HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	S12/2023
File Title:	Lesianawai v. Minister for Immigration, Citizenship and Multi
Registry:	Sydney
Document filed:	Form 3 - Order
Filing party:	HCA
Date filed:	15 Feb 2023

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Isaac Lesianawai
Plaintiff

- and -

Minister for Immigration, Citizenship and Multicultural Affairs
Defendant

ORDER

JUSTICE: Justice Gleeson

DATE GIVEN: 14 February 2023 (in chambers)

INITIATING PROCESS: Application for a constitutional or other writ / interlocutory application filed by the plaintiff

APPEARANCES: (on 13 February 2023)

D.J. Hooke SC with J.D. Donnelly
Counsel for the plaintiff

P.M. Knowles SC with B.D. Kaplan
Counsel for the defendant

THE COURT ORDERS THAT:

1. The plaintiff has leave to file an amended application for a constitutional or other writ seeking an extension of time pursuant to s 486A of the *Migration Act 1958* (Cth) by 6:00pm on 13 February 2023.

2. Compliance with the time limited by r 25.02.2 of the *High Court Rules 2004* (Cth) be dispensed with.

3. Pursuant to s 486A(2) of the *Migration Act 1958* (Cth), the time for making the application for a constitutional or other writ be extended up to and including 10 February 2023.

4. The plaintiff by his counsel having given the usual undertaking as to damages,

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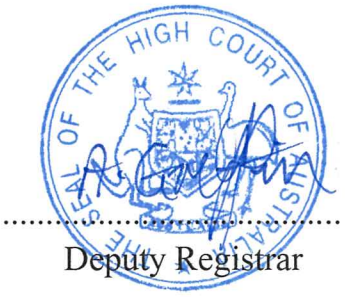
This Order was prepared by the plaintiff.

the defendant, his employees, officers, delegates or agents be restrained from removing the plaintiff from Australia until 4:00pm on the day on which these proceedings are finally determined.

5. The defendant pay the plaintiff's costs of and incidental to the application dated 11 February 2023.

6. Liberty to apply.

DATE AUTHENTICATED: 15 February 2023



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Deputy Registrar

[2023] HCATrans 006

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No. S12 of 2023

B e t w e e n -

ISAAC LESIANAWAI

Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Defendant

GLEESON J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA AND BY VIDEO CONNECTION

ON MONDAY, 13 FEBRUARY 2023, AT 2.00 PM

HER HONOUR: As this hearing is being conducted by video link, I will announce the appearances of the parties.

MR D.J. HOOKE, SC and **MR J.D. DONNELLY** appear for the plaintiff. (instructed by Zarifi Lawyers)

MR P.M. KNOWLES, SC and **MR B.D. KAPLAN** appear for the defendant. (instructed by Sparke Helmore)

HER HONOUR: Mr Hooke, I have the application for a constitutional or other writ and the supporting affidavit of your instructing solicitor, Ziaullah Zarifi. I also have the application for interlocutory relief dated 11 February 2023 and another affidavit of Ziaullah Zarifi, this one affirmed 11 February 2023. I also have two affidavits from Ellen Lucy Goldsworthy Tattersall, affirmed 13 February 2023. Does anyone have any objections to the reading of any of those affidavits? Mr Knowles?

MR KNOWLES: No objections to the plaintiff's material, your Honour.

HER HONOUR: Mr Hooke?

MR HOOKE: Your Honour, I have no objection to the one affidavit of Ms Tattersall that I have seen.

HER HONOUR: I see. Let me have a look at the materials that I have.

MR HOOKE: This is an affidavit, your Honour, that exhibits an email chain and a record of delivery of the notice of removal.

HER HONOUR: I see. I think I just had two copies of that. All right. So, that affidavit – the three affidavits are then taken as read. At the outset, I have a question about the application for extension of time. Mr Hooke, you have not referred to section 486A of the *Migration Act*. Does that provision apply in this case?

MR HOOKE: Would your Honour excuse me.

HER HONOUR: Mr Knowles, do you have any view about that?

MR KNOWLES: Yes, we would say it does apply. Formally, that . . . . . requires an application to be in writing, but I do not take any formal point regarding that. That can always be made, should it be necessary, but in my submission, my learned friend needs to satisfy both section 486A of the *Migration Act* and Rule 25.02.2 of this Court's Rules.

