

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, GLEESON AND BEECH-JONES JJ

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ISAAC LESIANAWAI

PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP  
AND MULTICULTURAL AFFAIRS

DEFENDANT

*Lesianawai v Minister for Immigration, Citizenship and Multicultural  
Affairs*

[2024] HCA 6

*Date of Hearing: 16 November 2023*

*Date of Judgment: 6 March 2024*

S12/2023

## ORDER

- 1. A writ of certiorari issue quashing the decision of the delegate of the defendant made on 9 October 2013 to cancel the plaintiff's Class BF 154 Transitional (Permanent) visa.*
- 2. The defendant pay the plaintiff's costs.*

## Representation

D J Hooke SC with J D Donnelly for the plaintiff (instructed by Zarifi Lawyers)

P M Knowles SC with B D Kaplan for the defendant (instructed by Sparke Helmore)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs**

Immigration – Visas – Cancellation of visa – Where plaintiff found guilty of robbery offences when under 16 years of age before Children's Court of New South Wales – Where plaintiff committed subsequent robbery offences as adult – Where plaintiff's visa cancelled under s 501(2) of *Migration Act 1958* (Cth) – Where delegate of Minister took into account "National Police Certificate" that listed robbery offences committed by plaintiff when under 16 years of age – Where "National Police Certificate" described plaintiff as being "convicted" of offences dealt with by Children's Court – Where delegate advised that plaintiff had "serious convictions" from 13 years of age – Where, at time of offending, s 14(1)(a) of *Children (Criminal Proceedings) Act 1987* (NSW) prohibited Children's Court from proceeding to, or recording, any conviction if child was under 16 years of age – Where s 85ZR(2)(b) of *Crimes Act 1914* (Cth) provided that where, under a State law, a person is, in particular circumstances or for a particular purpose, taken never to have been convicted of an offence, the person shall be taken in any State, in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority in that State never to have been convicted of that offence – Whether delegate erroneously took into account matters precluded by ss 85ZR(2)(b) and 85ZS(1)(d)(ii) of *Crimes Act* by considering the offences committed by plaintiff when under 16 years of age – Whether delegate's decision affected by jurisdictional error.

Words and phrases – "conviction", "criminal history", "finding of guilt", "for any purpose", "jurisdictional error", "materiality", "proceeding to conviction", "recording of conviction", "taken to be", "visa cancellation".

*Children (Criminal Proceedings) Act 1987* (NSW), s 14.

*Crimes Act 1914* (Cth), ss 85ZM, 85ZR, 85ZS.

*Migration Act 1958* (Cth), s 501(2).



1 GAGELER CJ. I agree with Beech-Jones J.

*Gordon J*

2.

2 GORDON J. I agree with Beech-Jones J.

3.

3 EDELMAN J. I agree with Beech-Jones J.

4 GLEESON J. I agree with Beech-Jones J.

5 BEECH-JONES J. In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton*,<sup>1</sup> the Court<sup>2</sup> held that ss 85ZR(2) and 85ZS(1)(d)(ii) of the *Crimes Act 1914* (Cth) precluded consideration of offences committed in Queensland by the respondent to that case when he was a child in the determination of whether to revoke the cancellation of his visa under s 501CA(4) of the *Migration Act 1958* (Cth). Pursuant to ss 183(2) and 184(2) of the *Youth Justice Act 1992* (Qld) respectively, no conviction was recorded for those offences and they were "not taken to be a conviction for any purpose".

6 This application, brought in the Court's original jurisdiction, seeks certiorari in respect of a decision by a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs to cancel the plaintiff's visa under s 501(2) of the *Migration Act*. It raises the same issue as *Thornton* except that, in this case, the delegate took into account offences for which the plaintiff was sentenced by the Children's Court of New South Wales<sup>3</sup> when he was under 16 years of age. A "National Police Certificate" that was provided to the delegate described the plaintiff as having been "convicted" of most of those offences ("the police certificate"). However, s 14(1)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW) ("the Children Proceedings Act") precluded the Children's Court from proceeding to, or recording, any conviction for those offences.

