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

AMENDED PLAINTIFF'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. There are two grounds before the Court in support of the plaintiff's application. The two critical issues raised by the application of the plaintiff are as follows:

   (a) Did the defendant act on a misunderstanding of the law by treating the plaintiff's sentences between 1996 and 1998 as criminal convictions?

   (b) Did the defendant take into account an irrelevant consideration by having regard to the plaintiff's offences between 1996 and 1998 and treating such conduct as criminal offending?

3. As will be explained, each question should be answered **yes**.

Part III: Section 78B of the *Judiciary Act 1903* (Cth) Certification

4. These proceedings do not involve an issue requiring notice pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Relevant Facts

5. On 13 December 2012, the plaintiff received a Notice of Intention to Consider Cancellation of his Class BF 154 Transitional (Permanent) visa (the **visa**) under s 501(2) of the *Migration Act 1958* (Cth) (the **Act**).[1] On 9 October 2013, a delegate of the defendant cancelled the plaintiff's visa under s 501(2) of the Act.[2]

6. On 10 October 2013, the defendant notified the plaintiff that his visa had been cancelled under s 501(2) of the Act (the **delegate's decision**).[3] What followed was a number of misconceived applications brought by the plaintiff over a number of years that were entirely unsuccessful.[4]

7. For present purposes, it is sufficient to note that the delegate's decision has not been the subject of lawful merits review before the Administrative Appeals Tribunal (the **Tribunal**), because the plaintiff did not lodge an application for merits review with the Tribunal within prescribed time limits.[5]

8. On 14 February 2023, Gleeson J ordered, inter alia, that the time for making an application for a constitutional or other writ be extended up to and including 10 February 2023.[6] As will be shown, there were good reasons for the time extension.

9. On 12 April 2023, the plaintiff filed a further amended application for a constitutional or other writ (the **application**).[7] These proceedings were held in abeyance pending judgment in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton*[8] (***Thornton***). After publication of *Thornton*, the defendant now says that decision can be distinguished from the issues under consideration in the current proceedings.

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[1] Agreed Bundle of Documents **(ABD)**, 43-52.
[2] ABD 72-76.
[3] ABD 43-52.
[4] *Lesianawai and Minister for Home Affairs (Migration)* [2019] AATA 2947; *Lesianawai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 896; *Lesianawai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 454.
[5] *Lesianawai and Minister for Home Affairs (Migration)* [2019] AATA 2947 [3].
[6] *Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 6.
[7] ABD 27-37.
[8] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17.

10. Given the issues in dispute, referral of the proceedings to the Full Court was not opposed. There are several proceedings in the Federal Court of Australia currently being held in abeyance pending resolution of the issues in these proceedings.

Part V: Argument

11. Ground 1 (Misunderstanding of the Law): The defendant was required to exercise the statutory power in s 501(2) of the Act on a correct understanding of the law.[9] For the reasons that follow, the defendant acted on a misunderstanding of the law in purporting to make the decision on 9 October 2013.

12. *First*, it is critical to outline the applicable law. The *Children (Criminal Proceedings) Act 1987* (NSW) (the **Children Act**) is directly relevant to Grounds 1-2. For that reason, it is necessary to carefully consider relevant provisions of the Children Act.

13. Section 4 of the Children Act provides that Part 2 of the Children Act applies where any court exercises criminal jurisdiction and where there are criminal proceedings before any such court.

14. Section 6 outlines applicable principles relevant to the Children Act. A particularly important principle, relevant for present purposes, is reflected in s 6(b); children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance.

15. Section 7(1) provides that generally, the Local Court may not hear and determine criminal proceedings that the Children's Court has jurisdiction to hear and determine.

16. Section 14, which is critical to Ground 1, is outlined in full below:

> (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

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[9] *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 [63]; *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 [54]; *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; (2015) 257 CLR 22 [33]; *Graham v Minister for Immigration and Border Protection* [2017] HCA 33 [57].

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

17. The effect of s 14(1)(a)[10] of the Children Act is that the court is prohibited from recording a conviction in relation to a child who is under the age of 16 years, and the court is dealing with the matter summarily.

