

# HIGH COURT OF AUSTRALIA

GAGELER, GORDON, EDELMAN, STEWARD AND JAGOT JJ

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MINISTER FOR IMMIGRATION, CITIZENSHIP,  
MIGRANT SERVICES AND MULTICULTURAL  
AFFAIRS

APPELLANT

AND

ROSS THORNTON

RESPONDENT

*Minister for Immigration, Citizenship, Migrant Services and Multicultural  
Affairs v Thornton*  
[2023] HCA 17  
*Date of Hearing: 8 March 2023*  
*Date of Judgment: 14 June 2023*  
B42/2022

## ORDER

1. *Appeal dismissed.*
2. *The appellant pay the respondent's costs of the appeal.*

On appeal from the Federal Court of Australia

### Representation

A L Wheatley KC with A G Psaltis for the appellant (instructed by Clayton Utz)

S J Keim SC with G J Rebetzke for the respondent (instructed by GTC Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton**

Immigration – Visas – Cancellation of visa – Where respondent's visa subject to mandatory cancellation under s 501(3A) of *Migration Act 1958* (Cth) – Where Minister decided not to revoke visa cancellation on basis that respondent represented unacceptable risk of harm to Australian community – Where Minister took into account respondent's offending as a child for which no conviction recorded – Where s 184(2) of *Youth Justice Act 1992* (Qld) provided that finding of guilt without recording of conviction not taken to be conviction for any purpose – Where s 85ZR(2)(b) of *Crimes Act 1914* (Cth) provided that where, under State law, a person is, in particular circumstances or for particular purpose, taken never to have been convicted of offence under law of that State, the person shall be taken, in any State, in corresponding circumstances or for corresponding purpose, by any Commonwealth authority in that State, never to have been convicted of that offence – Whether s 184(2) of *Youth Justice Act* a State law which provided that person to be taken never to have been convicted of offence under law of that State – Whether Minister took into account irrelevant consideration – Whether Minister's decision vitiated by jurisdictional error.

Words and phrases – "another reason", "conviction", "criminal history", "finding of guilt", "for a particular purpose", "for any purpose", "in particular circumstances", "irrelevant consideration", "jurisdictional error", "pardon", "recording of a conviction", "unacceptable risk", "visa cancellation".

*Crimes Act 1914* (Cth), ss 85ZM, 85ZR, 85ZS.

*Migration Act 1958* (Cth), ss 501, 501CA.

*Youth Justice Act 1992* (Qld), ss 148, 154, 183, 184.



1 GAGELER AND JAGOT JJ. The issues in this appeal principally involve construction of one provision in Commonwealth legislation, s 85ZR(2) of the *Crimes Act 1914* (Cth), and characterisation of one provision in State legislation, s 184(2) of the *Youth Justice Act 1992* (Qld).

2 Section 85ZR(2) of the *Crimes Act* provides<sup>1</sup> that:

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

3 Section 184(2) of the *Youth Justice Act* provides that:

"Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose."

4 As will be explained, the Full Court of the Federal Court of Australia was right to conclude that s 184(2) of the *Youth Justice Act* is a State law which, in all circumstances and for all purposes, provides that Mr Thornton is taken never to have been convicted of an offence committed when he was a child under a law of Queensland. The consequence is that Mr Thornton, under s 85ZR(2) of 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 184(2) of the *Youth Justice Act* applies. The Minister having conceded that if s 85ZR(2) of the *Crimes Act* so operated, the Minister had taken into account an irrelevant consideration (Mr Thornton's convictions as a youth offender)<sup>2</sup> in deciding not to revoke the cancellation of Mr Thornton's visa under s 501CA(4) of the *Migration*

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1 All references to statutory provisions are to the provisions as in force at the date of the Minister's decision under challenge, being 26 April 2019.

2 *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 10 at 19 [37].

*Act 1958* (Cth), the Full Court was also correct to conclude that this error was a material jurisdictional error vitiating the Minister's decision.

## Background

Mr Thornton, a citizen of the United Kingdom who had lived in Australia since he was three years old, held a Class BB Subclass 155 Five Year Resident Return visa.