7 For the reasons that follow, the relevant provisions of the Children Proceedings Act are not materially different to the provisions of the *Youth Justice Act* considered in *Thornton*, and the plaintiff's circumstances are not otherwise materially different to those of the respondent in *Thornton*. Consequently, the delegate was precluded by ss 85ZR and 85ZS of the *Crimes Act* from taking into account the offences for which the plaintiff was sentenced by the Children's Court when he was under the age of 16 years. As it was accepted by the Minister that those offences were material to the delegate's decision, it follows that the decision was affected by jurisdictional error and certiorari quashing the decision to cancel the plaintiff's visa should issue.

## Background

8 The plaintiff was born in July 1983. He is a citizen of Fiji. He arrived in Australia with his parents and siblings in January 1988. In November 1999, he was granted a Class BF 154 Transitional (Permanent) visa permitting him to remain in Australia permanently.

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1 (2023) 97 ALJR 488; 409 ALR 234.

2 Gageler, Gordon, Edelman and Jagot JJ, Steward J dissenting.

3 Established under the *Children's Court Act 1987* (NSW), s 4.

9 From 1996 until 2001, the plaintiff either pleaded guilty to, or was found guilty by the Children's Court of, numerous offences including multiple counts of robbery in company. In August 2003, he was convicted of three counts of robbery while armed with a dangerous or offensive weapon. He was sentenced by the District Court of New South Wales to substantial terms of imprisonment for each offence ("the 2003 offences").

10 In May 2010, the plaintiff was convicted and sentenced by the District Court to terms of imprisonment for two offences of robbery while armed with a dangerous weapon and two attempts to commit such offences. These offences were committed against financial institutions and other businesses between October and November 2007 ("the 2007 offences"). Similar offences were taken into account at the time of sentencing.<sup>4</sup> On 28 October 2010, the plaintiff was resentenced on appeal by the Court of Criminal Appeal of the Supreme Court of New South Wales. The longest sentence he received was imprisonment for ten years with a non-parole period of six years.

11 On 9 October 2013, the delegate cancelled the plaintiff's visa. On 30 October 2018, the plaintiff applied to the Administrative Appeals Tribunal ("the AAT") for review of the delegate's decision.<sup>5</sup> On 8 November 2018, the AAT dismissed the application on the basis that the delegate's decision was not reviewable.<sup>6</sup>

12 The plaintiff sought judicial review of the AAT's decision in the Federal Court of Australia. On 4 August 2021, his application was dismissed on the basis that the Court did not have jurisdiction to review a decision of a delegate of the Minister to cancel a visa under s 501(2) of the *Migration Act*,<sup>7</sup> and the plaintiff's circumstances did not justify the grant of an extension of time to seek judicial

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4 Presumably on a notice filed by the prosecutor under s 32(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). See also *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146.

5 *Lesianawai and Minister for Home Affairs (Migration)* (2019) 79 AAR 478 at 481 [3].

6 *Lesianawai and Minister for Home Affairs (Migration)* (2019) 79 AAR 478 at 481 [4], citing *Administrative Appeals Tribunal Act 1975* (Cth), s 42A(4).

7 *Migration Act 1958* (Cth), s 476A(1).

7.

review of the AAT's decision.<sup>8</sup> On 26 April 2022, an appeal from that decision was dismissed as incompetent.<sup>9</sup>

13 On 10 February 2023, the plaintiff commenced these proceedings. On 14 February 2023, Gleeson J restrained the Minister from removing the plaintiff from Australia, granted the plaintiff an extension of time to file his application and, on 14 July 2023, referred the application to the Full Court.<sup>10</sup>

14 In circumstances where the AAT did not address the merits of the delegate's decision and the Federal Court did not have jurisdiction to address the validity of that decision, it was not suggested that any of those proceedings, or the judgments they yielded, affected the challenge in this Court to the validity of the delegate's decision or the relief that should be granted.