HER HONOUR: Well, Mr Knowles, is it within the power of your client to dispense with the requirements of section 486A?

MR KNOWLES: No, your Honour.

HER HONOUR: All right. Mr Hooke, do you want some time to consider that issue?

MR HOOKE: Your Honour, if I could - - -

HER HONOUR: All right.

MR HOOKE: - - - it takes me a little by surprise. Could I inquire, just before your Honour gives us a few minutes, whether your Honour received, belatedly, three pages of written submissions?

HER HONOUR: I did receive those, and I also received a bundle of defendant's materials, which comprises three extracts from legislation and a decision called *Thornton*.

MR HOOKE: Yes.

HER HONOUR: All right. I will go off the Bench, and perhaps if you could let the Court know when you are ready to proceed. Perhaps, Mr Knowles, it would be helpful if you could have a conversation with Mr Hooke after you have worked out your client's position about what are the requirements before I can proceed today.

MR KNOWLES: Yes, your Honour.

HER HONOUR: Thank you. I will adjourn the Court.

AT 2.05 PM SHORT ADJOURNMENT

<u>UPON RESUMING AT 2.13 PM</u>:

HER HONOUR: Thank you. Mr Knowles, what is the Minister's position in relation to the applications?

MR KNOWLES: The Minister's position is that the applications for the extension of time and for the interlocutory relief are opposed. In relation to the specific issue which your Honour raised about the application of section 486A, I have spoken to Mr Hooke and I think we are in agreement, insofar as what I am about to say is that there is no difficulty with Mr Hooke making a formal amendment to the application so that it seeks an extension of time under section 486A and that that amendment need not delay any argument we have today, because the factors relevant to an extension of time under section 486A would overlap entirely with those factors which the Court may consider under rule 25.02.2, which Mr Hooke's application already addresses.

HER HONOUR: I think I accept that, subject to one matter. I do not think that the plaintiff has clearly articulated or explicitly articulated why it is necessary, within the meaning of section 486A, that is necessary in the interests of the administration of justice to make the extension order.

Mr Hooke, I would grant leave to file an amended application by 6.00 pm today seeking to invoke section 486A, provided that you articulate now why the applicant considers that it is necessary in the interests of the administration of justice or how that statement is going to be articulated on the amended application.

MR HOOKE: Thank you, your Honour. We can certainly make that amendment within the timeframe that your Honour postulates.

HER HONOUR: All right. I will grant that leave.

MR HOOKE: Thank you, your Honour. Your Honour, the basis upon which the extension of time is sought at a factual level is addressed in Mr Zarifi's first affidavit, and we have picked those matters up in our written submissions. In terms of the administration of justice limb of 486A, the case is put on the basis that the defendant, in making the decision that was made and is sought to be challenged, has proceeded upon what, in our submission, is a significant misunderstanding of the law. It is a position that was – or a misunderstanding that was explained most recently by the Full Court of the Federal Court in *Thornton*, to which both parties have given your Honour reference.

The misunderstanding is one which, in our submission, is important in the context of the administration of justice more generally, because it traverses an area of singular significance, which is the differential treatment of children in the criminal justice system, the manner in which their interaction with the criminal justice system is to be treated, and the manner in which transgressions are to be dealt with by the Children's Court, exercising its summary jurisdiction.

There is a clear legislative intent, both at the level of the State Parliament and the Commonwealth Parliament, to protect that differential treatment, to protect the privacy of young offenders, and to protect them also from having the consequences – the criminal consequences – of conduct that would otherwise be, in an adult offender, be dealt with by way of conviction and penalty, dealt with without those matters being recorded and forming part of the criminal record going forward. To traverse that protection, and those clear and significant legislative intents in the way that the delegate did in this case, as in *Thornton*, in our submission, is a significant matter that would concern the Court in terms of protecting the proper and faithful administration of justice according to those clear legislative measures.

Furthermore, in our submission, the significance in this case of those matters being dealt with on a false premise, in our submission, is clear. I will take your Honour – in fact, I might do it now. If your Honour takes up Mr Zarifi's first affidavit - - -

HER HONOUR: Mr Hooke, hearing all that, I am not sure that it has quite articulated a reason why it would be necessary in the interests of the administration of justice to extend time in this case.