18. Section 28(1)(a) of the Children Act provides that the New South Wales Children's Court has jurisdiction to hear and determine proceedings in respect of any offence (whether indictable or otherwise) other than a serious children's indictable offence.

19. Section 31(1) of the Children Act provides that if a person is charged before the Children's Court with an offence (whether indictable or otherwise) other than a serious children's indictable offence, the proceedings for the offence shall be dealt with summarily. That is the case here.

20. *Secondly*, before turning to the defendant's decision, it is appropriate to say something further about the plaintiff's National Police Certificate (the **NPC**).[11] The impugned aspects of the NPC are summarised below:

Court	Court Date	Offence	Court Result
Cobham Children's Court	13 March 1996	Robbery Whilst Armed (2 Charges) Robbery Whilst Armed & in Company (4 Charges) Robbery (4 Charges)	Convicted. Control order for 6 months, imprisonment for 9 months, probation for 12 months and adjourned generally

[10] Section 14(1) of the *Children (Criminal Proceedings) Act 1987* (NSW) has been in effect since 1989 (see Amendment, 1989 No 75, Sch 1 (6)).
[11] ABD 78-81.

Cobham Children's Court	12 August 1996	Demand Money with Menace (2 charges)	Convicted. Control order for 6 months
Cobham Children's Court	22 July 1997	Robbery While Armed with Dangerous Weapon	Convicted. Probation for 18 months
Cobham Children's Court	7 November 1997	Common Assault, Robbery, Robbery Whilst Armed with Dangerous Weapon (2 charges), Robbery in Company, Demand Property by Force with Intent to Steal, Robbery in Company and Destroy or Damage Property	Convicted. Control order for 6 months, 3 months and 1 month respectively and additional imprisonment for 6 months
Cobham Children's Court	24 August 1998	Be Carried in Conveyance Taken Without Consent of Owner	Convicted. Control order for 9 months and additional imprisonment for 6 months

21. The plaintiff was born on 28 July 1983.[12] Thus, the plaintiff was the following ages between 1996-1998 when he came before the Children's Court:

- 13 March 1996 **(aged 12)**.
- 12 August 1996 **(aged 13)**.
- 22 July 1997 **(aged 13)**.
- 7 November 1997 **(aged 14)**.

[12] ABD 78.

- 24 August 1998 **(aged 15)**.

22. What is immediately apparent is that the plaintiff's NPC incorrectly records that the plaintiff had been convicted for various offences between 13 March 1996 and 24 August 1998.[13] As the plaintiff was under the age of 16 when he came before the Court between 1996 and 1998, he could not have been convicted in relation to the relevant offences. That is the clear effect of s 14(1)(a) of the Children Act.

23. Further, the NPC shows that the plaintiff was dealt with in the Cobham Children's Court (which means that the relevant offences were dealt with summarily by that Court).[14] Section 14(2) of the Children Act therefor had no application in relation to the sentences received by the plaintiff between 1996 and 1998.

24. *Thirdly*, it is now necessary to carefully identify the impugned reasoning of the defendant that is in issue for the purposes of Ground 1, including:

    (a) the delegate considered the information set out in the Issues Paper and attachments;[15]

    (b) the delegate considered that the plaintiff had other "serious convictions" dating back to 1996 when he was aged 13;[16]

    (c) the plaintiff has a large number of previous convictions for crimes of violence, including many of robbery in company or robbery armed with a dangerous weapon, as well as assaults, and for car stealing offences;[17]

    (d) the sentencing sanctions the plaintiff received as a juvenile had little or no deterrent impact on his offending;[18]

    (e) the plaintiff first appeared in court as a 12-year-old and was "convicted" on a number of robbery offences;[19] and

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[13] ABD 80-81.
[14] *Children (Criminal Proceedings) Act 1987* (NSW), s 31(1).
[15] ABD 73[4].
[16] ABD 74[9].
[17] ABD 74[9].
[18] ABD 74[10].
[19] ABD 74[14].