When he was 21 years old, Mr Thornton was convicted of offences and sentenced to 24 months' imprisonment, with other, lesser sentences of imprisonment to be served concurrently. As a result, his visa was subject to mandatory cancellation under s 501(3A) of the *Migration Act*. Mr Thornton made representations to the Minister for the revocation of the cancellation of his visa in accordance with the invitation the Minister issued to do so under s 501CA(3) of the *Migration Act*. The information in support of his representations included reference to offences committed when he was a child.

The Minister could revoke the cancellation of Mr Thornton's visa under s 501CA(4) of the *Migration Act* if satisfied that, relevantly, "there is another reason why the original decision should be revoked". In considering this issue and deciding not to revoke the cancellation of the visa, the Minister said that he was satisfied that Mr Thornton represented an unacceptable risk of harm to the Australian community which outweighed all other relevant considerations in favour of revocation. Before reaching this conclusion, the Minister had noted that Mr Thornton had begun "offending as a minor and had a number of offences recorded before reaching adulthood" and "has a history of mainly drug-related and violent offences since he was 16 years old".

The primary judge dismissed Mr Thornton's application for judicial review seeking that the Minister's decision be quashed including on the ground that the Minister had taken into account Mr Thornton's offences committed as a child contrary to s 184(2) of the *Youth Justice Act* and s 85ZR(2)(b) of the *Crimes Act*, which made those offences irrelevant considerations<sup>3</sup>. On appeal, the Full Court allowed the appeal and quashed the Minister's decision on that ground<sup>4</sup>. The Minister's appeal is from the orders of the Full Court.

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<sup>3</sup> *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1500 at [32].

<sup>4</sup> *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 10 at 20 [47].

**Section 85ZR(2) of the *Crimes Act***

9           Section 85ZR of the *Crimes Act* is in Div 2 of Pt VIIC. Part VIIC is headed "Pardons, quashed convictions and spent convictions". Section 85ZL, in Div 1 of Pt VIIC, defines "State" to include, and "Territory" correspondingly to exclude, the Australian Capital Territory and the Northern Territory. It also defines "Commonwealth authority" to, relevantly, include "a Minister of State of the Commonwealth".

10           Section 85ZM(1), also in Div 1, provides that:

"For the purposes of this Part, a person shall be taken to have been convicted of an offence if:

- (a)   the person has been convicted, whether summarily or on indictment, of the offence;
- (b)   the person has been charged with, and found guilty of, the offence but discharged without conviction; or
- (c)   the person has not been found guilty of the offence, but a court has taken it into account in passing sentence on the person for another offence."

11           Section 85ZM(1) is a deeming, not a definitional, provision. Its effect is to bring within the scope of the word "conviction", for the purposes of Pt VIIC, the circumstances specified in s 85ZM(1)(a) to (c). The relevant provision for the present case is s 85ZM(1)(b), "the person has been charged with, and found guilty of, the offence but discharged without conviction".

12           Division 2 of Pt VIIC is headed "Pardons for persons wrongly convicted, and quashed convictions". The heading is indicative rather than exhaustive of its provisions. It deals with pardons for a Commonwealth offence or a Territory offence where a person has been wrongly convicted of such an offence in s 85ZR(1). It deals with offences under State or foreign laws of which a person is taken never to have been convicted in particular circumstances or for a particular purpose in s 85ZR(2). It deals with quashed convictions for a Commonwealth offence or a Territory offence in s 85ZT. Section 85ZS applies "where, under section 85ZR, a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence". By s 85ZS(1), the effects of being taken under s 85ZR never to have been convicted of an offence include, relevantly, that "anyone else who knows, or could reasonably be expected to know, that section 85ZR applies to the person in relation to the offence shall not ... in those circumstances, or for that purpose, take account of the fact that the person

was charged with, or convicted of, the offence"<sup>5</sup>. By s 85ZS(2), s 85ZS(1) "does not affect the generality of section 85ZR".

13 From this statutory context it is apparent that s 85ZM(1) operates to deem certain circumstances to involve a conviction of a person where, under a State or foreign law, those circumstances might not involve, or be treated as, a conviction. Section 85ZR(2) operates on this deemed state of affairs (that is, of conviction) by providing that if, relevantly, the State law is that the 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, the person shall be taken, in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority in that State, never to have been convicted of that offence. By this means, s 85ZR(2) gives full force and effect to the State law for, in effect, Commonwealth purposes.

