FEDERAL COURT OF AUSTRALIA

GKYW v Minister for Immigration, Citizenship and Multicultural Affairs

[2023] FCA 1543

Review of:	Application for judicial review of *GKYW and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 4119
File number:	VID 785 of 2022
Judgment of:	**MOSHINSKY J**
Date of judgment:	7 December 2023
Catchwords:	**MIGRATION** – character case – where applicant's visa was subject to mandatory cancellation – where a delegate decided not to revoke the cancellation decision – where the Tribunal affirmed the decision of the delegate – where the applicant contended that the Tribunal fell into jurisdictional error by taking into account findings of guilt in relation to juvenile charges in respect of which no conviction was recorded – where the Minister conceded that the Tribunal had erred – whether the Tribunal's error was material – held: application allowed
Legislation:	*Crimes Act 1914* (Cth), ss 85ZM, 85ZR, 85ZS *Migration Act 1958* (Cth), ss 501, 501CA *Youth Justice Act 1992* (Qld), s 184
Cases cited:	*Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125; 295 FCR 315 *Hartwig v Hack* [2007] FCA 1039 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 273 CLR 506 *Nathanson v Minister for Home Affairs* [2022] HCA 26; 403 ALR 398 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417 *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23; 288 FCR 10 *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 17; 409 ALR 234

Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	40
Date of hearing:	14 July 2023
Counsel for the Applicant:	Dr J Donnelly with Mr W Calokerinos
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr NM Wood SC with Mr JA Barrington
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The second respondent filed a submitting notice, save as to costs

ORDERS

VID 785 of 2022

BETWEEN:	**GKYW** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **MOSHINSKY J**

DATE OF ORDER: **7 DECEMBER 2023**

THE COURT ORDERS THAT:

1. A writ of certiorari issue quashing the decision of the second respondent made on 21 November 2022.
2. A writ of mandamus issue directing the second respondent to determine the applicant's application for review according to law.
3. Within seven days, the parties provide to the Court a proposed minute of orders in relation to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J:

Introduction

1 The applicant seeks judicial review of a decision of the Administrative Appeals Tribunal (the **Tribunal**) dated 21 November 2022: *GKYW and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 4119.

2 The procedural background to the present proceeding can be summarised as follows:

(a) On 2 March 2020, the applicant's Class WE Subclass 050 – Bridging (General) visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) (the **cancellation decision**).

(b) On 27 March 2020, the applicant made representations seeking revocation of the cancellation decision pursuant to s 501CA.

(c) On 26 August 2022, a delegate of the first respondent (the **Minister**) decided, under s 501CA(4), not to revoke the cancellation decision. The delegate was not satisfied that there was "another reason" to revoke the cancellation decision.

(d) On 6 September 2022, the applicant lodged an application for review with the Tribunal.

(e) On 21 November 2022, the Tribunal affirmed the delegate's decision not to revoke the cancellation decision.

3 The applicant relies on an amended originating application dated 6 April 2023 raising two grounds, which can be summarised as follows:

(a) By ground 1, the applicant contends that the Tribunal acted on a misunderstanding of the law, in that the Tribunal proceeded on the basis that the power conferred by s 501CA(4) to revoke a cancellation decision was *discretionary*. In support of this ground, the applicant relies principally on the judgment of the Full Court of this Court in *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125; 295 FCR 315.

(b) By ground 2, the applicant contends that the Tribunal erred by taking into account findings of guilt in relation to juvenile charges in respect of which no conviction was recorded. In support of this ground, the applicant relies principally on the judgment of the High Court of Australia in *Thornton v Minister for Immigration, Citizenship,*

Migrant Services and Multicultural Affairs [2023] HCA 17; 409 ALR 234 (***Thornton HC***).

4 In relation to ground 2, the Minister concedes that there was an error by the Tribunal (T30), in that the Tribunal took into account findings of guilt in relation to juvenile charges in respect of which no conviction was recorded (T33). There remains, however, an issue of materiality. The applicant contends that the error was material in the sense that there was a realistic possibility of a different decision had the error not been made. The Minister submits that there is no realistic possibility of a different decision.