(f) in the Conclusion section, the delegate said they considered all available evidence.[20]

25. The plaintiff's complaint is a simple one. The defendant treated the entries in the NPC between 1996 and 1998 as criminal convictions (when, by force of law, they were not). That is expressly stated in paragraphs 9 and 14 of the defendant's reasons for decision.[21]

26. The defendant stated that they had regard to the Issues Paper.[22] That finding itself reveals error. The Issues Paper incorrectly records (throughout the document) that the plaintiff had been convicted of various offences between 1996 and 1998.[23] The defendant's consideration and apparent reliance upon the Issues Paper has also, self-evidently, infected the defendant's reasons for decision.

27. The defendant also stated that they had considered relevant attachments[24] and all available evidence.[25] That finding also reveals error. As discussed above, the NPC incorrectly records that he had been convicted of various offences between 1996 and 1998. The defendant's consideration of, and reliance upon, the NPC has also infected the defendant's pathway of reasoning.

28. Expressed at a broader level, the error of the defendant is clear. The defendant failed to appreciate that the effect of s 14(1) of the Children Act was that the plaintiff could not be convicted for an offence when he was under the age of 16, and the matter was dealt with summarily.

29. The defendant's reasons for decision operate on the incorrect legal premise that the plaintiff was convicted of various offences between 1996 and 1998. In that way, the defendant operated on a critical misunderstanding of the law in New South Wales. Undoubtedly, the defendant appears to have been led into error by the NPC and by those who advised the defendant in the Issues Paper.

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[20] ABD 75[21].
[21] ABD 74[9], [14].
[22] ABD 73[4].
[23] ABD 57[15], 61[28], 62[36], 62[38], 63[43].
[24] ABD 73[4].
[25] ABD 75[21].

30. *Fourthly*, the next question is whether the defendant's error was "material" in the sense that it deprived the plaintiff of a realistic possibility that the decision made could have been different if the error had not occurred.[26]

31. The starting point, and what is critical, is the nature of the error in this case.[27] Consideration of the nature of the error involves identifying the relevant "historical facts" as to what occurred in the making of the defendant's decision.[28] The nature of the error has to be worked out in each case in the context of a particular decision under a particular statute.[29] A determination of whether the decision could have been different had the error not occurred "cannot be answered without determining the basal factual question of how the decision that was in fact made was in fact made".[30]

32. The critical reasoning of the defendant is as follows:

    (a) The defendant found they reasonably suspected the plaintiff did not pass the character test given he had a substantial criminal record within the meaning of s 501(7)(c) of the Act.[31]

    (b) The defendant concluded that it had a discretion to cancel the plaintiff's visa, having regard to Direction 55.[32]

    (c) The defendant concluded that the primary consideration of the protection of the Australian community weighed against the plaintiff.[33] In support of that conclusion, the defendant had regard to the full extent of the plaintiff's criminal

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[26] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [75].
[27] *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737 at 747-748 [32], 750 [46], 753-754 [65]; [2022] HCA 26; 403 ALR 398 at 410, 413, 418. See also *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 524 [38].
[28] *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737 at 747-748 [32], 750 [46], 755 [75], 763 [114]; [2022] HCA 26; 403 ALR 398 at 410, 413, 420, 430. See also *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 524 [38].
[29] *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 543 [101], quoted in *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737 at 756 [78]; [2022] HCA 26; 403 ALR 398 at 421.
[30] *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 524 [38].
[31] ABD 73[3].
[32] ABD 73[4].
[33] ABD 74[6]-[11].

history in Australia, a previous warning given to the plaintiff, and the plaintiff's risk of re-offending.[34]

(d) The defendant concluded that the primary consideration of strength, duration and nature of ties to Australia weighed in the plaintiff's favour.[35] The defendant noted that the plaintiff had resided in Australia for more than 25 years, arrived in Australia as a child, again had regard to the plaintiff's criminal history, and considered the plaintiff's family connections in Australia.[36]

(e) The defendant found that the primary consideration of the best interests of minor children in Australia weighed in the plaintiff's favour.[37] That finding was made having regard to the interests of the plaintiff's six-year-old daughter.[38]

