HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S12/2023
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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 SUBMISSIONS

Part I: Certification

1. The defendant (**Minister**) certifies that these submissions are suitable for publication on the internet.

Part II: Issues

2. The plaintiff's application for a constitutional or other writ raises two issues.

3. The first issue, raised by ground 1, is whether, in finding that the plaintiff had been convicted of various offences between 1996 and 1998, the Minister acted on a misunderstanding of the law (i.e. a misunderstanding of the effect of s 14 of the *Children (Criminal Proceedings) Act 1987* (NSW) (**CCPA**)).

4. The second issue, raised by ground 2, is whether, in treating the offences of which the plaintiff had been found guilty between 1996 and 1998 as convictions, the Minister had regard to an irrelevant consideration. Like the recent decision of this Court in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton*,[1] the issue turns on the interaction between a State law concerning criminal procedure and s 85ZR(2) of the *Crimes Act 1914* (Cth) (**Crimes Act**). The Minister's position is that *Thornton* is distinguishable because the State legislation in issue in this case, s 14 of the CCPA, does not operate so that a person under the age of 16 who is found guilty of an offence is taken never to have been convicted of that offence in *all circumstances* and for *all purposes*. The effect of this is that s 85ZR(2) did not operate to prohibit the Minister from the considering the fact that the plaintiff had been found guilty of a

[1] (2023) 97 ALJR 488 (***Thornton***).

number of offences as a child when exercising an administrative function under s 501 of the *Migration Act 1958* (Cth) (**Migration Act**).

Part III: Section 78B notices

5. The Minister has determined that notices under s 78B of the *Judiciary Act 1903* (Cth) are not required to be issued.

Part IV: Facts

6. The plaintiff was born on 28 July 1983 in Fiji (Agreed Bundle of Documents (**ABD**) 54). He arrived in Australia on 21 January 1988 as the holder of a visitor visa (ABD 55).

7. On 19 November 1999, the plaintiff was granted a transitional (permanent) visa (ABD 55).

8. Between 13 March 1996 and 24 August 1998, the plaintiff was found guilty of various offences by the Children's Court of New South Wales (ABD 80-81).

9. On 14 May 2010, the District Court of New South Wales convicted the plaintiff of multiple counts of armed robbery and attempted armed robbery (amongst other offences) and sentenced him to terms of imprisonment ranging between seven and nine years (ABD 78-79).

10. On 9 October 2013, a delegate of the Minister made a decision to cancel the plaintiff's transitional (permanent) visa under s 501(2) of the Migration Act (ABD 72-76). The delegate reasonably suspected that the plaintiff did not pass the character test because he had a "substantial criminal record" (within the meaning of s 501(7)(c) of the Migration Act) (ABD 73 [3]). In exercising his discretion to cancel the plaintiff's visa under s 501(2), the delegate was required to apply Direction No 55 made by the Minister under s 499 (ABD 57 [12]). The application of that direction required the delegate to consider the protection of the Australian community; strength, duration and nature of the plaintiff's ties to Australia; best interests of any children; non-*refoulement* obligations (if any); and other considerations such as impediments that the plaintiff may encounter in Fiji (ABD 74-75 [6]-[20]).

11. By application filed in this Court on 10 February 2023, the plaintiff sought an extension of time within which to seek a writ of certiorari in respect of the decision of the Minister's delegate. An extension of time was granted by Gleeson J on 14 February 2023. By a further amended application filed on 12 April 2023, the plaintiff sought a writ of prohibition in respect of the delegate's decision.

Part V: Argument

Ground 1

12. By this ground, the plaintiff contends that the delegate "acted on a misunderstanding of the law" "[b]y treating [his] sentences in 1996 as criminal convictions" (ABD 28 [4]). His argument is that the delegate misunderstood s 14(1)(a) of the CCPA in having regard to a National Police Certificate which provided that the plaintiff had been convicted of various offences between 13 March 1996 and 24 August 1998 (PS [25], [28]-[29]).

13. Section 14(1)(a) of the CCPA provides as follows:

> **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 …

14. The Minister accepts that it is a condition on the valid exercise of a statutory discretion (such as that in s 501(2) of the Migration Act), like the formation of a state of satisfaction, that she or he proceed "on a correct understanding of the law".[2] It is important not to take statements of that principle out of context, however. The principle is concerned with (a) understanding the law controlling the power being exercised (that is, the test or criteria imposed by law on the making of the decision), or (b) the effect that the decision will have on legal rights and duties. However, the principle is not concerned with the law in some general sense.