### **The issues paper and the delegate's decision**

15 As at October 2013, s 501(2) of the *Migration Act* provided that the Minister may cancel a visa that has been granted to a person if the Minister reasonably suspects the person does not pass the "character test" and the person does not satisfy the Minister that they pass that test. This power could be, and was, delegated.<sup>11</sup> A person did not pass the character test if, inter alia, they had a "substantial criminal record",<sup>12</sup> which included being sentenced to a term of imprisonment for 12 months or more.<sup>13</sup> The sentences imposed for the 2003 and 2007 offences satisfied the definition of a substantial criminal record.

16 Placed before the delegate was a memorandum prepared by a departmental officer entitled "Issues for consideration of possible visa cancellation under subsection 501(2) of the *Migration Act 1958*" ("the issues paper"). The issues paper addressed the plaintiff's circumstances by reference to a direction made under s 499 of the *Migration Act* in relation to visa refusals and cancellations under

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8 *Migration Act*, s 477A(2). See *Lesianawai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 454 ("*Lesianawai*") at [1], [4]-[6] per Jagot J.

9 *Lesianawai* [2022] FCA 454 at [8]-[9] per Jagot J, citing *Migration Act*, s 476A(3)(b).

10 *Migration Act*, s 486A(2); *Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 6.

11 *Migration Act*, s 496.

12 *Migration Act*, s 501(6)(a).

13 *Migration Act*, s 501(7)(c).

s 501 of that Act ("Direction No 55").<sup>14</sup> Direction No 55 provided that any exercise of the discretion conferred by s 501 must be informed by principles that included the protection of the Australian community. By reference to that principle, the issues paper described the facts and circumstances of the 2003 and 2007 offences. The issues paper also advised the delegate that the plaintiff had other "serious convictions" for similar offences "dating back to 1996, when he was a juvenile aged 13".

17 The issues paper and its attachments, including the police certificate, were provided to the delegate. The delegate's reasons record that he took into account the plaintiff's convictions, including his "convictions" for offences for which he was sentenced by the Children's Court when he was under the age of 16 years.

### **Sections 85ZR and 85ZS of the *Crimes Act* and *Thornton***

18 The plaintiff contended that the delegate's decision was affected by two jurisdictional errors. The first alleged error was that the delegate supposedly acted on a misunderstanding of the law in treating the plaintiff as having been "convicted" of the offences listed on the police certificate which were committed when he was under 16 years (or at least for which he was sentenced by the Children's Court when he was under 16 years). The second alleged error was that, in having regard to those offences and treating them as "criminal offending", the delegate took into account material he was precluded from considering by ss 85ZR and 85ZS of the *Crimes Act*. At the hearing, senior counsel for the plaintiff accepted that the first contention need not be addressed if the second contention succeeded. As the second contention should be accepted, it is not necessary to address the first contention.

### *Sections 85ZR and 85ZS*

19 Sections 85ZR and 85ZS are found within Div 2 of Pt VIIC of the *Crimes Act*. Division 2 is entitled "Pardons for persons wrongly convicted, and quashed convictions". Section 85ZR(2) addresses the effect of a particular form of State or foreign law concerning convictions. It relevantly provides:

"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:*

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14 Section 499(1) of the *Migration Act* provided that the Minister "may give written directions to a person or body having functions or powers under this Act if the directions are about: (a) the performance of those functions; or (b) the exercise of those powers".

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- (a) ...
- (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." (emphasis added)

20 Section 85ZR(2) operates "[d]espite any other Commonwealth law", including s 501(2) of the *Migration Act*.<sup>15</sup> For the purpose of s 85ZR(2), a "Commonwealth authority" includes a Commonwealth Minister, a Commonwealth department and a person holding or performing the duties of an office established by or under, or an appointment made under, a Commonwealth law, which includes the delegate.<sup>16</sup>

21 Section 85ZS(1) elaborates on the consequences of s 85ZR operating so that a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence by any Commonwealth authority.<sup>17</sup> Thus, the person is not required, in those circumstances or for that purpose, to disclose the fact that they were charged with or convicted of the offence.<sup>18</sup> Another consequence, in s 85ZS(1)(d)(ii), is that "anyone else who knows, or could reasonably be expected to know, that section 85ZR applies to the person in relation to the offence shall not ... in those circumstances, or for that purpose, take account of the fact that the person *was charged with, or convicted of, the offence*" (emphasis added).<sup>19</sup> Section 85ZS(1) does not affect the generality of s 85ZR<sup>20</sup> and s 85ZM relevantly provides that a person shall be taken to have been convicted of an offence if "the person has been charged with, and found guilty of, the offence but discharged without conviction".<sup>21</sup>

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15 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 97 ALJR 488 ("*Thornton*") at 501 [60] per Gordon and Edelman JJ; 409 ALR 234 at 249.