(f) The defendant also concluded that the other consideration of the extent of impediments if removed weighed in the plaintiff's favour.[39] In support of that finding, the defendant noted the absence of family support in Fiji for the plaintiff, a lack of familiarity with Fijian lifestyle customs, traditions and languages other than English, the generally lower level of development in Fiji and the somewhat depressed state of the Fijian economy.[40]

(g) In conclusion, the defendant concluded that the plaintiff represented a risk of harm to the Australian community that was unacceptable.[41] Ultimately, the defendant concluded that the primary consideration of the protection of the Australian community outweighed the positive countervailing considerations.[42]

33. The error in this case was "relevant to the actual course of the decision-making".[43] In this case, the course of the defendant's decision-making reveals that the taking into account the plaintiff's sentences between 1996-1998 (and treating those sentences as

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[34] ABD 74[6]-[11].
[35] ABD 74[12]-[15].
[36] ABD 74[12]-[15].
[37] ABD 75[16]-[17].
[38] ABD 75[16]-[17].
[39] ABD 75[20].
[40] ABD 75[20].
[41] ABD 75[22].
[42] ABD 75[21]-[23].
[43] *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 543 [101]; see also at 539 [87].

criminal convictions), infected the whole of the reasoning in coming to the decision to exercise the discretion to cancel the plaintiff's visa.

34. It is to be emphasised that, when read as a whole, the defendant's reasons indicate that primacy was given to the conclusion that the plaintiff represents a risk of harm to the Australian community. So much can be seen from the defendant's statements in the concluding sections of the reasons.[44]

35. The defendant's reasons, being "historical facts" as to what occurred in the making of his decision, show that the repeated references to the plaintiff's criminal convictions between 1996-1998 were bound up in the assessment of the plaintiff's offending generally.

36. Read fairly, and as a whole, in circumstances where in coming to his conclusion the defendant expressly gave primacy to the plaintiff representing a risk of harm to the Australian community, the reliance on the impugned entries in the NPC cannot be disentangled; they infected the reasoning to that conclusion.[45]

37. Expressed at a broader level of generality, the defendant's error infected the analysis undertaken in relation to the primary considerations of the protection of the Australian community,[46] and the strength, duration and nature of the plaintiff's ties to Australia,[47] and in the conclusion section of the decision.[48]

38. The reasonable possibility that the decision *could* have been different had the error not occurred cannot, on the face of the defendant's reasons, be displaced.[49] The error was jurisdictional.

39. Ground 2 (Irrelevant Consideration): A decision-maker may make a jurisdictional error by taking into account an irrelevant consideration.[50]

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[44] ABD 75[21]-[23].
[45] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [79].
[46] ABD 74[6]-[11].
[47] ABD 74[12]-[15].
[48] ABD 75[21]-[23].
[49] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [80].
[50] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40. See also *R v Trebilco; Ex parte F S Falkiner & Sons Ltd* [1936] HCA 63; (1936) 56 CLR 20 at 27, 32, 33; *Parramatta City Council v Pestell* [1972] HCA 59; (1972) 128 CLR 305 at 323, 327, 332; *Craig v*

40. *First*, the substance of this ground is to the effect that s 14(1) of the Children Act is a State law which, in all circumstances and for all purposes, provides that the plaintiff is taken never to have been convicted of an offence committed under a law of New South Wales when he was under the age of 16.[51]

41. The consequence is that the plaintiff, under s 85ZR(2) of the *Crimes Act 1914* (Cth) (the **Crimes Act**), is to be taken by any Commonwealth authority, in all circumstances and for all purposes, never to have been convicted of an offence to which s 14(1)(a) of the Children Act applies.[52]

42. If s 85ZR(2) of the Crimes Act so operated, the defendant took into account an irrelevant consideration (ie the plaintiff's sentences, wrongly treated as convictions, as a juvenile offender between 1996-1998) in deciding to cancel the plaintiff's visa under s 501(2) of the Act.[53]

43. *Secondly*, the issues related to this ground principally involve construction of one provision in Commonwealth legislation, s 85ZR(2) of the Crimes Act, and characterisation of one provision in State legislation, s 14 of the Children Act.