14 The issue then is whether s 184(2) of the *Youth Justice Act* is a law of a State under which 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.

### **The Youth Justice Act**

15 The long title of the *Youth Justice Act* identifies it as an "Act to provide comprehensively for the laws concerning children who commit, or who are alleged to have committed, offences and for related purposes". In the Second Reading Speech for what was then referred to as the *Juvenile Justice Bill 1992*, it was explained that the response to young offenders included reforms to the "juvenile justice system through the Juvenile Justice Bill and the complementary Childrens Court Bill, which together will establish a new framework for dealing effectively with children who commit offences"<sup>6</sup>. It was said that the Bill "establishes a new basis for the administration of juvenile justice" and will be a "code for dealing with children who have, or are alleged to have, committed offences"<sup>7</sup>.

16 Section 2, which contains the objectives of the Act, reiterates that the principal objectives of the Act include: "(b) to establish a code for dealing with children who have, or are alleged to have, committed offences"; and "(d) to ensure

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5 Section 85ZS(1)(d) of the *Crimes Act*.

6 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 June 1992 at 5922.

7 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 June 1992 at 5923.



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that courts that deal with children who have committed offences deal with them according to principles established under this Act".

17 Section 3 provides that:

"(1) Schedule 1 sets out a charter of youth justice principles.

(2) The principles underlie the operation of this Act."

18 Schedule 1 includes the following youth justice principles:

"2 The youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing.

...

8 A child who commits an offence should be –

(a) held accountable and encouraged to accept responsibility for the offending behaviour; and

(b) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways; and

(c) dealt with in a way that strengthens the child's family."

19 Neither "youth justice system" nor "child" is generally defined under the *Youth Justice Act*. The minimum age of criminal responsibility in Queensland is ten years<sup>8</sup>. Division 11 of Pt 6 of the *Youth Justice Act* contains provisions for dealing with child offenders, including as adults. By s 134, subject to Div 11, the offender must be treated as a child for the purposes of the Act in relation to a child offence committed by the offender. Sections 140 to 144 regulate when an offender may be treated as an adult. Division 12 includes provisions about the admissibility of childhood offences. By s 148(1), in "a proceeding against an adult for an offence, there must not be admitted against the adult evidence that the adult was found guilty as a child of an offence if a conviction was not recorded". Section 148(2) provides that "[s]ubsection (1) applies even though the evidence would otherwise be admissible under the *Evidence Act 1977*, section 15 and the *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 5(3)(b)".

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8 Section 29(1) of the *Criminal Code* (Qld).

20 Part 7 of the *Youth Justice Act* concerns sentencing. Section 149 provides that:

"(1) A court that sentences a child for an offence must sentence the child under this part.

(2) Subsection (1) applies despite any other Act or law."

21 Section 154(1), in contrast to s 148(1), provides that a finding of guilt against a child for an offence, "whether or not a conviction has been recorded, is part of the criminal history of the child to which regard may be had by a court that subsequently sentences the child for any offence as a child".

22 By s 175(1), when a child is found guilty of an offence before a court, the court may do one of several things, including, for example, reprimanding the child, ordering the child to perform obligations under a restorative justice agreement or to participate in a restorative justice process, ordering the child to perform unpaid community service, or ordering the child to be detained. Sections 183 and 184 should be considered together. They provide that:

### **"183 Recording of conviction**

- (1) Other than under this section, a conviction is not to be recorded against a child who is found guilty of an offence.
- (2) If a court makes an order under section 175(1)(a) or (b), a conviction must not be recorded.
- (3) If a court makes an order under section 175(1)(c) to (g) or 176 or 176A, the court may order that a conviction be recorded or decide that a conviction not be recorded.

### **184 Considerations whether or not to record conviction**

- (1) In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including –
  - (a) the nature of the offence; and
  - (b) the child's age and any previous convictions; and
  - (c) the impact the recording of a conviction will have on the child's chances of –
    - (i) rehabilitation generally; or

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(ii) finding or retaining employment.