16 *Crimes Act 1914* (Cth), s 85ZL.

17 Section 85ZS is subject to the exemptions in Div 6 of Pt VIIC of the *Crimes Act*, none of which are presently relevant.

18 *Crimes Act*, s 85ZS(1)(a).

19 See *Thornton* (2023) 97 ALJR 488 at 493 [12] per Gageler and Jagot JJ, 501 [60] per Gordon and Edelman JJ; 409 ALR 234 at 237, 249.

20 *Crimes Act*, s 85ZS(2).

21 *Crimes Act*, s 85ZM(1)(b).

*Thornton*

22 In *Thornton*, Gageler and Jagot JJ held that the effect of the *Youth Justice Act* was that a finding of guilt for which no conviction was recorded was not, and was "not taken to be", a conviction for any purpose.<sup>22</sup> It followed that s 85ZR(2)(b) was engaged and the "corresponding purpose" was "any purpose", including the purpose of considering whether to revoke the cancellation of a visa.<sup>23</sup> Their Honours concluded that "[t]he 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*" (emphasis added).<sup>24</sup>

23 Gordon and Edelman JJ reached the same conclusion by in part relying on s 85ZS. Their Honours construed s 85ZR(2) so that, if a State law provides that in "particular circumstances" a person is deemed never to have been convicted of an offence for any purpose, then a Commonwealth authority in that State in those circumstances is to take that person as never having been convicted for any purpose.<sup>25</sup> Their Honours construed ss 183 and 184 of the *Youth Justice Act* as specifying particular circumstances in which a person was taken never to have been convicted, namely, where a finding of guilt had been made and a court had decided or been mandated not to record a conviction.<sup>26</sup> Thus, their Honours found that s 85ZR(2) was engaged for all purposes in those particular circumstances.<sup>27</sup> Their Honours concluded that ss 85ZS(1)(d)(ii) and 85ZM of the *Crimes Act* precluded the Minister from taking into account any of the "findings of guilt" made against the respondent or the fact that he had been charged with the offences he committed when he was a child.<sup>28</sup>

**The Children Proceedings Act**

24 Relying on s 85ZR, s 85ZS and *Thornton*, the plaintiff contended that under a "State law", namely the Children Proceedings Act, he was "taken never to have been convicted" of (at least) the offences for which he was sentenced by the

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22 *Thornton* (2023) 97 ALJR 488 at 496 [33]; 409 ALR 234 at 242.

23 *Thornton* (2023) 97 ALJR 488 at 497 [36]; 409 ALR 234 at 243.

24 *Thornton* (2023) 97 ALJR 488 at 497 [36]; 409 ALR 234 at 243.

25 *Thornton* (2023) 97 ALJR 488 at 500-501 [58]; 409 ALR 234 at 248.

26 *Thornton* (2023) 97 ALJR 488 at 502 [69], [71]; 409 ALR 234 at 250-251.

27 *Thornton* (2023) 97 ALJR 488 at 503 [73]; 409 ALR 234 at 252.

28 *Thornton* (2023) 97 ALJR 488 at 503 [74]; 409 ALR 234 at 252.

Children's Court when he was under the age of 16 years for all but presently immaterial purposes.

