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

PLAINTIFF'S REPLY

Part I: Certification

1. The reply is in a form suitable for publication on the internet.

Part II: Reply

Ground 1

2. *First*, the defendant contends that the plaintiff argues any misunderstanding of the law (subject to any issue of materiality) vitiates an exercise power under s 501(2) ([DS18]). The defendant's submission is based on a false premise. It is, with respect, simply wrong.

3. The plaintiff argues that where the decision-maker has acted on a misunderstanding of the law that has *impeded* the decision-maker's compliance with a mandatory consideration under Direction No. 55 (the **Direction**), subject to materiality, the error is aptly characterised as jurisdictional (*contra*, DS[20]).

4. The impugned Direction expressly mandated, given the statutory effect of s 499(2A) of the *Migration Act 1958* (Cth) (the **Act**), that the defendant was to have regard, *inter alia*, to the nature of a non-citizen's criminal offending and conduct in Australia, the nature of sentences imposed and the frequency of criminal offending.

5. Where a decision-maker acts on a misunderstanding of the law in manner that has infected the decision-maker's evaluative assessment of mandatory considerations in

the Direction, subject to materiality being met (where it applies), the nature of the error rises to a jurisdictional error.

6. *Secondly*, the defendant contends that it is not a condition on the valid exercise of power under s 501(2) of the Act that the Minister recognise 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 *Children (Criminal Proceedings) Act 1987* (NSW) (the **Children Act**), that Court did not proceed to convict him of those offences (DS[19]). That is also, with respect, wrong. It elides the important legal implications that flow from s 499(2A) of the Act.

7. There is ample authority for the proposition that a failure to comply with a lawful direction made under s 499 of the Act can constitute jurisdictional error.[1] A condition on the valid exercise of power under s 501(2) of the Act was that the defendant comply with the Direction.

8. By failing to recognise that the plaintiff had <u>not</u> been convicted of various offences (see PS[20]), the defendant failed to lawfully consider the *nature of sentences* imposed upon the plaintiff. So much was required given s 499(2A) of the Act and the Direction.

9. *Thirdly*, the defendant next contends that it has been held by this Court that a verdict of guilty or a plea of guilty amounts to a conviction (DS[20]). Footnote 10 to that submission cites two decisions of this Court. The defendant had earlier stated that it is important not to take statements of principle out of context (DS[14]). But that is precisely what the defendant does here. Neither case cited, being *Maxwell*[2] and *Thornton*, addressed the impugned Children Act. It follows that any statement of principle in those cases says nothing about the statutory effect of s 14(1)(a) of the Children Act in New South Wales.

10. *Fourthly*, the defendant next contends that the Federal Court has held that the word "conviction" in s 501(10) of the Act refers not only to the formal act or order of

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[1] *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112 [34]-[35] (Mortimer J); *FKP18 v Minister for Immigration and Border Protection* [2018] FCA 1555 [34] (Kenny J); *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 [63]; *Rokobatini v Minister for Immigration and Multicultural Affairs* [1999] FCA 1238; 90 FCR 583 [38]; *XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 619 [102]-[103].
[2] *Maxwell v R* (1996) 184 CLR 501.

conviction but also extends to findings of guilt (DS[20]). Justice Logan in *EVX20*[3] was considering s 501(10) of the Act and said nothing about s 14(1)(a) of the Children Act. The question of statutory construction in *EVX20* is a world away from the question of statutory construction in this case.

11. *Fifthly*, the defendant says that the delegate gave weight not to the characterisation attached to the plaintiff's criminal conduct (convictions) but rather the conduct itself (DS[21]). The defendant points to one line in the conclusion section of the reasons for decision (ABD 75[22]; DS[21]). However, the reasons for decision must be read as a whole.[4] One cannot ignore the defendant's evaluative assessment when expressly addressing the consideration of the protection of the Australian community: ABD74[6]-[11]. Moreover, the ultimate decision as to which relevant factors are more important (and thus which side of the line a case falls) is likely to be instinctive, and correspondingly unlikely to be explained in granular detail,[5] but affected by terms such as "convicted".

