imposed by the Executive can be punishment in effect, and it is that effect which Chapter III polices.

58. Banishment orchestrated by the Executive to a third country for a prolonged period—implemented through an automatic process that strips procedural fairness at the decisive

moment—goes beyond neutral processing. It is the State imposing a grave detriment on a class of persons by executive fiat, which is the paradigm risk Chapter III is designed to avert.

59. *ASF17* supplies the punitive/non-punitive boundary that sharpens this contention. The Court explained that executive detention ceases to be constitutionally supportable when there is no real prospect of removal becoming practicable in the reasonably foreseeable future. That principle guards against detention (and collateral coercive measures) being used as an end in itself.

60. If the Commonwealth can manufacture a third-country permission to convert an otherwise non-removable person into someone immediately liable to banishment, characterisation must look past the formal availability of removal and ask whether the asserted migration end is genuine. Where the end is incapacitation or political expediency rather than a bona fide, proportionate migration outcome, the means cease to be reasonably necessary and take on a punitive character.

61. *CZA19* underscores that context matters. There, the Court emphasised that the *NZYQ* limitation was directed to persons for whom the duty to remove is engaged, whereas a person with a pending application has permission to remain while it is determined. Parliament has excluded those with undecided protection applications from s 76AAA's reach. But outside that carve-out, s 76AAA allows the Executive to switch on removal by procuring a third-country permission, thereby re-detaining and expelling a person away from their community for an extended period.

62. Re-read through *YBFZ's* lens, the practical end is a severe deprivation—indeed, a form of executive banishment. That is the kind of detriment which, when imposed as punishment, the Constitution reserves to courts.

63. In sum, the combination of (i) an Executive-engineered trigger, (ii) an automated, no-hearing cessation of lawful status, (iii) immediate detention and removal, and (iv) prolonged exclusion in a third country, supports the contention that removal under s 76AAA constitutes punishment by the Executive in substance. *YBFZ's* prohibition on punitive executive restraints and *ASF17's* insistence on a genuine, practicable removal pathway together sustain this characterisation.

Conclusion

64. In conclusion, the post-*NZYQ* statutory architecture will stand or fall on whether, in operation, it hews to *Lim's* non-punitive purpose and *NZYQ's* “real prospect of removal” constraint: measures that are truly facilitative of removal or active processing (for example, carefully administered status-management under s 76E, third-country coordination and non-coercive steps under ss 198AHB/198AHAA, and the s 76AAA “permission” pathway where the foreign endpoint is genuine and removal reasonably practicable) are more likely to be sustained, whereas executive controls that look, feel, and bite like punishment (class-wide curfews and ankle monitoring with mandatory imprisonment, or any Commonwealth-executed restraint of liberty contemplated by s 198AHA) remain constitutionally fragile notwithstanding validation clauses or natural-justice exclusions; put practically, durability turns on calibration (individualised necessity, proportional duration and intensity, and continual reassessment against removal feasibility), transparency (clear statutory footing and reasons that expose the non-punitive end), and restraint (eschewing automatic, criminal-style responses in favour of measures demonstrably tied to progressing removal or processing), with the sharpest litigation risk arising where the Commonwealth appears to manufacture endpoints (e.g., third-country “permissions”) or to use liberty-restrictive tools as a standing substitute for judicially imposed sanctions—moves that, as the cases show,

invite characterisation as executive punishment and thereby engage Chapter III prohibitions.