25 During the period of the plaintiff's appearances before the Children's Court, Pt 2 of the Children Proceedings Act contained various provisions applicable to any court exercising criminal jurisdiction and any criminal proceedings before such a court.<sup>29</sup> Part 3 addressed the conduct and disposition of criminal proceedings in the Children's Court. The Children's Court was vested with jurisdiction to hear and determine proceedings in respect of any offence other than a "serious indictable offence", and committal proceedings in respect of any indictable offence, including a serious indictable offence, if the offence was alleged to have been committed by a person who was a child at the time the offence was committed and was under the age of 21 years when they were charged before the Children's Court.<sup>30</sup> "Child" was defined as a person under the age of 18 years.<sup>31</sup>

26 Within Pt 2, s 6 specified various principles applicable to the exercise of criminal jurisdiction by any court with respect to children, including that "children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance".<sup>32</sup>

27 Within Div 3 of Pt 2 was s 14, which provided:

**"Recording of conviction"**

- (1) Without limiting any other power of a court to deal with a child who has pleaded guilty to, or has been found guilty of, an offence, a court:
  - (a) shall not, in respect of any offence, proceed to, or record such a finding as, a conviction in relation to a child who is under the age of 16 years, and
  - (b) may, in respect of an offence which is disposed of summarily, refuse to proceed to, or record such a finding as, a conviction in relation to a child who is of or above the age of 16 years.
- (2) Subsection (1) does not limit any power of a court to proceed to, or record such a finding as, a conviction in respect of a child who is

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29 *Children (Criminal Proceedings) Act 1987* (NSW) ("Children Proceedings Act"), s 4.

30 *Children Proceedings Act*, s 28(1).

31 *Children Proceedings Act*, s 3(1).

32 *Children Proceedings Act*, s 6(b).

charged with an indictable offence that is not disposed of summarily."

28 Save for where the Children's Court committed a person for trial or sentence to a higher court in respect of an indictable offence (including a serious indictable offence),<sup>33</sup> proceedings in the Children's Court were required to be dealt with summarily.<sup>34</sup> With the possible exception of three offences,<sup>35</sup> all of the offences for which the plaintiff was sentenced by the Children's Court when he was under the age of 16 years were not serious indictable offences and the plaintiff was not committed to a higher court. Leaving aside those three offences (which may have been misdescribed in the police certificate), it should therefore be concluded that the plaintiff could not have been, and was not, "convicted" of any of those offences. Instead, he either pleaded guilty to or was found guilty of those offences.

29 Section 15(1) of the Children Proceedings Act imposed a (limited) restriction on the use that might be made of a finding of guilt of (or a plea of guilty to) an offence committed by a person when they were a child. It provided that a finding of guilt shall not be admitted in evidence in any criminal proceedings that might be subsequently taken against that person, other than in the Children's Court,<sup>36</sup> provided that no conviction was recorded following that finding of guilt (or plea) and the person has not been punished by a court for any offence committed in the two years prior to the commencement of those subsequent proceedings.

30 Section 33(1) of the Children Proceedings Act conferred power on the Children's Court to make orders that amount to the imposition of a sentence. This included the power to make an order committing a person to the control of the relevant Minister for a period of time that does not exceed two years, ie, a "control order".<sup>37</sup> The existence of the power to make orders under s 33(1) was predicated

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33 Children Proceedings Act, s 31(2)-(5).

34 Children Proceedings Act, s 31(1).

35 Three of the offences are described in the police certificate as "robbery whilst armed with a dangerous weapon". This appears to correspond with an offence under former s 97(2) of the *Crimes Act 1900* (NSW) which, during the period between 1995 and 1997, was punishable by penal servitude for 25 years. The definition of "serious indictable offence" in s 3(1) of the Children Proceedings Act included an offence punishable by penal servitude for life or for 25 years.

36 Children Proceedings Act, s 15(2).

37 Children Proceedings Act, s 33(1)(g).

on the Court having found a person guilty of an offence (and not on their being "convicted").

31 Two matters should be noted about these provisions of the Children Proceedings Act in their application to the plaintiff.