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[2] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 (***Graham***) at [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

15. *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*[3] is a useful illustration of the former category. In that case, Latham CJ spoke of "the law *under which* [the decision-maker] acts".[4] That case establishes that a condition on the valid exercise of a statutory power is that the decision-maker proceeds on a correct understanding of *that* power. This understanding of *Connell* coheres with Gageler J's description in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* of the common law presumption of statutory interpretation that "a statutory conferral of a decision-making authority on a person or body other than a court is conditioned by an implied requirement that the person or body can validly exercise that authority only on a correct understanding of the law *applicable to the decision to be made*".[5]

16. *Graham* and *Re Patterson; Ex parte Taylor*[6] are examples of the latter category. In *Graham*, the error identified went to "an important attribute of the decision to be made" purportedly pursuant to s 501(3), namely, "whether or not the decision would be shielded from review by a court in so far as it was based on [information protected from disclosure by reason of s 503A of the Migration Act]".[7] Similarly, in *Patterson*, the cancellation power in s 501(3) was exercised on the incorrect understanding that its effect was only provisional because the prosecutor would have the opportunity under s 501C to make representations seeking revocation of that decision. Justices Gummow and Hayne described the error as a "misconception as to what the exercise of the statutory power entailed".[8] That case, therefore, involved a misunderstanding of a coordinate provision (s 501C) within the scheme pertaining to the refusal or cancellation of visas under s 501(3).

17. The plaintiff's argument is tantamount to saying that s 501(2) imposes a jurisdictional requirement on the decision-maker to both:

    a) understand the effect of other bodies of law (e.g. s 14 of the *CCPA*) that might be more or less relevant to the facts of a particular case; and

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3 (1944) 69 CLR 407 (***Connell***)
4 (1944) 69 CLR 407 at 430 (emphasis added).
5 (2018) 264 CLR 1 at [75] (emphasis added). See also at [78], [81] (Gageler J).
6 (2001) 207 CLR 391 (***Patterson***).
7 (2017) 263 CLR 1 at [68] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
8 (2001) 207 CLR 391 at [196]. See also at [1] (Gleeson CJ), [83] (Gaudron J), [87] (McHugh J).

b) look beyond the evidence before the decision-maker to determine whether or not any conclusion expressed in that evidence is based on an incorrect understanding of law.

18. Put another way, the plaintiff argues that any misunderstanding of the law (subject to any issue of materiality) will vitiate an exercise of power under s 501(2). This involves the conflation of, *first*, an error of law arising from a misunderstanding of the particular power that has been exercised and, *secondly*, a misunderstanding of some legal issue (or issue of fact and law) which forms part of the background circumstances relevant to the exercise of that power. The former type of error would (again subject to materiality) ordinarily go to jurisdiction; but the latter type would not. No decision of this Court countenances such an at-large jurisdictional requirement not to make errors of law, however, for that would be contrary to the maintenance in Australian law of the distinction between jurisdictional and non-jurisdictional errors.[9]

19. For the foregoing reasons, it is not a condition on the valid exercise of power under s 501(2) of the Migration Act that the Minister recognises that the plaintiff was found guilty by the Children's Court of various offences as a minor but that, by reason of s 14 of the CCPA, that court did not proceed to convict him of those offences. The Minister does not misunderstand the law under which she or he acts because the effect of s 14(1)(a) of the CCPA has been overlooked. Thus, even if the delegate's findings that the plaintiff had "convictions dating back to 1996 when he was aged 13" (ABD 74 [9]), "a large number of previous convictions" for various offences (ABD 74 [9]), and "first appeared in court as a 12 year old, and was convicted on a number of robbery offences" (ABD 74 [14]) were based on a misunderstanding as to the effect of s 14(1)(a) of the CCPA, whether directly or indirectly via the Issues Paper and/or relevant attachments (ABD 73 [4]), there was no misunderstanding of the power under s 501(2) of the Migration Act and, therefore, no jurisdictional error (*cf* PS [26]-[29]).