MR HOOKE: Your Honour, in our submission, where a decision which was made and which has such significant consequences for this plaintiff and those forming part of his family and others affected by the decision is brought about in circumstances where there is, in our submission, such a clear departure from the statutory framework concerning young offenders, it is an important aspect of the administration of justice that a decision of that kind, particularly where the matters wrongly taken into account as convictions by the delegate are so significant and so extensive that the decision be set aside and made according to law.

HER HONOUR: All right. Thank you.

MR HOOKE: I was going to make good the last point by taking your Honour to the police certificate, which is exhibited to Mr Zarifi's first affidavit, starting at page 41 of the numbers your Honour will find at the top of the pages in the centre.

HER HONOUR: Yes.

MR HOOKE: Your Honour sees that there are, in the first two and one third pages, an unflattering sequence of offending. But what your Honour sees starting about halfway down page 43, with the first entrance from "Bidura Childrens Court" through to the end of the record on page 44, is

that there are – I have not counted them up, but many, many charges which are plainly wrongly recorded as having been the subject of convictions. When your Honour goes to the reasons, and this is found at page 37 of Mr Zarifi's first affidavit, at paragraphs 9 and 14, the delegate has dealt with the criminal history, including those significant numbers . . . . . which cannot have been the subject of conviction in an omnibus fashion, by just referring to:

> convictions of a similar nature dating back to 1996 when he was aged 13.

So, there is a substantial body of the history which has been dealt with contrary to section 14 of the New South Wales Act, contrary to – I think it is section 87ZR of the *Criminal Code* (Cth), 85ZR.

HER HONOUR: Mr Hooke, do those paragraphs not need to be read with paragraph 22 of the delegate's decisions, which seem to suggest that the ultimate decision was made by reference to your client's offending rather than his convictions?

MR HOOKE: Your Honour, that is so, although we would observe in passing that paragraph 22 seems to be inconsistent with the ultimate decision, although that is probably a typographical error rather than an error of substance.

HER HONOUR: I am sorry, I have not picked that up, what are you talking - - -

MR HOOKE: The last sentence:

> I noted in particular, the length of time Mr LESIANAWAI has lived in Australia, and his prospects on return to Fiji, but consider the history and nature of his offending and his risk of reoffending do not outweigh these considerations.

HER HONOUR: I see.

MR HOOKE: Which would seem to suggest that the power to revoke the cancellation was going to be exercised, but it does not, of course, fit with the first part of paragraph 22. It is probably a product of the pace rather than substance. But your Honour is certainly right, and if what the delegate had done was in fact to have considered the circumstances of the conduct that gave rise to the entries in the police certificate . . . . . by section 14 of the New South Wales Act, and had dealt with that in an appropriate fashion, we would have no cause for complaint.

But as far as we can ascertain, the only information in relation to those charges is the bare entry in the National Police Certificate, so there is no factual substratum to ground paragraph 22 in relation to everything from the middle of page 43 of Mr Zarifi's first affidavit to the end of the record other than the incorrect reliance on those matters being the subject of convictions. And that is why we say it is a matter of substance, because there simply was no factual basis for any consideration, to use the terms of paragraph 22, "the history and nature of his offending" in relation to that substantial chunk of history.

That is the nub of our complaint on the basis of *Thornton* and also feeding into ground 2, because once you take away the convictions, which one must, there is no factual substratum for that analysis at all. But there is, in relation to the last three, I think it was, offences, which resulted in the last lengthy period of incarceration, but, I apprehend, not before that. I am reminded that direction 55 included as a mandatory consideration the nature and seriousness of the offending, so without the factual substratum, that simply could not be properly considered, and cannot have been. Indeed, the only basis upon which it was considered at all, that was on the basis the defendant – section 85ZR of the *Criminal Code* (Cth) and section 14 of the *Children (Criminal Proceedings) Act* (NSW).

We say that on the basis of the Full Court's decision in *Thornton*, and I appreciate that that is the subject of a grant of special leave in this Court, we would, subject to the extension of time, in our submission, succeed on ground 1, and once we get into that territory, ground 2 would follow, in our submission, as a matter of necessary logical extension. But we would also say, with respect, that ground 2 is capable of succeeding on its own, because when one takes away the non-existent convictions, there is not any probative basis for addressing the matters the subject of paragraph 22 and reaching that conclusion.