32 First, like the provisions of the *Youth Justice Act* considered in *Thornton*, the above provisions of the Children Proceedings Act reflect a clear distinction between a finding of guilt and a conviction. Under the Children Proceedings Act, a finding of guilt is not a conviction and, subject to any statutory provisions that provide to the contrary, is not treated as a conviction for any purpose. An example of a statutory provision that provides to the contrary is s 33(6) of the Children Proceedings Act, which was introduced with effect from 3 November 2008.<sup>38</sup> Section 33(6) deems a finding of guilt by the Children's Court to be a conviction "[f]or the purposes of any provision of the road transport legislation that confers power on a court with respect to a person who has been convicted of an offence" and enables the Court to exercise power under that legislation as if the person had been convicted of the offence.<sup>39</sup>

33 Second, an issue arises as to the operative date of the provisions of State law that engage s 85ZR(2) (and s 85ZS) of the *Crimes Act*. Section s 85ZR(2)(b) is engaged at the point in time when the relevant Commonwealth authority purports to take some step or action ("by any Commonwealth authority") that involves a consideration of something that took place in respect of a person who, under State law, is taken never to have been convicted. In this case, the action "by any Commonwealth authority" was the decision by the delegate on 9 October 2013 to cancel the plaintiff's visa. In doing so, the delegate considered something about the plaintiff, namely various findings of guilt made against him as a child. It follows that the relevant "State law" to be considered is so much of the State law that in October 2013 defined and described the effect of the findings of guilt made by the Children's Court when the plaintiff was under the age of 16 years.

34 As explained, the effect of the Children Proceedings Act as continually in force up until the time of the delegate's decision is that a finding of guilt was not to be treated as a conviction for any purpose unless that Act or other legislation specifically so provided. No such provision was referred to. Thus, under State law applying as at 9 October 2013, the plaintiff is "taken [as] never ... hav[ing] been

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38 *Children (Criminal Proceedings) Amendment Act 2008* (NSW), sch 1 [30].

39 See also s 3(2) of the *Crimes (Local Courts Appeal and Review) Act 2001* (NSW), which, with effect from 7 July 2003, provided that for the purpose of making an application or appeal in respect of a decision of the Children's Court, a reference to a "conviction" included a reference to a finding of guilt made under the Children Proceedings Act.

convicted of" the offences for which he was sentenced by the Children's Court when he was under the age of 16 years.<sup>40</sup>

**The "convictions" and findings of guilt could not be considered**

35 The plaintiff contended that, once it is concluded that he is taken never to have been convicted of the offences for which he was sentenced by the Children's Court when he was under the age of 16 years for any purpose, then s 85ZR(2) is engaged, and it follows from *Thornton* that s 85ZR(2) and, to the extent necessary, s 85ZS(1)(d)(ii) precluded the delegate from relying on those convictions (or the findings of guilt they embody). This contention should be accepted.

36 On behalf of the Minister, it was submitted that s 85ZR(2) is only engaged by a State law that deems a person never to have been convicted in circumstances where at one point in time they were convicted. The Minister relied on the judgment of Kiefel J, as her Honour then was, in *Hartwig v PE Hack*,<sup>41</sup> in which her Honour held that the effect of a provision of State law that engages s 85ZR(2) must be that it "take[s] away the *fact* of [a] conviction, as a pardon might do" (emphasis in original).<sup>42</sup>

37 This submission is inconsistent with *Thornton*. A common premise of the majority judgments in *Thornton* is that s 85ZR(2) is not restricted to a State law that sets aside the fact, or relieves the effects, of a previous conviction. Instead, s 85ZR(2) is engaged by a State law that prevents a finding of guilt being recorded as a conviction and provides that, at least for some purposes or in some circumstances, a person is not to be taken, or treated, as having been convicted.<sup>43</sup> It is also a common premise of the majority judgments in *Thornton* that the phrases "particular circumstances" and "particular purpose" can include all circumstances and all purposes.<sup>44</sup>

38 Two further matters should be noted about the Minister's reliance on *Hartwig v PE Hack*. First, a pardon, even one that is free and absolute (ie, free of

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40 *Crimes Act*, s 85ZR(2).

41 [2007] FCA 1039.

42 *Hartwig v PE Hack* [2007] FCA 1039 at [8].