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9 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 487 (Williams J); *Craig v South Australia* (1995) 184 CLR 163 at 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [163] (Hayne J); *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at [21] (Gleeson CJ), [56] (Gaudron J), [182]-[183] (Gummow J), [251] (Hayne J); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [70] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [66] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

20. The next difficulty with this ground of review is that, in decision-making under s 501(2), it is not inaccurate to describe the findings of guilt by the Children's Court as convictions. While the question as to what amounts to a conviction depends on the context in which it is asked, it has been held by this Court that a verdict of guilty or a plea of guilty amounts to a conviction.[10] There is nothing in the text or context of s 501 to suggest that a finding of guilt cannot be described as a conviction in the exercise of power under s 501(2). Indeed, the Federal Court has held that the word "conviction" in s 501(10) refers not only to the formal act or order of conviction but also extends to findings of guilt.[11]

21. Finally, any error by the delegate was immaterial to the decision to cancel the plaintiff's visa (*cf* PS [30]-[38]). Contrary to the plaintiff's submissions, the characterisation of the findings of guilt by the Children's Court as convictions did not "infec[t] the whole of the reasoning in coming to the decision to exercise the discretion to cancel the plaintiff's visa" (PS [33]). In that connection, it is no insignificant matter that, in exercising the discretion conferred by s 501(2), the delegate gave weight not to the characterisation attached to the plaintiff's criminal conduct (convictions) but rather the conduct itself ("the history and nature of his offending": ABD 75 [22]). There is nothing in the delegate's reasons to suggest that, had he not referred to the plaintiff having been convicted of offences as a minor, the outcome could realistically have been different. The "history and nature of [the plaintiff's] offending" would have remained the same.

Ground 2

22. By this ground, the plaintiff contends that the delegate took into account irrelevant considerations – namely, convictions by the Children's Court between 13 March 1996 and 24 August 1998. In aid of that argument, the plaintiff relies on the judgment of this Court in *Thornton*.

23. For the reasons that follow, the delegate made no such error.

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10 *Maxwell v The Queen* (1996) 184 CLR 501 at 507 (Dawson and McHugh JJ); see also *Thornton* (2023) 97 ALJR 488 at [27] (Gageler and Jagot JJ).

11 *EVX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1079 at [25] (Logan J).

24. Section 85ZR of the Crimes Act relevantly provides as follows:

> **85ZR Pardons for person wrongly convicted**
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> …
>
> (2) Despite any other Commonwealth law … , where, under a State 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 … :
>
> …
>
> (b) 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.

25. Section 14(1)(a) of the CCPA is not a State law of the kind referred to in s 85ZR(2) of the Crimes Act. That is, it is not a law under which a person "is … to be taken never to have been convicted of an offence under a law of [New South Wales]". As Kiefel J (as her Honour then was) put it in *Hartwig v Hack*, it is not a law which "deems a person never to have *been* convicted of an offence" and does not "take away the *fact* of the conviction".[12] Rather, s 14(1)(a) operates so that, where a child has pleaded guilty to, or has been found guilty of, an offence, a court is prevented from "proceed[ing] to, or record[ing] such a finding as, a conviction" in relation to that child. It cannot deem a child never to have been convicted because the court dealing with the child had no power to proceed to, or record, a conviction in the first place.

26. Separately, the plaintiff's submission that s 14(1)(a) operates so that he is taken never to have been convicted of the offences in respect of which he was found guilty between 13 March 1996 and 24 August 1998 "in all circumstances and for all purposes" is also wrong (PS [40]-[41]). Both the text and context of s 14(1)(a) point strongly against that conclusion.

27. So far as the text of the section is concerned, unlike the legislation which fell for consideration in *Thornton*,[13] there is nothing in s 14(1)(a) which establishes that a person is taken never to have been convicted of an offence under a law of New South Wales for all purposes and in all circumstances. The section is silent about that matter. In fact, s 4 of the CCPA would suggest that s 14(1)(a) does not apply for all purposes and in all circumstances (and, in particular, does not apply for the purpose of the making

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12 [2007] FCA 1039 at [8] (emphasis in original).
13 (2023) 97 ALJR 488 at [36] (Gageler and Jagot JJ), [71] (Gordon and Edelman JJ).

of administrative decisions under separate legislation). Section 4 provides that Part 2 of the CCPA (within which s 14 lies) applies to "any court that exercises criminal jurisdiction" and "any criminal proceedings before any such court". The purpose of s 14, and the circumstances in which it applies, are peculiarly directed to curial proceedings of a criminal nature.

28. As to context, s 15(1) of the CCPA is also an important provision. It provides as follows:

> **Evidence of prior offences and other matters not admissible in certain criminal proceedings**
>
> (1) The fact that a person has pleaded guilty to an offence in, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if--
>
> (a) a conviction was not recorded against the person in respect of the firstmentioned offence, and
>
> (b) the person has not, within the period of 2 years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.