- (2) Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose.
- (3) A finding of guilt against a child for an offence without the recording of a conviction stops a subsequent proceeding against the child for the same offence as if a conviction had been recorded."

23 It is apparent from these provisions that the *Youth Justice Act* is a code for dealing with children who are alleged to have committed an offence. This code deals with children in a way which is not comparable to the way the law deals with adults who are alleged to have committed an offence. Under the *Youth Justice Act* children are dealt with in a manner appropriate to their unique needs and circumstances as children.

### The arguments on the appeal

24 The Minister's arguments depended largely on the contention that the present case is indistinguishable from *Hartwig v Hack*<sup>9</sup>. In that case, Kiefel J considered s 12(3) of the *Penalties and Sentences Act 1992* (Qld) and s 85ZR(2) of the *Crimes Act*. Section 12(3)(a) provided that "a conviction without recording the conviction is taken not to be a conviction for any purpose". Kiefel J held that s 85ZR(2) involved, relevantly, State legislation "which deems a person never to have *been* convicted of an offence" and that the "effect of the provision must be such as to take away the *fact* of the conviction, as a pardon might do"<sup>10</sup>. Accordingly, s 12(3), which concerned only that there be no record of a conviction, did not engage the application of s 85ZR(2)<sup>11</sup>.

25 *Hartwig v Hack* is distinguishable. It concerned the legislative scheme of the *Penalties and Sentences Act*. In that scheme, "conviction" was defined in s 4 to mean "a finding of guilt, or the acceptance of a plea of guilty, by a court". Section 12 relevantly provided that:

- "(1) A court may exercise a discretion to record or not record a conviction as provided by this Act.

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9 [2007] FCA 1039.

10 *Hartwig v Hack* [2007] FCA 1039 at [8] (emphasis in original).

11 *Hartwig v Hack* [2007] FCA 1039 at [11].

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- (2) In considering whether or not to record a conviction, a court must have regard to all circumstances of the case, including –

...

- (3) Except as otherwise expressly provided by this or another Act –

- (a) a conviction without recording the conviction is taken not to be a conviction for any purpose; and

- (b) the conviction must not be entered in any records except –

...

- (ii) in the offender's criminal history but only for the purposes of subsection (4)(b).

...

- (6) If –

- (a) a court –

- (i) convicts an offender of an offence; and

- (ii) does not record a conviction; and

- (iii) makes a probation order or community service order for the offender; and

- (b) the offender is subsequently dealt with by a court for the same offence in any way in which it could deal with the offender if the offender had just been convicted by or before it of the offence;

the conviction for the offence must be recorded by the second court."

26 The differences between this scheme and that of the *Youth Justice Act* are clear.

27 The *Youth Justice Act* does not define "conviction" as "a finding of guilt, or the acceptance of a plea of guilty, by a court". Like all words, the meaning of "conviction" will depend on its context<sup>12</sup>, but it is apparent that the *Penalties and*

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12 *Maxwell v The Queen* (1996) 184 CLR 501 at 507.

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*Sentences Act* and the *Youth Justice Act* assume that it ordinarily includes the making of a court order recording the conviction. This is why s 12(4) of the *Penalties and Sentences Act* additionally provides that a conviction without the recording of a conviction, by para (a), "does not stop a court from making any other order that it may make under this or another Act because of the conviction" and, by para (b), "has the same result as if a conviction had been recorded for the purposes of", amongst other things, "appeals against sentence" and "proceedings against the offender for a subsequent offence", as well as "subsequent proceedings against the offender for the same offence"<sup>13</sup>. The expansive definition of "conviction" in the *Penalties and Sentences Act* also enables s 12(6) of that Act to be framed as an apparent oxymoron in referring to a court which both "convicts an offender of an offence" and "does not record a conviction". In other words, under the *Penalties and Sentences Act*, a person is in fact "convicted" by a finding or admission of guilt even if no conviction is recorded.