The only basis upon which it has been done in respect of all of that material to which I have drawn attention, is the erroneous – the legally erroneous – fact of conviction. It just not does exist. Your Honour, in our submission, those are substantial matters of concern to the administration of justice, and, apart from the substance of the matter in terms of the application for a constitutional writ and the significance of that to the application for the interlocutory injunction, it speaks, in our submission, loudly to the administration of justice criterion in 486A.

HER HONOUR: I am conscious of Justice McHugh's decision in *Re Commonwealth of Australia; Ex Parte ex Marks* (2000) 75 ALJR 470 at paragraphs 15 to 16 in which he said, in relation to a delay of 17 months before seeking relief, that he found it:

> difficult to see how a person who, with knowledge of the decision, delays 17 months before seeking relief could ever be granted an extension of time to quash such a decision unless some conduct of the respondent or the public body or official had brought about the delay.

Now, that was not in the migration context, but looking through the matters that are set out in paragraph 7 of your instructing solicitor's affidavit, I am concerned about whether or not the extreme delay in this case is a consideration that weighs heavily against whatever merit might be identified at this stage of the proceedings. In particular, I cannot see that I could place any weight on paragraph 7 beyond the obvious – I think the obvious inference that your client would be likely to suffer the adverse mental health effects that anyone would suffer from continuous time in prison and then in immigration detention.

But that also has to be weighed against – as I think Justice McKerracher did in one of the earlier proceedings – the fact that he was able to bring before proceedings in the AAT and the Federal Court, which failed, there is no evidence about when this particular point that is now sought to be agitated first came to your client's attention.

MR HOOKE: Your Honour - - -

HER HONOUR: When did – I am sorry. I do just have one more question before you say anything further that you wish to say on the question of the extension of time, and that is, when did your client move from prison to immigration detention?

MR HOOKE: Dr Donnelly will just turn that up, your Honour. Could I address your Honour's earlier inquiry and say this: we accept, as we must, that the delay in this case is exceptional. It is long and there are not many longer – one would hope – that one would encounter. But when your Honour goes to the opening paragraphs of Mr Zarifi's first affidavit, your Honour sees he received instructions on 9 February and that on that date he had an urgent telephone conference with Dr Donnelly. At that time he received advice that there were reasonable prospects of success in challenging the decision.

HER HONOUR: But the way that I read that affidavit – I could be misunderstanding it – it is almost as though he was receiving instructions from Dr Donnelly, which rather suggests that this issue had been identified before 9 February.

MR HOOKE: Your Honour, I do not apprehend that to be so. Although it would not be the first time that counsel who are known to appear for

applicants in this jurisdiction were contacted directly by someone in immigration detention, so, whether that was the conduit to Mr Zarifi or not, either way, what is plain is that the provision of instructions on 9 February was a catalyst for this issue being identified and agitated. In our submission, your Honour would comfortably infer that 9 February was the time at which the errors for which we contend were identified.
Your Honour - - -

HER HONOUR: I am sorry – I cut you off. But I suppose the other issue that that raises is the question of what happened between 1 and 9 February.

MR HOOKE: Well, your Honour, the man is in immigration detention in Western Australia somewhere and doing the best that he can with the limited hand he has been dealt. In our submission, a delay – a period of about a week between being notified of his removal and managing to identify and make contact with someone who can provide him with advice and assistance is not a delay that your Honour would be concerned by, in our submission.

HER HONOUR: Is there anything more that you want to say on the question of delay?

MR HOOKE: Your Honour, only this. That the bringing of full proceedings, to which Justice McKerracher made reference, is something that cuts both ways because, true it is that he brought full proceedings across the Tribunal and the Federal Court, but all of them, as it transpired, were misconceived or offended the time limit in respect of the initial AAT proceedings because of issues in relation to notice, which may or may not have had a lot of substance. I do not – I am not sufficiently familiar with the detail of it to be able to say. But the fact is that, like many people, he struggled with the significant complexity that attends the vindication of these sorts of rights.

He was unrepresented in the Tribunal and in the Federal Court, and unsurprisingly he failed to grasp the issue that Dr Donnelly identified on 9 February that brings us to this Court. I say unsurprisingly because it is a matter that, despite all of the litigation of these types of matters over many years, it is only late last year that the Full Court of the Federal Court delivered judgment in *Thornton* which identified this matter – or this complaint – as a serious matter.