44. Section 85ZR(2) of the Crimes Act 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:
>
> (a) the person shall be taken, in any Territory, in corresponding circumstances or for a corresponding purpose, never to have been convicted of that offence; and
>
> (b) the person shall be taken, in any State or foreign country, in corresponding circumstances or for a corresponding purpose, by any

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South Australia [1995] HCA 58; (1995) 184 CLR 163 at 179; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 572 [67].

[51] Cf, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [4].

[52] Cf, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [4].

[53] Cf, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [4].

> Commonwealth authority in that State or country, never to have been convicted of that offence.

45. Section 85ZR(2) of the Crimes Act thus provides that if, under the State law, the person is to be taken never to have been convicted of an offence under a law of that State, the person shall be taken, in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority, never to have been convicted of that offence.[54]

46. Section 85ZR(2) gives full force and effect to the State law for Commonwealth purposes. The issue then is whether s 14(1) of the Children Act is a law of a State under which a person is, relevantly, to be taken never to have been convicted of an offence under a law of that State.[55]

47. *Thirdly*, it is necessary then to carefully consider the Children Act in New South Wales. The task of construction must start with the text of each provision,[56] having regard to its context and purpose.[57] Further, the context is to be considered "at the first stage of the process of construction",[58] where context is to be understood in its widest sense[59] as including "surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole".[60]

48. Section 14 of the Children Act is extracted at [16] above. The text of s 14(1)(a) is clear. It provides that the court "shall not" record a conviction in respect of an offence when the child is under the age of 16.[61] The mandatory terms of sub-s 14(1) are significant.

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[54] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [13].
[55] Cf, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [14].
[56] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at 46 [47].
[57] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021] HCA 19; (2021) 273 CLR 21 at 35 [15].
[58] *R v A2* [2019] HCA 35; (2019) 269 CLR 507 at 521 [33], 554 [148]. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].
[59] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78], quoting *Bennion, Statutory Interpretation*, 3rd ed (1997) at 343-344.
[60] *R v A2* [2019] HCA 35; (2019) 269 CLR 507 at 521 [33], 554 [148].
[61] *R v AR* [2022] NSWCCA 5 [15].

49. Section 14(1)(b) of the Children Act provides the court with a statutory discretion not to record a conviction in respect of an offence (including an indictable offence) committed by a child who is aged 16 or above where the matter is disposed of summarily.

50. It follows that the text of s 14(1)(a) of the Children Act is a law of New South Wales under which a child is to be taken never to have been convicted of an offence to which s 14(1)(a) applies. That is the clear statutory effect of the court being prohibited from recording a conviction.

51. The preceding construction is supported by various Australian cases. In *EPU19*,[62] Perry J held that the Minister "wrongly state[d]" that orders made under s 14(1) of the Children Act were convictions. In *R v GW*,[63] Lerve DCJ outlined "I was careful to use the expression "findings of guilt" rather than conviction" when applying s 14(1)(a) of the Children Act.

52. In *R v Cordell*,[64] Cogswell SC DCJ had to consider whether an offender had a "record of previous convictions" as an aggravating factor for the purposes of s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the **Adult Sentencing Act**) in circumstances where the person had previously been the subject of orders under s 14(1)(a) of the Children Act. The Court accepted the offender's argument; matters in the Children's Court were not convictions for the purposes of s 21A of the CSP Act.[65]

53. In *Moroney*,[66] Nicholson SC DCJ had to consider whether an offender was an "eligible convicted offender" for the purposes of s 5A of the *Drug Court Act 1998* (NSW) (the **DC Act**). That section provided, inter alia, that the person had to be "convicted of an offence" to be an "eligible convicted offender". The Court held that the offender was not an "eligible convicted offender" because an order under s 14(1) of the Children Act does not amount to a conviction.[67]

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[62] *EPU19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 1536 [16].
[63] *R v GW* [2015] NSWDC 52 [20].
[64] *R v Cordell; R v Petersen* [2014] NSWDC 74.
[65] *R v Cordell; R v Petersen* [2014] NSWDC 74 [28].
[66] *R v Justin Moroney* [2007] NSWDC 154.
[67] *R v Justin Moroney* [2007] NSWDC 154 [12] and [16].