28        The scheme of the *Penalties and Sentences Act* bears no resemblance to that under the *Youth Justice Act*. While s 184(2) is within Pt 7, concerning sentencing, s 183(1) directs that a conviction is not to be recorded against a child who is found guilty of an offence other than under that section, and s 184(2) does not refer to "a conviction without recording the conviction" (in contrast to s 12(3) of the *Penalties and Sentences Act*). Section 184(2) relevantly provides that "a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose". Section 175(1) also operates on a finding of guilt, and not the recording of a conviction. Moreover, under the *Youth Justice Act*, unlike an adult found guilty in accordance with the *Penalties and Sentences Act*, a child is not convicted by a finding or admission of guilt if no conviction is recorded.

29        Section 148 of the *Youth Justice Act* is not inconsistent with this conclusion. The prohibition on the admission of evidence against an adult of a finding of guilt and without the recording of a conviction against them as a child ensures that a person who committed offences as a child has permanent protection against any use of that against them as an adult. Otherwise, s 12(3)(b)(ii) of the *Penalties and Sentences Act* would operate, for example, to enable, by operation of s 12(4)(b)(iii), the finding of guilt to be used in "proceedings against the offender for a subsequent offence". Such a use, and indeed any such use of a finding of guilt against a child in proceedings against them as an adult, as would otherwise be authorised under s 12(4)(b) by s 12(3)(b)(ii) of the *Penalties and Sentences Act*, would be inconsistent with the scheme of the *Youth Justice Act*. Accordingly, s 148 of the *Youth Justice Act* in fact supports the conclusion that a finding of guilt under the *Youth Justice Act*, without any conviction being recorded, is not a conviction.

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13    Section 12(4)(b)(i), (iii), (iv) of the *Penalties and Sentences Act*.

In this context, s 184(2) ensures that a child offender found guilty, but not the subject of the recording of a conviction, has never been convicted at all.

30 Nor does s 154 of the *Youth Justice Act* assist the Minister's case. Section 154 ensures only that a finding of guilt against a child may be used in subsequently sentencing that child for any offence *as a child*. It is thus a provision complementing s 148. The policy intent is clear. Findings of guilt of a child should be able to be used against the child for further offences they commit as a child. Otherwise, the court could not adequately perform its functions under s 175 of the *Youth Justice Act*. But, under the *Youth Justice Act*, a finding of guilt of a child is not a conviction and is not taken to be a conviction for any purpose.

31 Further, the provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), and the definitions of "conviction" and "rehabilitation period" in that Act, do not suggest to the contrary. Rather, they reinforce that the *Criminal Law (Rehabilitation of Offenders) Act* applies only to a child "in relation to a conviction recorded against"<sup>14</sup> the child as a child. Section 5(2), which contemplates that a person may have a "conviction" which has not been recorded, reflects only the general application of that Act, including to adults convicted in accordance with the *Penalties and Sentences Act* without any conviction being recorded.

32 Section 9A of the *Criminal Law (Rehabilitation of Offenders) Act* is immaterial. Section 9A applies to an applicant for a position specified in that section (including, for example, a police officer, justice of the peace, or teacher). If requested or required, the applicant is required to disclose, by s 9A(1)(a), the person's criminal history concerning specified offences and, by s 9A(1)(b), convictions recorded against the person in respect of specified offences, being "convictions that pursuant to any law are to be deemed not to be convictions". The definition of a person's "criminal history" is confined to "the convictions recorded against that person", so s 9A(1)(a) does not apply to a person found guilty of an offence as a child where no conviction was recorded. Section 9A(1)(b) does not apply to a person found guilty of an offence as a child where no conviction was recorded because the finding of guilt is not a "conviction deemed not to be a conviction". It is a finding of guilt deemed not to be a conviction. The two are different.

33 The other submissions for the Minister do not accept the significance of the fact that the scheme of the *Youth Justice Act* ensures that a finding of guilt is not, and is not taken to be, a conviction for any purpose. While s 85ZM(1) of the *Crimes Act*, as a Commonwealth law, prevails so that the finding of guilt is taken

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14 Section 3(1) of the *Criminal Law (Rehabilitation of Offenders) Act*, para (b) of the definition of "rehabilitation period".

to be a conviction for the purpose of Pt VIIC of that Act, s 85ZR(2)(b) operates on s 184(2) of the *Youth Justice Act* so that the person shall be taken, (relevantly) in Queensland, by any Commonwealth authority in that State never to have been convicted of that offence for any purpose. The geographical locators in the provision may be clunky, but they are clear enough. Mr Thornton's offences as a child were committed in Queensland. Mr Thornton, in Queensland, is to be taken by the Minister in that State (notionally for the purpose of considering Mr Thornton's revocation application) never to have been convicted of any such offence for any purpose. Section 85ZM(1) of the *Crimes Act* does not operate for any purpose other than Pt VIIC of that Act. It does not operate, for example, to rewrite the provisions of the *Youth Justice Act* to transform a finding of guilt into a conviction under and for the purposes of the *Youth Justice Act* or any other Queensland legislation.

