

HIGH COURT OF AUSTRALIA

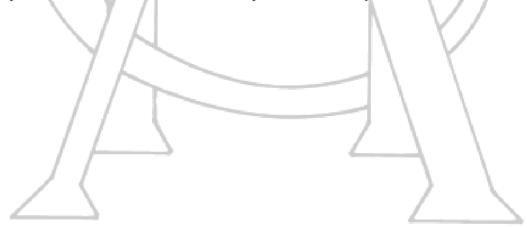
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Details of Filing	
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Important Information

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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

DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The defendant (the **Minister**) certifies that this outline of oral submissions is suitable for publication on the internet.

Part II: Outline of propositions

No misunderstanding of the law (ground one)

- 2. In exercising a statutory discretion, an administrative decision-maker must act on a correct understanding of the applicable law. That principle requires the decision-maker to understand the test or criteria imposed by law on the making of the decision and the effect that it will have on legal rights and duties (Defendant's Submissions (**DS**) at [14]-[15]).
 - a) Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1 at 29-30 [75] (Gageler J) [JBA vol 4, tab 19 at 446-447].
- 3. The *applicable* law in this case was s 501(2) of the *Migration Act 1958* (Cth) (**Act**). Acting on a correct understanding of the *applicable* law did not mean that the delegate:
 - a) could not rely on evidence in the form of a police certificate that indicated that the plaintiff had been convicted as a juvenile [**ABD** at 80-81]; or
 - b) was required to appreciate the effect of other bodies of law that might be more or less relevant to the facts of a case (such as s 14 of the *Children (Criminal Proceedings)* Act 1987 (NSW) (CCPA)) [JBA vol 1, tab 3 at 26].

- 4. The delegate found that the plaintiff had "convictions dating back to 1996 when he was aged 13" [ABD 74 at [9]], "a large number of previous convictions" for various offences [ABD 74 at [9]] and that he "first appeared in court as a 12 year old, and was convicted on a number of robbery offences" [ABD 74 at [14]]. Even if those findings were based on a misunderstanding of the effect of s 14 of the CCPA, the result, at best for the plaintiff, is an error within jurisdiction (DS at [18]).
- 5. In any event, there was no error. Section 14 of the CCPA cannot, by its own operation, determine what constitutes a "conviction" for the purpose of exercising the power under s 501 of the Act. It was not inaccurate to describe findings of guilt by the Children's Court of New South Wales as convictions for the purposes of s 501 of the Act (DS at [20]).
 - a) s 501 of the Act [JBA vol 2, tab 8 at 92-96];
 - b) Maxwell v The Queen (1996) 184 CLR 501 at 507 (Dawson and McHugh JJ) [JBA vol 4, tab 15 at 306].
- 6. In reply submissions, the plaintiff seeks to recharacterise ground one as a failure to comply with Direction 55, made mandatory by s 499 of the Act (Reply [2]-[8]). That does not assist. The delegate did consider "the nature and seriousness of the [plaintiff's] criminal offending or other conduct" (para 9.1.1(1)) and "the sentence imposed by the court for a crime or crimes" (para 9.1.1(1)(e))
 [JBA vol 2, tab 6 at 76-77]. Whether or not the plaintiff's "conduct" as a juvenile led to convictions under a State law, or whether or not the "sentences" imposed upon him were consequent upon a conviction under State law, were not matters that Direction 55 required to be taken into account.
- 7. In any event, any error was not material to the delegate's decision. The delegate gave weight to the history and nature of the plaintiff's offending as a juvenile, not the characterisation of that offending as convictions [**ABD 75 [22]**].

Irrelevant considerations were not taken into account (ground two)

 This Court's decision in Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton (2023) 97 ALJR 488 (Thornton) [JBA vol 4, tab 16 at 337] makes clear that whether or not s 85ZR(2) of the Crimes Act 1914 (Cth) (Crimes Act) [JBA vol 1, tab **5 at 59**] is engaged by a State law requires close consideration of the State law in question. *Thornton* is distinguishable for two reasons.

- 9. First, s 14(1)(a) of the CCPA is not a State law of the kind referred to in s 85ZR(2) of the Crimes Act because it is not a law which operates so that a person is "to be taken never to have been convicted of an offence". Section 14(1) is not a deeming provision; rather it is a prohibition upon a court proceeding to, or recording, a conviction (DS [25]).
 - a) *Thornton* (2023) 97 ALJR 488 at 494 [24] (Gageler and Jagot JJ) and 500 [57] (Gordon and Edelman JJ) [**JBA vol 4, tab 16 at 343 and 349**];
 - b) *cf* ss 183(1) and 184(2) of the *Youth Justice Act 1992* (Qld) [**JBA vol 2, tab 11 at 108**].
- 10. Secondly, s 14(1) of the CCPA does not operate for "all purposes" and in "all circumstances". Rather, it operates for the limited purpose, and in limited circumstances, to govern aspects of criminal procedure in a curial context. Accordingly, s 85ZR does not govern an exercise of power by a Commonwealth authority exercising a non-curial function in a context unrelated to the criminal law. There is no correspondence of circumstances or purpose (DS [26]-[29] and [31]-[32]).
 - a) ss 4, 14 and 15 of the CCPA [JBA vol 1, tab 3 at 20, 26-27];
 - b) *cf* ss 183(1) and 184(2) of the *Youth Justice Act 1992* (Qld) [**JBA vol 2, tab 11 at 108**];
 - c) Thornton (2023) 97 ALJR 488 at 497 [36] (Gageler and Jagot JJ), 500 [58], 501 [63] (Gordon and Edelman JJ) [JBA vol 4, tab 16 at 346, 349-350].

Mulis

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