So, there have plainly been other cases which would have raised this issue. They have not, which means that a lot of people with a lot more qualifications than the plaintiff have not identified it either. In our submission, that tells in favour of an extension of time. The fact, as we have said in writing, that this man was not sitting on his hands – he was

doing what he apprehended he needed to do to try to vindicate his position, but he did not get it right, and that is not something that is to be levelled against him as a criticism or as an adverse factor, in our submission. He has done what he could.

HER HONOUR: Albeit that that happened five years after the determination. I notice that at paragraph 7(a) your instructing solicitor was told that the plaintiff:

> never received the defendant's cancellation decision when it was made.

But Justice McKerracher found, at paragraph 23 of his Honour's reasons, that the cancelation decision was provided in accordance with the requirements of the Act.

MR HOOKE: Yes. I cannot and I do not shy away from that, your Honour. There is that finding of fact, there are the instructions that Mr Zarifi was given. The two do not reconcile, but that is not an infrequent occurrence either. Your Honour asked when the plaintiff moved from jail to immigration detention, and I am told that was August 2020.

HER HONOUR: Thank you.

MR HOOKE: Of course, there were COVID restrictions impacting both prisons and immigration detention across that period as well. So, that is another factor as a matter of judicial notice that your Honour would have regard to in respect of delay between the beginning of 2020 and pretty much the present time. Does your Honour need to hear me in terms of the balance of convenience?

HER HONOUR: No.

MR HOOKE: Thank you, your Honour. In that case, those are our submissions.

HER HONOUR: Well, when I say, no, I would not contemplate making an injunction until further order. The most I would be prepared to do would be to make an injunction restraining the removal until a hearing of the application for constitutional writ.

MR HOOKE: Yes. Yes.

HER HONOUR: All right. You do not want to say anything in relation to that?

MR HOOKE: No, your Honour.

HER HONOUR: All right. Thank you. Mr Knowles.

MR KNOWLES: Thank you, your Honour. I hope I can be relatively brief. On the question of the extension of time, your Honour has already identified, by reference to the decision of Justice McHugh in *Ex Parte Marks*, the relevant factors that – or the extraordinary nature of a decision to extend time many months, and, in this case, many years after the making of the decision. We respectfully would adopt what your Honour, no doubt not on a final basis but in argument or in the course of my learned friend's submissions, said about the matters that could be drawn from paragraph 7 of Mr Zarifi's affidavit.

In our submission, the explanation is inadequate to explain a delay of such a long period, even when one takes into account the other merits and judicial review proceedings that the applicant commenced unsuccessfully. The extension of time in this case is approximately 10 years. I agree with my learned friend that the applicant left prison and was taken into immigration detention on 5 August 2020, is my instructions.

Even if one were to consider the position only from that date, that is, August 2020, the extension of time until now would still be significant, and in terms of the events of February 2023, Mr Zarifi deposes to the fact that he had a telephone conversation of 9 February, which, as your Honour remarked, was more than a week after notice of the impending removal had been given.

But the issue, so much, is not what happened or did not happen during that week, but why no steps were taken earlier than that, and in that regard, contrary to a submission put my learned friend that *Thornton* was decided late last year, the decision in *Thornton* was delivered by the Full Court on 25 February 2022. So, the issue that is now relied upon has been known – at least in circles that consider legal issues relating to this Act – for at least a year, or approximately a year - - -

HER HONOUR: That knowledge cannot really be sheeted home to the plaintiff, can it?

MR KNOWLES: No, it cannot be. But the point that is now being raised is that he had legal advice for at least some of his judicial and merits review proceedings. He had advice from Dr Donnelly in February 2023. There is no explanation for why that advice could not have at least been sought prior to February 2023. So, I do not – your Honour correctly says that that knowledge cannot be attributed directly to the applicant, but what can attributed to the applicant is a failure to explain attempts to obtain legal

advice prior to February 2023. In those circumstances, in my respectful submission, the interests of justice do not demand the extension of time sought in light of the fact that it is such an extensive period.

I understood my learned friend to also make submissions that the substantive merits of the application for a constitutional writ itself justified the grant of an extension of time. Now, as a matter of principle, I do not dispute that the underlying merits of a case proposed to be brought could bear upon the interests of the administration of justice and whether or not an extension of time should be granted. However, I do briefly want to make a submission – I anticipate it will take about five minutes – as to why there is no underlying merit, because even if the decision in *Thornton* is correct – which may be accepted for present purposes even though an appeal to this Court is due to be heard.