43 *Thornton* (2023) 97 ALJR 488 at 496 [33] per Gageler and Jagot JJ, 503 [73] per Gordon and Edelman JJ; 409 ALR 234 at 242, 252.

44 *Thornton* (2023) 97 ALJR 488 at 497 [36] per Gageler and Jagot JJ, 500-501 [58] per Gordon and Edelman JJ; 409 ALR 234 at 243, 248.

conditions),<sup>45</sup> does not ordinarily take away the *fact* of a conviction. Instead, it only relieves the effects of a conviction.<sup>46</sup>

39 Second, *Hartwig v PE Hack*<sup>47</sup> was distinguished in *Thornton* and the basis for that distinction is applicable in this case. The applicant in *Hartwig v PE Hack* had been found guilty of an offence, but a Queensland court had exercised the discretion conferred by s 12(1) of the *Penalties and Sentences Act 1992* (Qld) to not record a conviction.<sup>48</sup> However, under that legislation, a "conviction" was defined to mean "a finding of guilt, or the acceptance of a plea of guilty, by a court"<sup>49</sup> such that a person was "convicted" by a finding of guilt or the acceptance of a plea of guilty even if no conviction was recorded.<sup>50</sup> Hence, under that State law it was not correct to say that the applicant in that case was taken never to have been convicted. By contrast, under the provisions of the *Youth Justice Act* considered in *Thornton*, a finding of guilt without any conviction being recorded was not, and was not taken to be, a conviction for any purpose.<sup>51</sup> The same position applies under the Children Proceedings Act.

40 The Minister further submitted that, unlike s 184(2) of the *Youth Justice Act* as considered in *Thornton*, there is nothing in s 14(1)(a) of the Children Proceedings Act that provides that a person is taken never to have been convicted of an offence under a law of New South Wales *for all purposes*. The Minister noted that s 14 is found within Pt 2, which only applies in a curial context.

41 This submission should also be rejected. Leaving aside s 33(6) of the Children Proceedings Act, the Court was not referred to any statutory provision which imposed any limit on the purposes for or circumstances in which a child who is the subject of a finding of guilt in the circumstances referred to in s 14(1)(a)

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45 *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364 ("*Kelleher*") at 371 per Wilson J.

46 *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 350-351 [98] per Heydon J, quoting *R v Foster* [1985] QB 115 at 128, 130; *Kelleher* (1984) 156 CLR 364 at 371 per Wilson J.

47 [2007] FCA 1039.

48 *Hartwig v PE Hack* [2007] FCA 1039 at [4]-[5] per Kiefel J.

49 *Penalties and Sentences Act 1992* (Qld), s 4.

50 *Thornton* (2023) 97 ALJR 488 at 494-495 [25], [27] per Gageler and Jagot JJ; 409 ALR 234 at 240-241.

51 *Thornton* (2023) 97 ALJR 488 at 495-496 [29]-[30] per Gageler and Jagot JJ, 504 [81] per Gordon and Edelman JJ; 409 ALR 234 at 241-242, 253.

is treated or taken as having not been convicted. It follows that under State law, the plaintiff is taken never to have been convicted of the offences for which he was sentenced by the Children's Court when he was under the age of 16 years for all relevant purposes and in all relevant circumstances.

42 Further, the fact that Pt 2 of the Children Proceedings Act, of which s 14 forms part, operates in a curial context does not affect the absence of any limit on the purpose for and circumstances in which the plaintiff is taken never to have been convicted. The application of Pt 2 to "any court ... exercis[ing] criminal jurisdiction" and "any criminal proceedings before any such court"<sup>52</sup> are words of expansion and not limitation. They confirm the application of Pt 2 to all such courts. The functions of making a finding of guilt then proceeding to and recording a conviction are reposed in courts exercising criminal jurisdiction and not administrative decision-makers. A legislative restriction on the circumstances in which a court not exercising criminal jurisdiction, or a body other than a court, would proceed to or record a conviction would be nonsensical.

