

Home Affairs Portfolio
Department of Home Affairs
Additional Estimates Hearing – February 2025

KEY BRIEF

Topic: NZYQ related litigation

Responsible Deputy: Ms Clare Sharp, Deputy Secretary Legal

Key Points

For NZYQ BVR Cohort see IG-05.

- In *NZYQ* [2023] HCA 37 (NZYQ), the High Court held that detention of an unlawful non-citizen for the purpose of removal will cease to be constitutionally permissible when there is no real prospect of their removal from Australia becoming practicable within the reasonably foreseeable future.
- Following *NZYQ*, a number of litigation trends emerged in relation to when the NZYQ-limit is reached and immigration detention is unlawful. These include:
 - **Cases where a removal duty does not apply at the time of filing, but where applicants are detained (some for significant periods) for the purpose of determining their visa applications.** Applicants claim that the NZYQ limit has been reached due to indicative protection findings made, which would ultimately prevent their removal to countries of reference once visa applications are finally determined (due to the effect of s.197C of the Act) and where there are no third-country removal options. Claimants seek writs of *habeas corpus* or alternatively mandamus, to compel a decision on their visa applications. The Department's position is that until such time visa applications are finally determined, the individual's detention is for the legitimate non-punitive purpose of determining whether they should be granted a visa. **This issue was heard by the High Court in the matters of CZA19 and DBD24 on 14 November 2024 and judgment was reserved.** Both CZA19 (BVR grant on NZYQ grounds following refusal of PV application) and DBD24 (PV grant) had been released from detention prior to the hearing.
 - As at 28 January 2025, there are two proceedings where a decision is yet to be made in relation to an ongoing visa application. The habeas and mandamus aspects of previous matters have since been rendered moot, upon the Department deciding their visa applications.
 - **Cases where applicants claim that there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future on their particular facts.** In these cases, the Department is required to adduce evidence to prove that there exists a real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. As at 28 January 2025, there is one active *habeas* case that falls within this category.

- **Cases where a removal duty applies but there are non-refoulement issues.** As at 28 January 2025, there is one ongoing proceeding which directly raises this issue: (*GKX18 – Federal Circuit and Family Court (Commonwealth argues habeas aspect currently moot due to grant of BVE for period of four months by the Minister on 17 October 2024)*). This issue has arisen in three published judgments:
- A decision of the Federal Court in *CRS20* [2024] FCA 619, where it was held that the **duty to take/remove CRS20 to a regional processing country (RPC) applied (s.198AD) rather than the general removal power (s.198)** to Iraq/Iran:
 - On 12 June 2024, the Federal Court ordered CRS20's release from detention on the basis that as an unauthorised maritime arrival, there was a duty to take him to an RPC/Nauru, despite being permitted to have his protection claims assessed (and finally determined) under the 'fast track' process in Australia. The NZYQ limit was held to be engaged due to the Commonwealth's failure to adduce evidence of the prospect of CRS20's removal to Nauru;
 - On 28 June 2024, the Department filed an appeal to the Full Court of the Federal Court of the CRS20 judgment. The Full Court heard the matter on 8 November 2024 and reserved judgment;

BVR challenges

- **Cases where a non-citizen challenges the decision to grant them a Bridging (Pending Removal) (BVR) visa subject to electronic monitoring and/or curfew conditions.**
 - To manage non-citizens released from detention because of the decision in *NZYQ*, the Minister has considered granting those people BVRs. BVRs are a temporary visa subject to a range of conditions that may diminish the risk of a non-citizen causing harm to the community, including the electronic monitoring and curfew conditions.
 - In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, the High Court held invalid regulations that required the electronic monitoring and curfew conditions to be imposed on a BVR unless the Minister was satisfied that it was not reasonably necessary to impose those conditions for the protection of any part of the Australian community. The Court found that the power to impose those conditions was punitive and so Chapter III of the Constitution precluded that power being reposed in the Minister.
 - Following *YBFZ*, the *Migration Regulations* were amended now to require the electronic monitoring and curfew conditions to be imposed on a BVR if the Minister is satisfied that the non-citizen poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and is satisfied that those conditions are reasonably necessary, and reasonably appropriate and adapted to protecting the community from that risk.

- As at 28 January 2025, there is one constitutional challenge to the amended *Regulations* and three ongoing administrative law proceedings that challenge decisions to grant BVRs subject to the electronic monitoring and curfew conditions. The number of these proceedings is expected to grow in 2025 and may include additional constitutional challenges.
- **BOE21** (Federal Court of Australia). BOE21 is a citizen of Somalia who was released from detention in March 2024. BOE21 has been granted a number of BVRs, most recently in November 2024. He is not currently subject to either the electronic monitoring or curfew conditions. BOE21 nonetheless challenges the constitutionality of the amended *Regulations* on the basis he may be subject to the conditions in the future. The challenge is raised as part of a related damages claim and is yet to be particularised.
- **JFSQ** (Federal Circuit and Family Court). JFSQ is a citizen of South Sudan who was released from detention in November 2023, following the pronouncement of orders in *NYZQ*. In November 2024, JFSQ was granted a BVR subject to the electronic monitoring and curfew conditions. JFSQ asserts that no decision-maker, acting reasonably, could have been satisfied that those conditions were required to be imposed on that visa. Amongst other things, JFSQ's criminal history includes several convictions for wounding-type offences, for which she has served terms of imprisonment.
- **DVRL** (Federal Circuit and Family Court). DVRL is a citizen of Indonesia who was released from detention in September 2024 after his application for a protection visa was refused. He was granted a BVR subject to the electronic monitoring and curfew conditions at that time. DVRL asserts the material before the decision-maker was insufficient to justify imposing those conditions, and they otherwise could not logically be imposed on him having regards to the circumstances of his past offending. Amongst other things, DVRL's criminal history includes a conviction for manslaughter, for which he was sentenced to seven years imprisonment. DVRL bludgeoned his de facto spouse with a child's bicycle, and she died from resultant injuries.
- **BIF23** (Federal Circuit and Family Court). BIF23 is a citizen of Cambodia who was released from detention in December 2024 after his application for a protection visa was refused. He was granted BVR subject to the electronic monitoring and curfew conditions at that time. To grant a person a BVR, the Minister must be satisfied that the person will abide by the conditions imposed on that visa. BIF23 argues that the Minister could not reasonably have been satisfied that he would abide by the conditions imposed on the BVR having regard to his mental health conditions, the fact that he is the subject of a guardianship order and his history of non-compliance with judicial orders, all being matters known by the Minister. BIF23 has a long criminal history primarily composed of drug offences. In 2021, he was convicted of *theft-from shop (shop steal)*, *affray* and

intentionally cause injury and was sentenced to an aggregate term of 18 months imprisonment.

Criteria applied to identify the cohort of impacted detainees

The Department applies the following criteria in determining whether a person is affected by the *NZYQ* judgment:

1. whether the obligation to remove under section 198 of the Act is engaged; and
2. if so, whether there is a real prospect of removal becoming practicable in the reasonably foreseeable future.

If pressed

This includes consideration of the below factors:

- Whether there is an identified country to which the person can be removed. This will generally not be the case where the person is stateless or there is a ‘protection finding’ within the meaning of the Act in respect of the person’s country of nationality, citizenship or long-term residence, unless there is a third country to which the person can be removed;
- Whether there are other barriers to removal of the person, e.g.:
 - a serious health condition that prevents removal in the foreseeable future;
 - no travel documents and there is no pathway to obtaining one; or
 - the country to which the person could be returned is physically inaccessible.