HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B42 of 2022

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
Appellant

and

ROSS THORNTON
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

1. ***Appeal Issue 1.*** The Appeal concerns the proper construction of each of s85ZR(2) of the *Crimes Act 1914* (Cth) (**Crimes Act**) JBA[1/3/68], and separately s184(2) of the *Youth Justice Act 1992* (Qld) (**YJA**) JBA[1/5/297-298], to then determine whether s184(2) is a State law which engages s85ZR(2) of the Crimes Act (AS[2], AR[2]).

2. The Full Court held that (AS[14]-[16]):

   (a) s85ZR(2) of the Crimes Act, is a provision which relevantly applies to a State law that removes or disregards a conviction altogether "*as a pardon might do*": at [36] CAB[6/185];

   (b) s184(2) of the YJA is a provision which provides that where a conviction is not recorded, the conviction is removed or disregarded altogether and therefore is a State law which engages the operation of s85ZR(2) of the Crimes Act: at [34], [36] CAB[6/185]; and

   (c) therefore the Minister, making a decision under s501CA(4) of the *Migration Act 1958* (Cth), by considering any of the facts and circumstances of the offending committed when the respondent was a juvenile, for which a conviction was not recorded, took into account an irrelevant consideration: at [37] CAB[6/185].

3. In so concluding, the Full Court undertook no real examination of the relevant statutory language or the context of s184(2) of the YJA to determine its construction. Although the construction adopted by the Full Court of s85ZR(2) of the Crimes Act can be accepted, further examination of the context and purpose assists to understand its operation and effect (AS[18]-[26], AR[3]-[4]). As such, the Full Court's determination of whether s184(2) is a State law which engages s85ZR(2) of the Crimes Act was erroneous (AS[17]).

4. The Appellant's approach to the construction of both provisions is drawn from the statutory text in light of its context and purpose: *R v A2* (2019) 269 CLR 507 at [32]-[37] JBA[3/21/762-764 (AS[18]-[26], [32]-[39], AR[4]).

5. As to s85ZR(2) of the Crimes Act:

   (a) it is directed towards matters akin to a pardon which have the effect of completely removing the fact of the conviction, not to a provision which provides for the non-recording of a conviction: *Eastman v Director of Public Prosecutions (ACT)* (2003)

214 CLR 318 at [98], fn64 JBA[3/14/485-486]; *R v Martens (No. 2)* [2011] 1 Qd R 575 at [35], fn29 and [201]-[202] JBA[4/39/1196-1197 and 1213] (AS[18]-[23], AR[3], cf. RS[33]-[35]); and

(b) in context, it requires for its application that under the relevant State law a person is deemed to have never been convicted (applying s85ZM) of the offence: *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [7], [36] JBA[3/15/510, 521] (AS[24]-[25], AR[3], cf. RS[36]).

6. As to s184(2) of the YJA:

(a) that section provides for the non-recording of a conviction in relation to a finding guilt. It is clear from the terms of s184(2) together with other provisions of the YJA that the *fact* of the conviction, being the finding of guilt survives the operation of s184(2) of the YJA, such that it is not a State law answering the requirements of s85ZR(2) (AS[32]-[39], [54]-[56], AR[5]-[6], [11]-[12], cf. RS[18], [21]-[25], [29]-[31]);

(b) contrary to the Full Court's consideration, s148 supports the Appellant's construction (AS[51], AR[5], [11]-[12], cf. RS[21]-[24]);

(c) the Full Court, on the other hand:

(i) did not properly recognise the distinction between the recording of a conviction, being a sentencing mechanism, and the *fact* of the conviction, being the court's acceptance of the verdict or the offender's plea of guilty (*R v Gallagher* [1999] 1 Qd R 200 at 203-205 JBA[4/37/1169-1071]) including such facts and circumstances necessary to provide an understanding of the offence (AS[27]-[31], [37]-[38], AR[4], [6], cf. RS[37]); and

(ii) conflated the antecedent step in the sentencing process, being the imposition of a sentence, with the effect of such a sentence being imposed. The antecedent step is the exercise of the discretion as to whether or not to record the conviction, which is where the different weighing, child-centric approach and interests of child are to be considered: *R v* ***MDD*** (2021) 293 A Crim R 14 at [21]-[22], [24] JBA[4/40/1219-1220]; *R v* ***DBU*** (2021) 7 QR 453 at [29]-[34] JBA[4/36/1159-1163] (AS[46]-[48], AR[13]-[14], cf. RS[26]-[29]).

7. In addition, by the Full Court differentiating the effect of s184(2) of the YJA regarding the non-recording of a conviction and the analogous provision, in relation to sentencing adults, being s12 of the *Penalties and Sentences Act* 1992 (Qld) (**PSA**) that was contrary to

authority: see *R v TX* [2011] 2 Qd R 247 at [28]-[30] JBA[4/44/1295];and to a similar effect *MDD* at [22] JBA[4/40/1219-1220]; *DBU* at [29] JBA[4/36/1159-1160] (AS[42]-[53], AR[7]-[9], [12], cf. RS[13]-[25]). B42/2022

8. This error also led to the incorrect application of s85ZR(2) and whether s184(2) was a relevant State law, for the purposes of that provision. The Full Court should have held that s184(2) had the same effect as s12(3) of the PSA and hence the same approach should have been applied to s85ZR(2) (including by application of *Hartwig v Hack* [2007] FCA 1039 at [6]-[12] JBA[4/27/917-919]) (AS[18]-[19], [40], cf. RS[13]). Had the Full Court so held, it could not have concluded that the Minister took into account an irrelevant consideration (AS[60], cf. RS[32]).

9. ***Appeal Issue 2.*** There is a further issue as to materiality and the reasons of the Full Court (AS[3], AR[15], cf. RS[3]).

10. The reasons of the Full Court are inadequate and do not demonstrate a proper engagement with the reasons of the Minister (CAB[1/10-16]) for whether "*in fact*" there was a realistic possibility that the decision could have been different. This required (*Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [46], [48], [72] JBA[3/19/674, 681-682]; *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 at [30]-[32], [53], [59] JBA[4/31/1038-1039, 1042-1043]) (AS[61]-[65], AR[15]):

    (a) *first*, the Court to determine, how the decision was in fact made; and

    (b) *secondly*, from those facts, could the decision (objectively evaluated) have been different.

11. The references to the Respondent's juvenile offending were of "*marginal significance*", such that objectively considered, in the context of how the decision was in fact made, could not have realistically affected the result (AS[66]-[71], AR[16]-[17], cf. RS[40]-[49]).

12. ***Conclusion.*** The appeal should be allowed, the decision of the Full Court set aside and the appeal from the primary judge dismissed. The Orders sought are contained in the Notice of Appeal (CAB[10/198]).

Dated: 8 March 2023

Amelia Wheatley KC

Alexander Psaltis