54. *Re Stubbs*[68] dealt with s 556A of the *Crimes Act 1900* (NSW) (the **NSW Crimes Act**), which required the Court to have regard to the applicant's circumstances (that is their health, age, or mental condition etc) when convicting an offender. Justice Davidson held that since the language of s 556A gave the Court discretion to proceed to conviction, and that by refraining from so doing it could not be a conviction within the meaning of s 526B of the NSW Crimes Act. Section 556A of the legislation is similar to s 14 of the Children Act, although expressed in terms of discretion rather than prohibition, with both provisions speaking of not proceeding to conviction. That has the legal consequence that there is no conviction.[69]

55. We now turn to context. By s 14 of the Children Act, the NSW Parliament has chosen that children aged 16 or over may be convicted of a criminal offence dealt with summarily.[70] Children under the age of 16 cannot be convicted if the offence (whether or not indictable) is dealt with summarily.[71] Contextually, then, if an order under s 14(1)(a) of the Children Act had the legal consequence of being recognised as a "conviction" for legal purposes, it would entirely undermine the clear statutory demarcation reflected in s 14(1).

56. The importance of a non-conviction for an offence is also reflected in s 15(1) of the Children Act. Subject to certain exceptions,[72] 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 conviction was not recorded against the person in respect of the first committed as a child.

57. In contrast, there is no equivalent provision (ie s 15(1)) in the sentencing of adult offenders under the Adult Sentencing Act.[73]

58. Section 33 of the Children Act is also an important provision. It outlines various

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[68] *Re Stubbs* [1947] NSWStRp 12; (1947) 47 SR (NSW) 329.
[69] *Rakhra (Migration)* [2020] AATA 5409 [10].
[70] *Children (Criminal Proceedings) Act 1987* (NSW), s 14(1)(b).
[71] *Children (Criminal Proceedings) Act 1987* (NSW), s 14(1)(a).
[72] For example, s 15(1) of the *Children (Criminal Proceedings) Act 1987* (NSW) does not apply to any criminal proceedings before the Children's Court.
[73] *Dungay v R* [2020] NSWCCA 209 [88]. See also *R v Eden* [2021] NSWDC 623 [22].

statutory penalties that the Children's Court can impose on a child offender if proceedings are dealt with summarily.[74]

59. Notably, s 33(6) of the Children Act provides as follows:

> For 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, a finding of guilt by the Children's Court for an offence is taken to be a conviction for the offence. Accordingly, following a finding of guilt, the Children's Court may exercise any power it could exercise under that legislation if the person had been convicted of the offence, unless the Court makes an order in respect of the person under section 33(1)(a).[75]

60. Subject to an order under s 33(1)(a), a finding of guilt by the Children's Court for an offence is taken to be a conviction for the *limited operative purpose* of invoking the applicability of road transport legislation. If the mere finding of guilt were taken to be a conviction for all purposes under the Children Act, there would be no statutory necessity for the enactment of s 33(6) of the Children Act.

61. We now turn to purpose. Section 6 directs a court exercising functions under the Children Act to have regard to a number of principles enumerated at subparagraphs (a)-(h). Those principles invoke considerations of children's state of dependency and immaturity; necessity for guidance and assistance; to allow the education or employment of a child to proceed without interruption; to allow a child to reside in his or her own home; and a desirability that children who commit offences be assisted with their reintegration into the community to sustain family and community ties.

62. Those statutory principles are unique to the sentencing regime related to children. Conversely, s 3A of the Adult Sentencing Act (applicable to adult offenders in New South Wales), provides distinctively different purposes of sentencing.[76] For example, in s 3A of the Adult Sentencing Act, the objectives of sentencing are focused on ensuring the offender is adequately punished for the offence; general and specific deterrence; protection of the community; to make an offender accountable for his or

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[74] *Children (Criminal Proceedings) Act 1987* (NSW), s 32.
[75] See Young offender [2005] NSWLRC 104.
[76] Cf, *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 [30].

her actions; to denounce the conduct; and otherwise to recognise the harm done to the victim of the crime.

