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Federal Court convenes crisis panel to tackle NZYQ case wave

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The Federal Court has convened a special panel of judges to tackle a wave of constitutional challenges engulfing the legal system in the wake of the landmark NZYQ decision, as dangerous non-citizens seek to use the ruling to [walk free from immigration detention](#) and lift their monitoring requirements.

Chief Justice Debra Mortimer revealed that the “increasingly complex situation” facing the Federal Court had prompted her to take steps to address the “high volume” of migration cases related to the watershed High Court ruling, with 25 [legal challenges](#) already being lodged.

In a recent decision, she said the cases had initially primarily consisted of unlawful imprisonment applications for release from detention [resulting from NZYQ](#), but the court had seen an increase in legal challenges to ankle monitoring or curfew requirements and requests for review of whether the conditions were justified. Some claims for damages have also been filed by detainees on the grounds that their detention was illegal.

Chief Justice Mortimer has also moved to delay rulings in three related cases concerning non-citizens until after the High Court has handed down its finding in the case of an [Eritrean man, known as YBFZ](#), who is challenging his visa conditions on the grounds they are “punitive” and unconstitutional.

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As the court foreshadows more constitutional uncertainty around the migration system, a spokesman for Immigration Minister Andrew Giles said he was actively preparing for the outcome of the YBFZ hearing, scheduled for August.

“The government is conducting a range of planning in advance of the High Court hearing the YBFZ case,” his spokesman said.

“Community safety continues to be the government’s highest priority.”

In a move that significantly raised the stakes for the Albanese government in the YBFZ case, Chief Justice Mortimer delayed ruling on whether a Somalia-born domestic violence offender – who kicked his pregnant victim in the stomach and was convicted of “wounding by stabbing” for his role in the assault of a 17-year-old boy – should have his visa conditions lifted.

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The slew of cases comes as Labor continues to suffer the fallout of a series of [immigration debacles](#), with the latest [Direction 99 scandal](#) forcing Mr Giles to rewrite his own ministerial order, after it was revealed it had allowed foreign criminals, including sex offenders, to avoid deportation because of their ties to Australia

Constitutional expert Greg Craven said NZYQ was ultimately a “separation of powers case” because the decision established that only a judge could imprison a person, with ankle monitoring being another point of legal vulnerability as an imposition on a non-citizen’s liberty.

“Now you’re getting what’s properly called judicial fallout,” he said. “The bomb has hit, but there’s stuff raining down from everywhere, and it could easily take two years for everything to settle down to a position that we actually know what the law is.”

Chief Justice Mortimer convened the panel of nine judges in January, about two months after the High Court ruled that the detention of a Rohingya man and convicted pedophile was unconstitutional, triggering the release of more than 150 non-citizens, including some with criminal records, into the community.

Australian Lawyers Alliance spokesman and barrister Greg Barns said Chief Justice Mortimer was being proactive in seeking to address the large volume of migration cases stemming from NZYQ, to prevent them placing a “burden” on the court’s caseload.

“What you’ve got here is a large number of people impacted by one High Court decision, and potentially now another (YBFZ), and all of those cases have to go to the Federal Court, and they can’t go to state supreme courts,” he said.

“So there’s a burden on the Federal Court, which needs to be case managed, so that people’s cases don’t sit in the list for three or four years.”

Mr Barns said the move to establish a panel was not one he had seen in the practice area before and it was not something “courts do every day”, but noted it was a “sensible” decision to tackle the large number of matters, considering the importance that wrongful imprisonment, or habeas corpus, cases are heard “expeditiously”.

“Every day a person is held unlawfully is a day too long,” he said.

The opposition immigration spokesman, Dan Tehan, said revelations that dozens of cases stemming from NZYQ were now before the courts were concerning. “The cascading effect of Immigration Minister Andrew Giles’ incompetence continues. If the government had handled the NZYQ case properly we wouldn’t be in this mess,” he said.

“Anthony Albanese’s ministerial reshuffle cannot come soon enough for this hapless minister.”

Mr Tehan accused Mr Giles of misleading the parliament when he said that authorities were using drones to monitor freed detainees, after documents obtained under Freedom of Information revealed that the technology was used only to survey non-citizens’ properties, rather than follow the individuals themselves.

Immigration lawyer Carina Ford said some judges specialised in migration law and would often hear cases presenting similar issues in order to harness their expertise. “The ones that would get priority are those people in detention, because the court guidelines allow those to be given priority,” she said.

Chief Justice Mortimer ruled the Somali man, anonymised as BOE21, would have to wait for his case to be heard, rejecting his legal bid that his case should be expedited on the grounds that his visa conditions were a form of imprisonment because the argument was a key pillar of YBFZ.

BOE21 – who struck the victim, his former partner’s mother, in the head several times and was convicted of breaching a domestic violence order in April 2016 – was released from immigration detention in March.

“The argument that a person subject to the impugned conditions remains in the custody of the commonwealth by reason of the curfew condition is also a matter that will be agitated in YBFZ,” Chief Justice Mortimer said.

The decision also paused the bid by a Polish convicted drug trafficker, who filed a protection claim arguing that the “Grypser” crime gang and former communist party figures had threatened him, to have his visa conditions lifted after he was released from immigration detention in May.

A Vietnamese national, known as DBD24, who was convicted of an unspecified crime and is fighting for his release from immigration detention, has also had his case put on hold.

Of the 25 cases to be examined by the judges on the panel, 17 challenges remain before the court after judgments were delivered in three, including two where the non-citizens were ordered to be released, and five cases were withdrawn following an agreement from the parties.

Eight of the matters still before the court were filed as wrongful imprisonment cases, while the other nine applicants have been released from immigration detention and are progressing a claim for damages.

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