But even if *Thornton* is correct, it is distinguishable – clearly in this case because *Thornton* considered materially different Queensland legislation – as opposed to the New South Wales legislation here. Can I start, in that regard, by reference to the Commonwealth Act? The *Crimes Act* 1914 and particularly section 85ZR.

HER HONOUR: Yes.

MR KNOWLES: Subsection 2 of that provision is what my learned friends rely upon alongside a State provision, which I will come to, to the effect that there is an error of law in taking into account the convictions recorded on the National Police Certificate that were Children's Court convictions - - -

HER HONOUR: Does the plaintiff rely explicitly on 85ZR?

MR KNOWLES: I understand that they do because that is the provision which effectively gives the State Act force for the purposes of Commonwealth legislation, but let me confirm whether there is explicit reliance on that, your Honour. I will have to turn to the application itself.

HER HONOUR: I am just a little confused, because the conviction – or the offending – seem to be in relation to State offences.

MR KNOWLES: That is right, your Honour. The convictions in the Children's Court were for State offences - - -

HER HONOUR: Yes.

MR KNOWLES: As I understand the relevance of section 85ZR, is that it gives effect to, in the Commonwealth field, State provisions which have the

effect of deeming a conviction never to, as a matter of fact, have occurred. But your Honour, I should say, is quite right. When I read the application for a constitutional writ or other relief, my learned friends do not expressly cite section 85ZR, but - - -

HER HONOUR: Perhaps I should just read section 85ZR. I will just take a second to do that.

MR KNOWLES: It is only subsection (2) that is applicable, your Honour.

HER HONOUR: Subsection (2). Thank you. All right, thank you.

MR KNOWLES: Thank you. So, it is really subsection (2)(b) which has potential application, and that the "Commonwealth authority":

> in corresponding circumstances or for a corresponding purpose –

shall not take into account the conviction. Can I ask your Honour just to turn up the decision in *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23, which is recorded at volume 288 of the Federal Court Reports at page 10.

HER HONOUR: Yes.

MR KNOWLES: And at paragraph 13 their Honours – I should say this is the decision of Justice SC Derrington with whom Justices Katzmann and Banks-Smith agree, but at paragraph 13 her Honour explains the relevance of section 85ZR(2) to decisions taken under the *Migration Act*. And there – if I just jump forward to paragraph 19, their Honours cite an earlier decision of Justice Kiefel sitting as a judge of the Federal Court, explaining the operation of section 85ZR(2), and, in a sense, her Honour Justice Kiefel in the third line of paragraph 8 extracted, says:

> The effect of the provision must be such as to take away the *fact* of conviction, as a pardon might do –

Then going down to paragraph 11 within the extract of paragraph 19 of the decision in *Thornton*, her Honour Justice Kiefel distinguishes between section 12 of the Queensland Act, which I will come to, and section 85ZR of the *Crimes Act*, whereas "the former", that is, the Queensland Act is concerned that there be "no record of a conviction", whilst:

> The Commonwealth provision envisages a state legislation provision, which removes or disregards the conviction altogether.

So, her Honour Justice Kiefel there, distinguishes between a State provision which simply provides that the conviction should not be recorded, as opposed to one which removes or disregards or takes away as a matter of fact the conviction. Their Honours, or her Honour Justice Derrington at paragraph 20, page 15 of the report, then looked at the Queensland provision in question – section 12 of the *Penalties and Sentences Act*, and, in particular, whilst – sorry, whilst subparagraph (12)(3) provided that:

> (3) Except as otherwise expressly provided b y this or another Act –
>
> (a) a conviction without recording ***the conviction*** is taken not to be a conviction for any purpose - - -

HER HONOUR: Mr Knowles, I am just wondering if I am missing something here because – and I am not sure that I have the provision that Mr Hooke is relying upon, but I understood his case to be stronger than this, which is not about recording a conviction, but about preventing the court from convicting a minor of a criminal offence.

MR KNOWLES: Well, we might be at issue then upon what the effect of section 14 of the *Children (Criminal Proceedings) Act* 1987 is. I hope that that that provision was in the bundle of the respondent's material.

HER HONOUR: Yes

MR KNOWLES: Section 14 is headed "Recording of a conviction".

HER HONOUR: Yes. Let me just ask you to pause and I will read that.

MR KNOWLES: Yes.

HER HONOUR: And subsection (2) does not apply here, or is there an issue about that?