63. The principles reflected in s 6 the Children Act emphasise the child-centric approach to juvenile justice. The aspect of rehabilitation attains a much greater emphasis in the interaction of a child with the criminal justice system.[77] The same is not true of the Adult Sentencing Act.

64. The range of penalties applicable to a child dealt with in the Children's Court is completely different to the range of penalties that can be imposed upon an adult offender.[78] The sentencing regime applicable in the Children's Court is a substantially different sentencing regime to that of adults.[79]

65. This Court has previously described the Children Act as intending "to make special provision with respect to the conduct of criminal proceedings against children" and as being "intended to work for the benefit of those children who face criminal prosecution".[80]

66. At [70]-[71] in *PM*, Kirby J made plain:[81]

> The separate treatment of children has long had a dual purpose. First, it recognises the inappropriateness, except in the gravest of cases, of invoking the full range of adult criminal trial procedures and punishments where the offender is young, and typically inexperienced and immature. Secondly, it operates so as to prevent youthful offenders becoming associated with adults having extensive criminal histories, acknowledging that affording such offenders a second chance may divert them away from future criminal behaviour. The removal of accused children to a court such as the Children's Court is, therefore, both the mark of a civilised community and a reflection of

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[77] *R v RI* [2019] NSWDC 129 [35]; *PM v The Queen* [2007] HCA 49; 232 CLR 370 at 390 [73]; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 April 1987 at 10357.
[78] *Apulu v R* [2022] NSWCCA 244 [110]. For example, Division 4 of Part 3 of the *Children (Criminal Proceedings) Act 1987* (NSW) provides for the penalties that may be imposed upon a child, with the most significant sanction available being a "control order", that is, an order committing the child offender "...to the control of the Minister administering the *Children (Detention Centres) Act 1987*..." for a period not exceeding 2 years: s 33(g)(i): *Apulu v R* [2022] NSWCCA 244 [110].
[79] *Apulu v R* [2022] NSWCCA 244 [111].
[80] *PM v The Queen* [2007] HCA 49; 232 CLR 370.
[81] *PM v The Queen* [2007] HCA 49; 232 CLR 370.

> that community's perception of its own self-interest in the treatment of young offenders.[82]
>
> These are not trivial purposes. They reflect extremely important social policies. In interpreting the CCP Act, it is the duty of courts, including this Court, not to brush such objectives aside but to attempt to fulfil them so far as this is possible, given the legislative provisions.

67. Further, as McClellan CJ at CL observed in *KT*:[83]

> In recognition of the capacity for young people to reform and mould their character to conform to society's norms, considerable emphasis is placed on the need to provide an opportunity for rehabilitation.[84]

68. Given that context, the purposes of the Children Act are indistinguishable from those of the *Youth Justice Act 1992* (Qld), the latter of which was the subject of consideration in *Thornton*.[85]

69. Noting the beneficial and remedial purposes identified in s 6 of the Children Act, it is to be construed liberally to take account of and give effect to the purposes of the legislation, particularly as a provision directed at protecting the rights and interests of children.[86] Any ambiguity is to be construed beneficially so as to give the fullest relief that the fair meaning of the language will allow.[87]

70. Section 33 of the *Interpretation Act 1987* (NSW) provides that a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object. Like direction is given in s 15AA of the *Acts Interpretation Act 1901* (Cth) in respect of the construction of s

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[82] *PM v The Queen* [2007] HCA 49; 232 CLR 370 at 389 [70].
[83] *KT v R* [2008] NSWCCA 51.
[84] *KT v R* [2008] NSWCCA 51 [22].
[85] *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 [31]. See generally *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17.
[86] Cf, *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 [31].
[87] *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384; *Appeal of VPS* [2007] NSWDC 320 [20].

85ZR of the Crimes Act.

