

SHORT PARTICULARS OF CASES
APPEALS

DARWIN
AUGUST 2024

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1.	YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor	1
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2.	Commonwealth of Australia v Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors	3
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YBFZ v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS & ANOR (S27/2024)

Date writ of summons filed: 22 February 2024

Date Special Case referred to Full Court: 22 May 2024

This proceeding concerns the constitutional validity of certain Ministerial powers provided for in the *Migration Act 1958* (Cth) (“the Act”) and the *Migration Regulations 1994* (Cth) as amended (“the Amended Regulations”). Clause 070.612A(1) of Schedule 2 to the Regulations is part of a suite of provisions that were introduced into the Act and the Amended Regulations in response to this Court’s decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (“NZYQ”). Under that clause, the Minister is empowered to impose two conditions on a Bridging R Visa granted to a non-citizen:

1. Condition 8620 (“the Curfew Condition”) – under which that person must remain at a notified address between the hours of 10:00pm on one day and 6:00am on the next day (or between such other times, not more than eight hours apart, as are specified in writing by the Minister); and
2. Condition 8621 (“the Monitoring Condition”) – under which that person must wear a monitoring device at all times.

When considering whether to impose the above conditions, the Minister must consider whether it is reasonably necessary to impose each condition for the protection of any part of the Australian community. Failure to comply with either condition without a reasonable excuse is an offence requiring imprisonment.

The plaintiff contends that the powers to impose the Curfew Condition and the Monitoring Condition, together or alone, are punitive and therefore contrary to Chapter III of the *Constitution* and the doctrine of the separation of judicial from executive and legislative powers. The plaintiff submits that the severity of the Curfew and Monitoring Conditions has a substantial interference with a person’s bodily integrity and privacy. The defendants (being the Minister and the Commonwealth, respectively) reject those contentions.

In this case, the plaintiff was born in Eritrea but became stateless in 1994 when his citizenship was revoked because his family were Jehovah’s Witnesses. The plaintiff arrived in Australia as a child in 2002 as a stateless refugee and became the holder of a permanent refugee visa. The plaintiff’s parents and siblings are Australian citizens, with the exception of one brother who is a permanent resident. In 2014, the plaintiff was diagnosed with schizophrenia. The plaintiff is illiterate.

The plaintiff has a criminal record of offences between 2005 and 2017 and in December 2017, the plaintiff’s refugee visa was cancelled under section 501(3A) of the Act (that is, the Minister was satisfied that the plaintiff did not pass the character test). In April 2018, the plaintiff was released from criminal custody and since then, was detained under s 189 of the Act at various immigration detention centres until November 2023, when this Court handed down its decision in *NZYQ*. In December 2019, the plaintiff applied for a protection visa which has been refused, the refusal of which is the subject of a separate ongoing review by the Administrative Appeals Tribunal. Since November 2023, the plaintiff has

purportedly been granted multiple Bridging R visas imposing a variety of conditions. The most current Bridging R visa was granted on 2 April 2024 imposing twenty conditions, including Curfew and Monitoring Conditions.

This case raises the issue of whether, to the extent to which clause 070.612A(1) authorises the Minister to impose the Curfew Condition and the Monitoring Condition on a Bridging R visa, that clause purports to authorise the Minister to exercise a power that is properly characterised as punitive, and therefore as exclusively judicial.

The plaintiff has filed a notice of a constitutional matter. The Attorney-General for the State of South Australia is intervening in support of the defendants.

Justice Beech-Jones ordered that the following questions of law in the form of a Special Case be referred for consideration by a Full Court:

1. Is clause 070.612A(1)(a) of Schedule 2 to the Amended Regulations invalid because it infringes Chapter III of the *Constitution*, either alone or in its operation with clause 070.612A(1)(d)?
2. Is clause 070.612A(1)(d) of Schedule 2 to the Amended Regulations invalid because it infringes Chapter III of the *Constitution*, either alone or in its operation with clause 070.612A(1)(a)?
3. What, if any, relief should be granted to the plaintiff?
4. Who should pay the costs of the Special Case?

COMMONWEALTH OF AUSTRALIA v YUNUPINGU (ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP) & ORS (D5/2023)

Court appealed from: Full Court of the Federal Court of Australia
[2023] FCAFC 75

Date of judgment: 22 May 2023

Special leave granted: 19 October 2023

The first respondent, Yunupingu on behalf of the Gumatj Clan or Estate Group of the Yolngu People (“the Gumatj respondent”), brought two applications in the Federal Court of Australia in November 2019 under section 61 of the *Native Title Act 1993* (Cth) (“the NTA”). One was a claimant application, seeking a determination of native title in favour of the Gumatj Clan or Estate Group. The second was a compensation application, seeking the payment of compensation for the alleged effects on native title of certain executive and legislative acts done after the Northern Territory became a territory of the Commonwealth in 1911, but prior to the coming into force of the *Northern Territory Self-Government Act 1978* (Cth). The claim area is located in the Gove Peninsula, in north-eastern Arnhem Land in the Northern Territory.