34 It is unnecessary to consider any other provision – such as s 19B of the *Crimes Act*, to which the Minister referred – to test this conclusion. Each provision of State or foreign law will turn on its own terms.

35 Contrary to the Minister's submissions, *Re Culleton [No 2]*<sup>15</sup> does not suggest otherwise. It concerned different provisions with different legal effects from s 184(2) of the *Youth Justice Act*. The other authorities on which the Minister relied also involved a different context. Accordingly, the statement in *R v SBY*<sup>16</sup> that s 184(2) "concerning the effect of not recording a conviction is in identical terms to s 12 in the *Penalties and Sentences Act*" cannot be taken to be accurate for all purposes. In any event, the focus of the statement is the general effect of the two provisions for the purposes of Queensland law. Similar cases to which the Minister referred<sup>17</sup> do no more than accept that, under the *Youth Justice Act*, the recording of a conviction is part of the process of sentencing. So much may be acknowledged. But that does not mean a finding of guilt is a conviction under the *Youth Justice Act*. Nor does it mean that s 184(2) of that Act has the same meaning as s 12(3)(a) of the *Penalties and Sentences Act* or the same effect as that provision for the purpose of s 85ZR(2) of the *Crimes Act*.

36 For these reasons, s 184(2) of the *Youth Justice Act*, in the language of *Hartwig v Hack*, deems a person never to have been convicted of an offence and

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15 (2017) 263 CLR 176.

16 (2013) 228 A Crim R 334 at 343 [63].

17 *R v Briese; Ex parte Attorney-General* [1998] 1 Qd R 487 at 490; *R v L* [2000] QCA 448; *R v TX* [2011] 2 Qd R 247 at 252 [28]-[30]; *R v SCU* [2017] QCA 198 at [93]; *R v DBU* (2021) 7 QR 453 at 467-468 [29]; *R v MDD* (2021) 293 A Crim R 14 at 24-25 [44(a)].

takes away the fact of the conviction, as a pardon might do. Moreover, s 184(2) expressly operates "for any purpose". It follows that, when regard is had to s 85ZR(2)(b) of the *Crimes Act*, full force and effect is to be given to s 184(2) for the "corresponding purpose", being "any purpose". "Any purpose" includes the purpose of a Commonwealth authority (the Minister) making a decision under s 501CA(4) of the *Migration Act*. The Minister's consideration of Mr Thornton's youth offending in deciding not to revoke the cancellation of the visa was contrary to the direction in s 85ZR(2)(b) of the *Crimes Act*. That direction had to be applied by the Minister irrespective of the fact that representations on Mr Thornton's behalf referred to his youth offending. Accordingly, the Minister was right to concede that, if this were so, the Minister had taken into account an irrelevant consideration.

37        There can be no doubt that the Minister's impermissible consideration of Mr Thornton's youth offending was material to the Minister's decision not to revoke the cancellation of Mr Thornton's visa. The Minister decided that there was not another reason to revoke the cancellation because Mr Thornton represented an unacceptable risk to the Australian community, and the protection of the Australian community outweighed the considerations in favour of revocation of the cancellation. The risk Mr Thornton represented to the Australian community arose from his offending, including violent offending. It is obvious that in weighing that risk the Minister took into account Mr Thornton's history of offending, including as a child. Indeed, there was no reason for the Minister to refer to that offending other than to bolster the conclusion that Mr Thornton represented an unacceptable risk to the Australian community.