MR KNOWLES: No, that would depend upon a factual question which I accept is currently unresolved on the material as to whether those matters in the Children's Court were tried on indictment or summarily. So, I do not take the point that it does not apply. But my point is that on its face what subsection (1) does is prevent the court from proceeding to or recording a "finding as, a conviction". What section 14 does not do in contrast to section 12 of the Queensland Act provision cited in *Thornton* is have an equivalent of subsection 12(3), which operates at least as the Full Court held in *Thornton*, to remove not just the recording of the conviction or the proceeding to the conviction, but the fact of a conviction.

There is, and I am sorry to have to take your Honour to one more provision, but to return to the *Crimes Act* – the *Crimes Act* (Cth) – there is another provision which hopefully your Honour was provided. Section 85ZM.

HER HONOUR: Section ZM – for Molly?

MR KNOWLES: Yes.

HER HONOUR: Yes.

MR KNOWLES: And your Honour will see from subparagraph (1)(b) that for the purposes of this part of the *Crimes Act*, which is the same part that section 85ZR is found in:

> (b) the person that has been charged with, and found guilty of, the offence but discharged without conviction –

is for this part, anyway, still taken to:

> have been convicted of an offence –

So, if Mr Hooke is right, and I accept that the first part of his argument is debatable, that the applicant – or the plaintiff should never have been formally convicted in the Children's Court by operation of section 14, there was, on any view, still a finding that the offences in fact had occurred, and there is, therefore, a conviction for the purposes of the *Crimes Act (Cth)* or that part of the *Crimes Act* (Cth) which section 85ZR is part of - - -

HER HONOUR: Well, hang on – how does section 85ZM subparagraph (2) operate? If we assume that a juvenile finding of guilt is a conviction, or taken to be a conviction within (1), a conviction is spent if they were not sentenced to imprisonment for the offence. Is that not a – I mean, it is just prima facie extraordinary that the – but it may well be right – that the *Crimes Act* (Cth) would bring within its scope as a conviction a finding of guilt by a person under the age of 14.

MR KNOWLES: Subsection – if I could just address the two points your Honour raised sequentially. Subsection (2) determines when an offence is spent, not when a conviction is found to exist. I do not understand there to be any issue in this case as to whether the plaintiff's convictions were spent convictions or spent offences. So, in my submission, section 85ZM subparagraph (2) does not have any direct operation.

As to the second point that your Honour raised, that it would be unlikely that the Commonwealth legislation would deem a conviction of a minor - - -

HER HONOUR: Not a conviction – a finding a guilt of which does not lead to the recording of the conviction.

MR KNOWLES: Yes, quite, your Honour. Your Honour's statement of that is more correct than mine was. But, in my submission, that is the effect of the legislation. But, perhaps the primary thrust of my argument really does just return to the difference between section 12 of the Queensland Act considered in *Thornton* and section 14 of the New South Wales Act, in that one is about recording or proceeding to a conviction, having made a finding that the offence is proven, whereas section 12, but particularly 12(3)(a) – at least as the Full Court construed it – did something different: it removed the fact of the conviction in the manner that Justice Kiefel described in the decision of *Hartwig* cited by the Full Court.

But that is really why, in our submission, the merits against the applicant here, along with the extraordinary delay – the unexplained delay – can I just make one further point?

I do not want to make long submissions on the balance of convenience, because your Honour is aware of the context in which this decision is made and the pending removal as well as what I acknowledge the impact upon the plaintiff is of removal. But there is one other matter which I should raise. If my learned friend is pushing – sorry, pressing for the grant of interlocutory relief, it ought to be conditioned upon him obtaining, and promptly, the usual undertaking as to damages which we have not seen proffered in any of the material to date. If I am wrong about that and it has been proffered then that issue will go away. If I am right that it has not been proffered, then it should be, and the relief ought be made conditional upon that.

HER HONOUR: Thank you, Mr Knowles. Mr Hooke.

MR HOOKE: Thank you, your Honour. Your Honour, I do have instructions to proffer the undertaking as to damages. Your Honour it rather sounded from my learned friend's submissions that there are a lot of interesting questions of substance to be tried. The position in relation to section 14 is that we say that section 14 on its own is enough, but that, if we need to, we would have resort to section 85ZR of the Commonwealth Act. We do not, with respect to our learned friends, see the distinction that is skilfully sought to be drawn between the Queensland Act and the New South Wales Act as bearing significantly on the determination of the primary issue.