5 For the reasons that follow, I have concluded that the Tribunal's error was material and therefore that ground 2 is made out. It is therefore unnecessary to consider ground 1.

Key relevant provisions

6 Section 501 of the *Migration Act* relevantly provides:

> (3A) The Minister must cancel a visa that has been granted to a person if:
>
> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph (6)(e) (sexually based offences involving a child); and
>
> (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

7 Section 501CA relevantly provides:

> (4) The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the Minister is satisfied:
>
> (i) that the person passes the character test (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked.

8 The obligations of the Minister in exercising the power conferred by s 501CA(4) were recently considered by the High Court in *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417.

The decision of the High Court in *Thornton*

9 Central to ground 2 is the decision of the High Court in *Thornton HC*. In that case, the High Court, by a majority (Gageler, Gordon, Edelman and Jagot JJ, Steward J dissenting), dismissed an appeal from the judgment of the Full Court of this Court in *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23; 288 FCR 10 (***Thornton FFC***). The Full Court held that the Minister's decision (not to revoke a cancellation decision under s 501CA(4)) was affected by jurisdictional error in circumstances where the Minister had taken into account an irrelevant consideration, namely Mr Thornton's juvenile offending in respect of which no conviction had been recorded.

10 The principal issues before the High Court concerned the construction of s 85ZR(2) of the *Crimes Act 1914* (Cth) and the characterisation of s 184(2) of the *Youth Justice Act 1992* (Qld). I will set out these provisions to provide context for the summary that follows of the High Court's decision. Section 85ZR(2) of the *Crimes Act* provided at the relevant time:

> Despite any other Commonwealth law or any Territory law, where, under a State law or a foreign law a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence under a law of that State or foreign country:
>
> (a) the person shall be taken, in any Territory, in corresponding circumstances or for a corresponding purpose, never to have been convicted of that offence; and
>
> (b) the person shall be taken, in any State or foreign country, in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority in that State or country, never to have been convicted of that offence.

11 Section 184(2) of the *Youth Justice Act* provided at the relevant time:

> Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose.

12 In relation to the construction of s 85ZR(2), Gageler and Jagot JJ, who delivered a joint judgment, referred to s 85ZM(1), which deemed a person to have been convicted of an offence in certain circumstances. Their Honours then held at [13]:

> Section 85ZR(2) operates on this deemed state of affairs (that is, of conviction) by providing that if, relevantly, the State law is that the person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence under a law of that State, the person shall be taken, in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority in that State, never to have been convicted of that offence. By this means, s 85ZR(2) gives full force and effect to the State law for, in effect, Commonwealth purposes.

13 In relation to the characterisation of s 184(2) of the *Youth Justice Act*, Gageler and Jagot JJ held (at [36]) that s 184(2) of the *Youth Justice Act* deemed a person never to have been convicted of an offence and took away the fact of the conviction, as a pardon might do (picking up the language used in *Hartwig v Hack* [2007] FCA 1039 at [8]). Their Honours continued (at [36]):

> Moreover, s 184(2) expressly operates "for any purpose". It follows that, when regard is had to s 85ZR(2)(b) of the *Crimes Act*, full force and effect is to be given to s 184(2) for the "corresponding purpose", being "any purpose". "Any purpose" includes the purpose of a Commonwealth authority (the Minister) making a decision under s 501CA(4) of the *Migration Act*. The Minister's consideration of Mr Thornton's youth offending in deciding not to revoke the cancellation of the visa was contrary to the direction in s 85ZR(2)(b) of the *Crimes Act*. That direction had to be applied by the Minister irrespective of the fact that representations on Mr Thornton's behalf referred to his youth offending. Accordingly, the Minister was right to concede that, if this were so, the Minister had taken into account an irrelevant consideration.