38        In this context, Mr Thornton's offending as a child was not of mere "marginal significance"<sup>18</sup> to the Minister's decision. His history of offending must be inferred to have been central to the Minister's conclusion. As Mr Thornton was only 19 at the time of his last offence, his juvenile offending was plainly material to the Minister's evaluation of the risk he represented to the Australian community. The decision of the Minister could well have been different had Mr Thornton's juvenile offending not been taken into account.

## Orders

39        For these reasons, the orders which should be made are:

- (1)    The appeal be dismissed.
- (2)    The appellant pay the respondent's costs of the appeal.

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18    *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [48].



40 GORDON AND EDELMAN JJ. The Full Court of the Federal Court of Australia concluded that the appellant's decision under s 501CA(4) of the *Migration Act 1958* (Cth) refusing to revoke a decision to cancel the respondent's visa gave rise to jurisdictional error because the appellant took into account a consideration made irrelevant by s 85ZR(2) of the *Crimes Act 1914* (Cth) – namely the respondent's offending as a child for which no conviction was recorded – when, under s 184(2) of the *Youth Justice Act 1992* (Qld), the respondent was taken never to have been convicted of any of those offences committed as a child.

41 We agree that the appeal should be dismissed with costs. We write separately primarily to address the construction, and intersection, of provisions of the *Crimes Act* and the *Youth Justice Act*.

### **Mr Thornton's criminal history and visa cancellation**

42 The respondent, Mr Thornton, is a citizen of the United Kingdom who arrived in Australia with his family in 1999 on an Australian parent visa when he was three years old. He has lived in Australia since that time on a succession of temporary visas, the last of which was a Class BB Subclass 155 Five Year Resident Return visa, granted in 2011.

43 At the age of 16, Mr Thornton appeared three times in the Queensland Childrens Court and was found guilty of five offences: "failure to appear in accordance with undertaking", for which he was reprimanded; three offences – "going armed so as to cause fear", "serious assault police biting/spitting/applied bodily fluid/faeces", and "assault or obstruct police officer" – for which he was placed on a probation period of six months; and "assault or obstruct police officer", for which he was placed on a good behaviour bond for a period of six months. When he was 17, Mr Thornton appeared in a Queensland Magistrates Court and was found guilty of an offence of "commit public nuisance", for which he was ordered to pay a fine. No conviction was recorded for any of those offences.

44 From when Mr Thornton turned 18 in September 2014 up until February 2018, at the age of 21, he was found guilty of a range of offences, including possessing dangerous drugs and property suspected of being connected with drugs offences, public nuisance, assaulting or obstructing police officers, failure to appear, drunk and disorderly behaviour, domestic violence offences, and several contraventions of domestic violence orders. He received various sentences for those offences, ranging from fines with community service or good behaviour periods without any conviction being recorded, to periods of imprisonment ranging from two to 18 months.

45 In February 2018, Mr Thornton pleaded guilty and was sentenced by a Magistrates Court to two years' imprisonment for an offence of "assaults occasioning bodily harm – domestic violence offence". On the same day

he was also convicted of four counts of "contravention of domestic violence order (aggravated offence)", two counts of "assault or obstruct police officer – domestic violence offence", one count of "wilful damage – domestic violence offence" and one count of "failure to appear in accordance with undertaking". In relation to those latter offences he was sentenced to concurrent periods of imprisonment of one to 18 months, partly suspended.

46 On 21 February 2018, Mr Thornton's visa was cancelled under s 501(3A) of the *Migration Act* as a delegate of the Minister was satisfied that he did not pass the character test because he had a substantial criminal record, and he was serving a sentence of imprisonment on a full-time basis ("the cancellation decision"). In the Minister's notice of visa cancellation, Mr Thornton was invited to make representations about revocation of the cancellation decision under s 501CA(4) of the *Migration Act*.

### **Mr Thornton's revocation representations**

47 In March 2018, Mr Thornton made representations to the Minister in response to the invitation contained in the Minister's notice of visa cancellation by completing and submitting a "Request for revocation of a mandatory visa cancellation under s 501(3A)", together with supporting documents<sup>19</sup>. Later that month, and in July 2018, November 2018, March 2019 and April 2019, Mr Thornton provided further supporting documents<sup>20</sup>. In many of Mr Thornton's representations, there were references to the offences he had committed as a child.