Ground 2

12. *First*, the defendant contends that s 14(1)(a) of the Children Act is not a law which deems a person never to have been convicted of an offence (DS[25]). That analysis is wrong. It is the statutory effect of s 14(1)(a) of the Children Act that mandates that the child offender cannot be convicted (much less, taken to have been convicted) of the impugned offence. Indeed, if anything, s 14(1)(a) of the Children Act is stronger than a simple deeming provision; the prohibition on the very conviction that might be deemed away from ever coming into existence self-evidently means that the person is "to be taken never to have been convicted".

13. *Secondly*, the defendant contends that the purpose of s 14 of the Children Act, and the circumstances in which it applies, are peculiarly directed to curial proceedings of a criminal nature (DS[27], [32]). That is not precisely correct. Section 14 has a wider purpose. As the plaintiff explained in his submissions-in-chief, the impugned provision has a wider purpose associated with recognising important characteristics

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[3] *EVX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1079.
[4] *SZNNQ v Minister for Immigration and Citizenship* [2010] FCA 376 [20]; *BDU22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 819 [105].
[5] *Demir v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 870 [22].

of a child, treating child offenders differently to adult offenders, giving greater effect to rehabilitation of children, and giving effect to social policies that focus on a child-centric approach to juvenile justice (PS[61]-[71]).

14. *Thirdly*, the defendant next contends that s 15(1) of the Children Act is also "an important provision" (DS[28]-[29]). The plaintiff disagrees. It can be accepted that regard can (and should) be had to s 15(1) as part of the process of statutory interpretation, but it is only one provision.

15. *Fourthly*, the defendant refers to s 33(6) of the Children Act (DS[30]). Analysis of that subsection underscores the plaintiff's argument. If a child is caught by the jurisdictional facts under s 14(1)(a) of the Children Act, there is no conviction. Section 33(6) provides an exception for the purposes of road transport legislation.

16. If Parliament sought to impose a further exception to s 14(1) for other administrative/executive purposes, it could have done so. But it has not. The defendant's argument is really to the effect that the statutory operation of s 14(1)(a) of the Children Act has no field of operation in relation to the lawful exercise of power under s 501(2) of the Act. Such a construction, if accepted, would entirely undermine the important statutory objectives served by the application of s 14(1)(a) of the Children Act.

17. It is important to keep steadily in mind that although s 501(2) is concerned with the application of an executive power, an important premise of that power is to carefully engage in an evaluative assessment of criminal conduct of a person[6] (which, self-evidently, is also an important function of the Children Act in New South Wales).

18. *Fifthly*, the defendant next submits as follows (DS[33]):

> The plaintiffs' submissions (especially at PS [61]-[69]) focus on the objective of s 14 of the [Children Act]. However, the relevant question in this case is the scope of the operation of s 14, because 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.

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[6] *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 [68].

19. Even if it were accepted that the determinative issue in this case is concerned with the scope of operation of s 14 of the Children Act, the plaintiff's careful consideration of the statutory purpose of s 14 is critical in answering that larger question. Indeed, in *Thornton*,[7] this Court carefully considered the statutory objectives of the *Youth Justice Act 1992* (Qld) as part of the statutory construction task required.[8]

20. *Sixthly*, the defendant contends that the pleaded error is not material (DS[34]). The plaintiff relies upon his submissions on materiality at PS[76]-[80] and the additional points made at [11] above (the latter of which applies with equal force to this second ground of appeal). Furthermore, the error complained of in this case is of the same character as that considered in *Thornton*.[9] In *Thornton*, the Minister properly conceded that if the construction of s 85ZR was as Mr Thornton contended, the Minister had taken into account an irrelevant consideration, and that subject to any question of materiality the error was jurisdictional.[10] For the same reasons the Full Court of the Federal Court, and this Court, found the cognate error to be material in *Thornton*, it is also material in this case.

DATED: 30 August 2023

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[7] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 97 ALJR 488.
[8] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 97 ALJR 488 [15]-[18], [23], [30], [54], [64].
[9] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 97 ALJR 488.
[10] Ibid at [4] (Gageler and Jagot JJ), [78]-[79] (Gordon and Edelman JJ); *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23; 288 FCR 10 at [37].