14 Gageler and Jagot JJ considered the error to be material: at [37]-[38].

15 A joint judgment was also delivered by Gordon and Edelman JJ, the other members of the majority. In relation to the construction of s 85ZR(2) of the *Crimes Act*, their Honours held at [57]:

> The chapeau to s 85ZR(2) relevantly has as its starting premise that a "State law" exists under which "a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence under a law of that State". The words "to be taken" direct attention to a State law which has the effect of deeming a conviction never to have occurred. The words "in particular circumstances or for a particular purpose" direct attention to a State law which deems a conviction never to have occurred at all in two scenarios: first, in certain circumstances – that is, the State law sets out that in certain circumstances the person is taken never to have been convicted, but not in others ("in particular circumstances"); or second, for certain purposes – that is, the State law sets out that for some purposes the person is taken never to have been convicted, but not for others ("for a particular purpose").

16 At [60], their Honours said that s 85ZR needed to be read with s 85ZS, which expressly stated the consequences of a State law engaging s 85ZR. Their Honours concluded in relation to the construction issue at [61]:

> As will be apparent, ss 85ZR(2) and 85ZS combine relevantly to operate so that where a State law provides that a person is to be taken never to have been convicted of an offence under a law of that State, **then a Commonwealth authority shall not take account of the fact that the person was charged with, or convicted of, that offence**. The Commonwealth law is not to contradict the State law.
>
> (Emphasis added.)

17 In relation to s 184(2) of the *Youth Justice Act*, their Honours concluded (at [73]) that s 184 engaged s 85ZR of the *Crimes Act*. Their Honours reasoned:

> The "particular circumstance[]" – the condition – referred to in s 85ZR(2) is found in s 184(2): a finding of guilt against a child has been made, and the court has decided, or been mandated, under s 183 not to record a conviction. Section 184(2) deems a person never to have been convicted of an offence and takes away the adverse consequences which attend a conviction. In sum, consistent with s 85ZR of the *Crimes Act*, ss 183 and 184 of the *Youth Justice Act* prescribe a particular circumstance in which a person – a child – is taken never to have been convicted of an offence under the law of Queensland.

18 At [74], their Honours said that, accordingly, s 85ZS(1)(d)(ii) of the *Crimes Act* engaged s 184(2) of the *Youth Justice Act* so that the Minister could not take into account under s 501CA(4) of the *Migration Act* any of the findings of guilt made against Mr Thornton when he was a child for which no convictions were recorded, and the Minister could not take into account that Mr Thornton had been charged with offences committed when he was a child for which no convictions were recorded.

19 Gordon and Edelman JJ considered whether the Minister's error was material at [75]-[80], concluding that it was.

20 For completeness, I note that Steward J, in dissent, was of the view (at [83]) that s 85ZR(2) of the *Crimes Act* was concerned with the pardoning of an offender who had been wrongly convicted; it was not concerned with a juvenile who was found guilty of an offence for which no conviction was recorded.

21 The judgments of the majority in *Thornton HC* establish that s 184(2) of the *Youth Justice Act* engages s 85ZR(2) of the *Crimes Act*. Accordingly, a decision-maker exercising the power conferred by s 501CA(4) of the *Migration Act* may fall into jurisdictional error if they take into account findings of guilt in respect of which, under s 184(2), no conviction was recorded.

Consideration

22 In the present case, the applicant was, as a juvenile, charged with four offences, namely: (a) unauthorised dealing with shop goods (maximum $150); (b) stealing; (c) stealing; and (d) receiving tainted property. The charge in (a) was dealt with by the Brisbane Childrens Court in November 2017. No conviction was recorded and the applicant was reprimanded (CB 48). Charges (b), (c) and (d) were dealt with by the Richlands Childrens Court in February 2019. On all charges, no conviction was recorded. It is also recorded: "Restorative justice order within 12 months" (AB 48). The Minister accepts that these dispositions must have

proceeded on the basis that there was a finding of guilt (T30). The Minister accepts that the effect of *Thornton HC* is that the Tribunal could not have regard to the findings of guilt in making the decision under s 501CA (T30). As already noted, the Minister accepts that the Tribunal did take into account those findings of guilt and therefore erred. In my view, those concessions are correctly made.