43 The Minister's submissions also referred to the limited restrictions on the use of the finding of guilt found in s 15 of the Children Proceedings Act. It was submitted that this provision "says nothing as to whether regard may be had to a finding of guilt in relation to an offence committed by a child by an administrative decision-maker". The Minister contended that, unlike s 184(2) of the *Youth Justice Act*, which expressly stated that a finding of guilt is not taken to be a conviction "for any purpose", s 15(1) of the Children Proceedings Act does not prohibit consideration being given to findings of guilt by an administrative decision-maker. On this approach, the reference in the delegate's decision to the plaintiff's convictions in the Children's Court should be construed as references to findings of guilt and the delegate's reliance on these findings of guilt was consistent with Direction No 55, which does not limit considerations to a visa holder's *convictions* but includes a consideration of, inter alia, the visa holder's "offences", "conduct" and "criminal behaviour".

44 This contention elides the question of whether the Children Proceedings Act purports to preclude the use of the finding of guilt contemplated by s 14, in all or at least some circumstances and for all or at least some purposes, with the question posed by s 85ZR(2) of the *Crimes Act*, namely, whether the Children Proceedings Act purports to preclude such a finding of guilt being treated *as a conviction* in all or at least some circumstances and for all or at least some purposes. In relation to the former, s 15(1) precludes the use of the finding of guilt in criminal proceedings in some, but not all, circumstances and does not impose any restriction on its use for the purposes of making an administrative decision. However, in relation to the latter, the effect of the Children Proceedings Act is that such a finding is not to be treated or taken as a conviction for any purpose unless

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52 Children Proceedings Act, s 4.

some other provision of State law specifically provides to that effect. That is sufficient to engage s 85ZR(2).

45 Under the *Youth Justice Act* considered in *Thornton*, a finding of guilt made against a child could not be used in any subsequent proceedings against them as an adult for an offence<sup>53</sup> and could not form part of the criminal history of any adult.<sup>54</sup> Although those restrictions on the use of a finding of guilt were wider than those imposed by s 15 of the Children Proceedings Act, they did not preclude a finding of guilt being used for a purpose, or in a circumstance, analogous to a consideration of whether to cancel a visa. Even so, that did not inhibit the majority judgments in *Thornton* from concluding that the Minister was precluded from taking into account the respondent's "youth offending"<sup>55</sup> and the "finding[s] of guilt".<sup>56</sup>

46 Similar to *Thornton*, in this case the delegate was precluded from taking into account so much of the plaintiff's "youth offending"<sup>57</sup> and "finding[s] of guilt"<sup>58</sup> that related to the offences for which he was sentenced by the Children's Court prior to his reaching 16 years of age and the fact that he was charged with, or supposedly convicted of, those offences.

### **Jurisdictional error, materiality and relief**

47 It was not disputed by the Minister that, if it was accepted that ss 85ZR(2) and 85ZS(1)(d)(ii) of the *Crimes Act* precluded the delegate from considering the plaintiff's "convictions" for which he was sentenced by the Children's Court when he was under the age of 16 years, then the delegate's decision was affected by

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53 *Youth Justice Act*, s 148(1).

54 *Youth Justice Act*, s 154(1); *Thornton* (2023) 97 ALJR 488 at 502-503 [72] per Gordon and Edelman JJ; 409 ALR 234 at 251.

55 *Thornton* (2023) 97 ALJR 488 at 497 [36] per Gageler and Jagot JJ; 409 ALR 234 at 243.

56 *Thornton* (2023) 97 ALJR 488 at 503 [73] per Gordon and Edelman JJ; 409 ALR 234 at 252.

57 *Thornton* (2023) 97 ALJR 488 at 497 [36] per Gageler and Jagot JJ; 409 ALR 234 at 243.

58 *Thornton* (2023) 97 ALJR 488 at 503 [73] per Gordon and Edelman JJ; 409 ALR 234 at 252.

jurisdictional error.<sup>59</sup> This concession extended to accepting that the erroneous consideration was material to the delegate's decision.<sup>60</sup> Those concessions were rightly made. It follows that a writ of certiorari should issue quashing the delegate's decision. The Minister should pay the plaintiff's costs.

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**59** See *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

**60** *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506; *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737; 403 ALR 398.