29. Section 15(1) spells out the circumstances in which a finding of guilt in respect of an offence committed by a child is inadmissible in *criminal* proceedings taken against that person – whether as a child or an adult. It 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 in administrative procedures of the kind under consideration in this case. Unlike the restriction in s 184(2) of the *Youth Justice Act 1992* (Qld), which is expressly stated to apply "for any purpose", s 15(1) of the CCPA does not prohibit consideration being given to findings of guilt in administrative decision-making processes.

30. Section 33 of the CCPA, which deals with traffic offences, does not alter the foregoing analysis. The Minister does not contend that "the mere finding of guilt [is] taken to be a conviction for all purposes under the [CCPA]" (PS [60]); rather, the point is that s 14(1)(a) does not operate to deem a person coming within its reach never to have been convicted of an offence in all circumstances or for all purposes. If that were not so there would be no need for s 33(6) of the CCPA to provide as it does.

31. It suffices to meet the plaintiff's case to show that s 14(1)(a) does not deem a person meeting the description therein never to have been convicted of an offence for the purposes of, and in circumstances relating to, administrative decision-making (either generally or under the Migration Act). By reason of the terms of s 85ZR(2)(b) of the Crimes Act, the purposes for which, and circumstances in which, the plaintiff is taken by any Commonwealth authority (such as the Minister's delegate) never to have been convicted of the offences of which he was found guilty between 13 March 1996 and 24 August 1998 must correspond to the particular circumstances, and the particular purposes, in which he is to be taken never to have been convicted of an offence under New South Wales law.[14] Those circumstances or purposes do not include making an administrative decision, including a decision under s 501(2) of the Migration Act.[15] This case, because of the limited operation of s 14 of the CCPA, is distinguishable from *Thornton.*[16]

32. The plaintiff's appeal to "purpose" (PS [61]-[69]) goes nowhere. The Minister accepts that, in exercising functions under the CCPA, a "person or body that has functions under [the CCPA]" must have regard to the principles listed in s 6. Those principles may fairly be described as beneficial to children. It is also not in contest that the CCPA "make[s] special provision with respect to the conduct of criminal proceedings against children"[17] and is "intended to work for the benefit of those children who face criminal prosecution".[18] What the CCPA does not do, however, is to deem a person never to have been convicted of an offence under New South Wales law in all circumstances or for all purposes (including administrative decision-making under the Migration Act). Nothing in *PM* suggests otherwise.

33. It is important in this regard to distinguish between the purpose of a statute (in the sense of the objective or aim of a statute) and the purpose for which a statue applies (in the sense of the scope of the operation of a particular statutory rule). The plaintiffs' submissions (especially at PS [61]-[69]) focus on the objective of s 14 of the CCPA. However, the relevant question in this case is the scope of the operation of s 14, because

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14 *Thornton* (2023) 97 ALJR 488 at [36] (Gageler and Jagot JJ), [58] (Gordon and Edelman JJ).
15 *cf Thornton* (2023) 97 ALJR 488 at [36] (Gageler and Jagot JJ).
16 *Thornton* (2023) 97 ALJR 488 at [30], [33], [36] (Gageler and Jagot JJ), [58] (Gordon and Edelman JJ).
17 *PM v The Queen* (2007) 232 CLR 370 (***PM***) at [1] (Gleeson CJ, Hayne, Heydon and Crennan JJ).
18 *PM* (2007) 232 CLR 370 at [26] (Gleeson CJ, Hayne, Heydon and Crennan JJ). See also at [72]-[73] (Kirby J).

it is that issue which is determinative of whether s 85ZR of the Crimes Act will apply in "the particular circumstances" and for "the particular purposes" of decisions taken under s 501 of the Migration Act.

34. In any event, for the reasons given at [21] above, even if the delegate took into account irrelevant considerations (in the form of convictions), the error was immaterial to the decision made under s 501(2) of the Migration Act (*cf* PS [76]-[80]).

Part VI: Notice of contention or cross-appeal

35. This is a matter in the Court's original jurisdiction. The Minister therefore has not filed a notice of contention or cross-appeal in this proceeding.

Part VII: Oral argument

36. The Minister anticipates that he will require approximately one hour for the presentation of his oral argument.

Dated: 24 August 2023

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ANNEXURE: APPLICABLE PROVISIONS

Children (Criminal Proceedings) Act 1987 (NSW) (as at 24 August 1998), ss 4, 14, 15 and 33.

Crimes Act 1914 (Cth) (as at 9 October 2013), s 85ZR.

Judiciary Act 1903 (Cth) (as at 24 August 2023), s 78B.

Migration Act 1958 (Cth) (as at 9 October 2013), ss 501 and 501C.