23 The remaining issue is whether the applicant has established that the error was *material* in the sense that there was a realistic possibility that the decision could have been different had the error not occurred: *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 273 CLR 506 at [2], [51] per Kiefel CJ, Gageler, Keane and Gleeson JJ; *Nathanson v Minister for Home Affairs* [2022] HCA 26; 403 ALR 398 at [32] per Kiefel CJ, Keane and Gleeson JJ, [45]-[46] per Gageler J.

24 In my view, considering the reasons of the Tribunal as a whole, the error was material in that sense.

25 At [2] of the Tribunal's reasons, the Tribunal stated:

> [The applicant] has compiled a not-insignificant history of offending in Australia. **As a juvenile he was convicted of four offences, all of which were punished by non-custodial sentences**. As an adult he has convictions for eight offences that attracted a cumulative head custodial term of six and a half years. His offending history can be summarised as follows: …
>
> (Emphasis added).

26 Immediately after that passage, the Tribunal set out two tables. The first was headed "Convictions as a juvenile" and the second headed "Convictions as an Adult". In the first table, the Tribunal set out details of the four instances of juvenile offending referred to above, in respect of which no conviction was recorded. It should be noted that the Tribunal's statement in [2] that, as a juvenile, the applicant was "convicted of four offences" is factually inaccurate. In fact, as detailed above, no conviction was recorded in respect of these charges. Likewise, the heading to the first table ("Convictions as a juvenile") is inaccurate.

27 At [20]-[22], the Tribunal discussed the judgment in *Thornton FFC*, which was decided before the Tribunal's decision. (At the time of the Tribunal decision, there had been a grant of special leave to appeal to the High Court from that decision, but the appeal had not yet been heard.) The Tribunal stated at [21]-[22]:

> 21. In assessing the extent to which *Thornton [FFC]* binds this Tribunal, it must be understood *Thornton [FFC]* specifically stands for the proposition that

> s 184 of the *Youth Justice Act 1992* (Qld) and s 12(3) of the *Penalties and Sentences Act 1992* (Qld) engage the provisions of s 85ZR(2) of the *Crimes Act 1914* (Cth). That said, I will, out of an abundance of caution proceed on the basis that (1) *Thornton [FFC]* binds this Tribunal such that it cannot consider the fact of a conviction and that (2) it does not preclude consideration of the underlying conduct giving rise to the subject offending in circumstances where there is independent evidence of that conduct before this Tribunal.
>
> 22. The Respondent contends that *Thornton [FFC]* was wrongly decided. That issue remains to be determined by the High Court of Australia in respect of which there has been a successful application for special leave and the matter is otherwise pending. **My primary focus in these Reasons in assessing the nature and seriousness of the Applicant's unlawful conduct will be on his convictions as an adult.** Those convictions were for eight specific offences that came before the Brisbane Children's Court of Queensland on 13 September 2019 when the Applicant was aged 18 years and two months.
>
> (Emphasis added.)

28 The Tribunal's reasons are structured on the basis of the primary and other considerations outlined in *Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**). I note that primary consideration 1 is protection of the Australian community from criminal or other serious conduct.

29 At [32]-[36] of the Tribunal's reasons, which formed part of the Tribunal's consideration of primary consideration 1, the Tribunal addressed paragraph 8.1.1(1)(d) of Direction 90. In that context, the Tribunal stated:

> 32. This paragraph [i.e. 8.1.1(1)(d)] deals with (1) the frequency of a person's offending and (2) whether there is any trend of increasing seriousness in that offending. First, in terms of frequency, **the Applicant has committed twelve offences that have been dealt with across three sentencing episodes. His first four offences were committed as a juvenile** and he was sentenced for them as a juvenile. His remaining eight offences were committed as a juvenile and he was sentenced for them as an adult.
>
> 33. **The totality of his offending history runs (in terms of sentencing episodes) from November 2017** to September 2019. **The commission of 12 offences** during an approximate two year period is surely frequent offending. Likewise, if we only look at the offending for which he was convicted as an adult, (i.e on 13 September 2019) we are [talking] about the commission of eight offences in a period of well under a year. On either metric, the Applicant's offending has been frequent.
>
> (Emphasis added.)