It is, with respect to our learned friend, difficult to conceive of a clearer statement of legislative intent that a finding of guilt not be taken as a conviction, than a blanket prohibition on the recording of a conviction at all. The jurisdictional, or the question of whether the proceedings were dealt with summarily or on indictment is a red herring. The Children's Court only has a summary jurisdiction. Indictable matters are dealt with by committal, as your Honour would know, so that is an issue that need not trouble your Honour, in our submission.

Your Honour, otherwise – other than to say that, in our respectful submission, there is nothing put by the Minister that derogates from the merit of this application – the substantive application – to the standard requisite for your Honour's consideration on the interlocutory application. Those are our submissions in reply.

HER HONOUR: Thank you, Mr Hooke. I will adjourn briefly to decide what course I will take. Would you please adjourn the Court.

AT 3.08 PM SHORT ADJOURNMENT

UPON RESUMING AT 3.18 PM:

HER HONOUR: I propose to grant the extension of time and the injunctive relief with a view to having a final hearing of this matter next week if that is feasible. Is that feasible, Mr Hooke?

MR HOOKE: Sorry, your Honour, I was just looking at my diary. Your Honour, it would cause me significant difficulties, but if it has to be done it has to be done, I suppose.

HER HONOUR: Mr Knowles, is that feasible?

MR KNOWLES: I have a hearing all of next week. My junior is interstate. But the Minister has other counsel available to run the substantive argument if we are not. The only other matter I wish to raise, and it is a matter for the Court, not for me, but to say that the decision in *Thornton*, as I understand it, is being heard by the Full Court in the March sittings, and your Honour may wish to consider how that affects any decision by a single judge in the near future.

HER HONOUR: Well, is your client likely to have a view about that?

MR KNOWLES: I do not think my client would have any view as to when the Court should order its business, and it is merely a matter I raise because it may affect, for instance, the constitution of the Court for the appeal in *Thornton.* I should say – and I do not wish – I think that I was sufficiently clear, obviously, on a final application in this matter, I will also be saying the decision in *Thornton* was wrong and ought not be followed, and for the same reasons the Minister is saying that in the appeal in *Thornton*, hence there is a degree of overlap in the substantive arguments that did not attend the interlocutory argument that your Honour has just heard.

HER HONOUR: I see. Well, my proposal of a final hearing next week was predicated on the assumption that the Minister would want the matter dealt with urgently, but it rather sounds as though it might be more convenient to have it dealt with after *Thornton*.

MR KNOWLES: I do not have any precise instructions on the urgency of the final hearing, but my impression would be that your Honour's final statement was correct. If removal is not to occur tomorrow as scheduled, which it now will not, the question of whether the final matter is determined next week or after the decision in *Thornton* is not one that is particularly pressing to my client, I imagine.

HER HONOUR: Thank you. Before I make orders, does your client require reasons, Mr Knowles?

MR KNOWLES: Your Honour, can I propose it this way: I do not have instructions on that, but we certainly do not require reasons today, and we will, before the end of the day, inform your Honour whether we require reasons at all.

HER HONOUR: Thank you. In that case, what I propose to do is make – is it sufficient, Mr Knowles, for section – I think I need a copy of section 486A. Well, perhaps this is the way to go. Could I ask the parties to agree on the form of orders addressing the extension of time and providing for appropriate – an injunction in terms of the application upon the plaintiff by his counsel giving the usual undertaking as to damages. The injunction to be until the determination, until – well, perhaps you can agree on a date for the termination of the injunction, or if you do not agree, 4.00 pm on the date of the final determination of the application for constitutional or other writ. I will refer the parties to the Registry for fixing a final hearing date.

MR KNOWLES: If the Court pleases.

MR HOOKE: May it please the Court.

HER HONOUR: All right. And I will make – if those draft orders, agreed draft orders, are sent to my chambers, then I will make the orders in chambers this afternoon.

MR KNOWLES: May it please the Court.

HER HONOUR: And I will deliver reasons as soon as practicable.

MR HOOKE: Yes, your Honour.

MR KNOWLES: Thank you, your Honour. And could I thank your Honour for taking the matter on such short notice.

HER HONOUR: Would you please adjourn the Court.

AT 3.25 PM THE MATTER WAS ADJOURNED