The Gumatj respondent broadly accepted that, by reason of the grant of a pastoral lease in respect of the claim area in 1886 (and three further pastoral leases in respect of the claim area in the years up to 1903), the claimants’ *exclusive* native title rights in respect of the claim area were extinguished. However, the Gumatj respondent contended that the claimants continued to hold *non-exclusive* native title rights in respect of the claim area, including the right to access, take and use for any purpose the resources of the claim area. This was said to include resources below, on or above the surface of the claim area, such as minerals on or below the surface. The Gumatj respondent then contended that, in the period from 1911 to 1978, a number of grants or legislative acts took place which, if valid: (a) may have been inconsistent with the continued existence of the claimants’ non-exclusive native title rights (either generally or in relation to minerals, depending on the particular grant or act); and (b) may have extinguished or impaired those non-exclusive native title rights at common law. The Gumatj respondent contended that if the grants or acts had any extinguishing effect, then, the NTA apart, the grants or acts were invalid by reason of the failure to provide just terms as required by s 51(xxxi) of the *Constitution*. On this basis, the Gumatj respondent contended that each of the grants and acts fell within the definition of a “past act” in the NTA. It was then contended that, by operation of the NTA, the grant or act was effective to grant or vest the rights that it purported to grant or vest, and the claimants were entitled to compensation under the NTA in respect of the acquisition of property.

In order to progress the matters in the Federal Court, it was agreed that the Gumatj respondent would file a statement of claim in both proceedings, and that the Commonwealth would file an interlocutory application in the compensation proceeding seeking orders to facilitate a hearing before a Full Court of the Federal Court of a demurrer against the claims for compensation. Orders were made for separate questions to be determined. At the commencement of the hearing, the Full Court considered it appropriate to restate the separate questions.

Before the Full Court, the Commonwealth contended that the acts were not invalid when done, because (relevantly):

- (a) The just terms requirement contained in s 51(xxxi) of the *Constitution* does not apply to laws enacted pursuant to s 122 of the *Constitution*, including the *Northern Territory (Administration) Act 1910* (Cth) (and Ordinances made thereunder), as determined in *Teori Tau v Commonwealth* (1969) 119 CLR 564 and the High Court in *Wurridjal v Commonwealth* (2009) 237 CLR 309 did not hold otherwise or, in the alternative, that *Wurridjal* is wrong and should be overruled; and, in any event,
- (b) The acts referred to were not capable of amounting to “acquisitions of property” within the meaning of those words in s 51(xxxi) of the *Constitution* because native title was inherently susceptible to a valid exercise of the Crown’s sovereign power – derived from its radical title – to grant interests in land and to appropriate to itself unalienated land. The Full Court rejected these contentions.

In addition to the submissions filed by the appellant and the Gumatj respondent, submissions have been filed by:

- The 2nd respondent (“Northern Territory”), which makes submissions in relation only to the first and third grounds of appeal set out below.
- The 25th to 28th respondents (“the Rirratjingu respondents”). They make their own claims to native title over parts of the area, but on the separate questions they support the position of the Gumatj respondent.
- The 29th and 32nd respondents (together, “the NLC respondents”), who are also seeking leave to file a notice of contention out of time.

A number of notices of a constitutional matter have been filed. The Attorney-General of the State of Queensland had intervened in the proceedings in the Federal Court and is a party to the appeal in this Court as the 34th respondent. The Attorneys-General for the State of Western Australia and the Australian Capital Territory have also intervened in the appeal.

The grounds of appeal are:

- The Full Court erred by failing to find that the just terms requirement contained in s 51(xxxi) of the *Constitution* does not apply to laws enacted pursuant to s 122 of the *Constitution*, including the *Northern Territory (Administration) Act 1910* (Cth) and Ordinances made thereunder.
- The Full Court erred in failing to find that, on the facts set out in the applicant’s statement claim, neither the vesting property in all minerals on or below the surface of land in the claim area in the Crown by the enactment of s 107 of the *Mining Ordinance 1939* (NT), nor the grants of special mineral leases identified in paragraphs [232], [255] and [293] the statement claim, were capable amounting to acquisitions of property within the meaning of s 51(xxxi) of the *Constitution* because native title was inherently susceptible to a valid exercise of the Crown’s sovereign power, derived from its radical title, to grant interests in land and to appropriate to itself unalienated land for Crown purposes.

- The Full Court erred in failing to find that the reservation of “all minerals” from the grant the pastoral lease “had the consequence creating rights ownership” in respect the minerals in the Crown, such that the Crown henceforth had a right of exclusive possession of the minerals and could bring an action for intrusion: contrary to *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at [112].