30 In the above passage, the Tribunal stated that the applicant had committed *twelve offences*. That number includes the four instances of juvenile offending referred to above, in respect of which no conviction was recorded. (This is apparent from [32], and also from [2], set out earlier in these reasons.) Insofar as the Tribunal stated that the applicant's offending history ran *from November 2017*, this is the month of the first instance of juvenile offending, in respect of which no conviction was recorded.

31 At [34] of its reasons, the Tribunal had regard to the "totality of the offending", including his juvenile offending, in considering whether there had been an increase in seriousness, concluding that there had been.

32 At [35], the Tribunal stated that, "[i]f viewed through the lens of the Applicant's offences for which he was convicted as an adult", the offending was very serious from the outset.

33 At [36], the Tribunal stated that it was satisfied that the applicant's offending "has been frequent" and "when viewed through the lens of his entire history, there is an obvious trend of increasing seriousness". It is apparent that, in that sentence, the Tribunal was relying on the applicant's juvenile offending. The Tribunal also added (with reference to the applicant's adult offending): "Otherwise, his offending punished on 13 September 2019, was serious from the outset."

34 The Tribunal addressed paragraph 8.1.1(1)(e) of Direction 90 at [37]-[41] of its reasons. The Tribunal referred, at [37], to the applicant's "pattern of offending" and made three observations about the effect of that offending. The first of these (at [37]) was that "his offences for which he was convicted as a juvenile demonstrate a failure to respect the rights of others to own and enjoy the property they have acquired". Again, this statement is factually inaccurate, in that the applicant was not convicted; no conviction was recorded. Further, it is another instance of the Tribunal relying on the applicant's juvenile offending.

35 At [46]-[47], the Tribunal dealt with the issue of the nature of the harm to individuals or the Australian community were the applicant to engage in further criminal or other serious conduct. In this context, the Tribunal referred to and relied on the applicant's juvenile offending. This point was repeated at [80(b)] of the Tribunal's reasons, forming part of its conclusion in relation to primary consideration 1.

36 At [172] of the Tribunal's reasons, in the context of considering links to the Australian community, the Tribunal stated that the applicant "committed his first offence in Australia in

October 2017 and was convicted of that offence in November of that year". Again, this is inaccurate as the applicant was not convicted.

37 At [188], the Tribunal summarised its conclusions in relation to the various considerations identified in Direction 90. The Tribunal concluded that: primary consideration 1 carried a very heavy level of weight against revocation; primary consideration 2 was not relevant; primary consideration 3 weighed moderately in favour of revocation; and primary consideration 4 weighed heavily against revocation. Further, all but one of the *other considerations* weighed in favour of revocation of the cancellation decision.

38 At [189], the Tribunal stated that a "holistic view of the evidence" relevant to the primary and other considerations did not favour revocation of the delegate's decision not to revoke the cancellation decision.

39 The summary set out above demonstrates that, notwithstanding the Tribunal's outline of its approach at [21]-[22] of its reasons, the Tribunal placed considerable emphasis on the findings of guilt in respect of the applicant's juvenile offending. The Tribunal referred to it repeatedly through its consideration of primary consideration 1. I am satisfied that, had the Tribunal not had regard to the applicant's juvenile offending, its conclusion in relation to primary consideration 1 may have been calibrated differently, and this could have affected its overall assessment of whether there was "another reason" for the purposes of s 501CA(4). Accordingly, I am satisfied that the error was material in the sense set out above, and therefore that the Tribunal's decision is affected by jurisdictional error.

Conclusion

40 It follows that the application is to be allowed. I will make orders that: a writ of certiorari issue quashing the decision of the Tribunal made on 21 November 2022; and a writ of mandamus issue directing the Tribunal to determine the applicant's application for review according to law. In relation to costs, there does not appear to be any issue that costs should follow the event. In circumstances where, as I understand it, the applicant's counsel appeared on a pro bono basis, it may be that the costs order should be formulated in a particular way. I will therefore make an order that, within seven days, the parties provide to the Court a proposed minute of orders in relation to costs.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:

Dated: 7 December 2023