71. A construction that the application of s 14(1)(a) of the Children Act still amounts to "a conviction" would offend the material objectives of the legislation.[88] The true construction of the combined effect of various provisions in the Children Act, as outlined above, is that it is state legislation that operates in the way contemplated by s 85ZR(2) of the Crimes Act.[89]

72. A construction of s 14(1) of the Children Act that removes or disregards a finding of guilt against a child in circumstances where a conviction has not been recorded is consistent with the mischief sought to be addressed by that Act.[90] It has been said that s 14 of the Children Act restricts the circumstances in which a conviction can be recorded so as to, as far as possible, avoid stigmatising the child.[91]

73. Thus, the effect of s 14(1) of the Children Act for the purposes of s 85ZR(2) of the Crimes Act is that the plaintiff is taken never to have been found guilty of any offence committed as a child under the age of 16, and s 85ZR of the Crimes Act prohibited the defendant from regarding as a conviction that which is prohibited by statute from being one.[92]

74. It should thus be concluded that the defendant took into account an irrelevant consideration by having regard to asserted conviction in the NPC in relation to offences committed when the plaintiff was a child under 16 for which no convictions were permitted to be recorded.[93]

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[88] Cf, *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 [32].
[89] Cf, *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 [34].
[90] Cf, *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 [34].
[91] Sentencing Bench Book, *Children (Criminal Proceedings) Act 1987*, [15-020] *Hearings,* Judicial Commission of New South Wales 2022.
[92] Cf, *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 [36].
[93] Cf, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [51].

75. To the extent that the plaintiff's NPC recorded convictions between 1996-1998, it was impermissible to do so – it was contrary to the clear terms of s 14(1)(a) of the Children Act.

76. *Fourthly*, on materiality, it cannot be gainsaid that the defendant's impermissible consideration of the plaintiff's youth offending that came before the Children's Court between 1996-1998 was material to the defendant's decision to cancel the plaintiff's visa under s 501(2) of the Act.

77. The defendant decided to cancel the plaintiff's visa because the plaintiff represented an unacceptable risk to the Australian community,[94] and the protection of the Australian community outweighed the considerations in favour of non-cancellation.[95]

78. The risk the plaintiff represented to the Australian community arose from his offending, including violent offending.[96] It is obvious that in weighing that risk the defendant took into account the plaintiff's history of offending, including as a child, which were wrongly understood to be the subject of "convictions".[97] Indeed, there was no reason for the defendant to refer to that offending other than to bolster the conclusion that the plaintiff represented an unacceptable risk to the Australian community.[98]

79. In this context, the plaintiff's offending as a child was not of mere "marginal significance"[99] to the defendant's decision; it was central. As observed in relation to Ground 1, the defendant's error in taking into account the plaintiff's impugned juvenile offending infected the defendant's reasoning process in relation to two primary considerations and the ultimate balancing exercise.

80. The decision of the defendant could well have been different had the plaintiff's impugned juvenile offending not been wrongly considered as a history of criminal

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[94] ABD 75[21]-[23].
[95] ABD 75[21]-[23].
[96] ABD 74[6]-[11].
[97] ABD 75[21]-[23].
[98] Cf, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 [37].
[99] *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421 at 445 [48].

convictions. The defendant's error was jurisdictional.

Part VI: Orders Sought

81. The plaintiff would propose the following orders:

(a) There issue absolute in the first instance a writ of certiorari, directed to the defendant, quashing its decision to cancel the plaintiff's Class BF 154 Transitional (Permanent) visa made on 9 October 2013.

(b) The defendant pay the plaintiff's costs as agreed or as assessed.

Part VII: Estimate of Plaintiff's Oral Argument

82. The plaintiff estimates that he will require up to 2 hours for oral submissions.

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ANNEXURE: APPLICABLE PROVISIONS

Children (Criminal Proceedings) Act 1987 (NSW) (as of 01 July 2013), ss 6, 7, 14, 15, 28, 31 and 33

Crimes Act 1914 (NSW) (as of 29 June 2013), s 85ZR

Crimes (Sentencing Procedure) Act 1999 (NSW) (the Adult Sentencing Act) (as of 1 July 2013), ss 3A, 21 and 15

Interpretation Act 1987 (NSW) (as of 20 December 2018), ss 15AA and 33

Judiciary Act 1903 (Cth) (as of 11 June 2013), s 78B

Migration Act 1958 (Cth) (as of 1 August 2013), ss 501(2) and 501(7)(c)