### **Minister's decision**

48 On 29 April 2019, the Minister notified Mr Thornton of his decision not to revoke the cancellation decision and provided him with his statement of reasons dated 26 April 2019. The Minister's decision was made on the basis that he was not satisfied that Mr Thornton passed the character test (as defined by s 501) and that there was not "another reason" why the cancellation decision should be revoked<sup>21</sup>. As Mr Thornton clearly did not pass the character test due to his "substantial criminal record"<sup>22</sup>, the Minister's reasons primarily focused on

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19 Namely, a "personal circumstances form", a personal statement, and statements from his father, mother, grandmother and uncle, as well as a reference from his employer.

20 Including two further personal statements, two sets of submissions from his legal representative, and the report of a psychologist.

21 See *Migration Act*, s 501CA(4)(b)(ii).

22 *Migration Act*, s 501(6)(a) and (7)(c).

whether the Minister was satisfied that there was "another reason" why the cancellation decision should be revoked. In deciding that he was not satisfied there was "another reason", the Minister said he was satisfied that Mr Thornton represented an unacceptable risk of harm to the Australian community which outweighed all other relevant considerations in favour of revocation.

49 Before stating that conclusion, the Minister made several observations concerning Mr Thornton's offending, including his childhood offending. The Minister first noted that he had assessed all of the information in the attachments to his reasons, which included Mr Thornton's juvenile criminal history, and in particular Mr Thornton's representations, which included acknowledgment of his childhood offending. The Minister noted that although he held the view that the Australian community might afford a higher tolerance of Mr Thornton's criminal conduct given that he had lived in Australia most of his life since he was three years old, he thought that "would be offset to at least some degree by the fact that he began offending as a minor and had a number of offences recorded before reaching adulthood". The Minister noted that Mr Thornton "has a history of mainly drug-related and violent offences since he was 16 years old" and referred to Mr Thornton having been fined and placed on probation, including as a result of his appearances in "juvenile courts", for offences "without any convictions being recorded". The Minister also stated that he considered that the fact that Mr Thornton had "repeatedly committed offences of or related to domestic violence, and *other assault offences* add[ed] more gravity to his offending" (emphasis added). Finally, in his concluding remarks, the Minister stated that he "gave significant weight to the serious nature of the crimes committed by Mr THORNTON, that are of a violent nature". As Mr Thornton's criminal history makes clear<sup>23</sup>, the majority of his juvenile offences involved some form of violence.

50 Unsurprisingly, there was no dispute that the Minister had taken into account findings of guilt in relation to offences committed when Mr Thornton was a child for which no convictions were recorded. That concession was properly made.

### **Irrelevant consideration**

51 The next question was whether that consideration – findings of guilt in relation to offences committed when Mr Thornton was a child for which no convictions were recorded – was an irrelevant consideration.

52 What is required of a decision-maker in considering whether there is "another reason" to revoke a cancellation decision under s 501CA(4) of the

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23 See [43] above.

*Migration Act* was recently explained in *Plaintiff M1/2021 v Minister for Home Affairs*<sup>24</sup>. That provision "confers a wide discretionary power" to revoke a cancellation decision if the Minister is satisfied there is another reason to do so<sup>25</sup>. The scheme for that determination "commences with a former visa holder making representations"<sup>26</sup>. A decision-maker "must read, identify, understand and evaluate the representations"<sup>27</sup>; that is, they "must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them"<sup>28</sup>, and from that point the weight to be given to those representations is for the decision-maker<sup>29</sup>.

53           The requirement to read, identify, understand and evaluate the representations does not detract from established principle in respect of the types of errors that may be jurisdictional<sup>30</sup>, including where a decision-maker took into account an irrelevant consideration<sup>31</sup>. Accordingly, although the Minister was required to consider Mr Thornton's representations, which included references to

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24 (2022) 96 ALJR 497; 400 ALR 417.

25 *Plaintiff M1/2021* (2022) 96 ALJR 497 at 508 [22]; 400 ALR 417 at 424, citing *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897 at 902 [36]; 383 ALR 194 at 201 and *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13 at 17 [12]; 395 ALR 403 at 406.

26 *Plaintiff M1/2021* (2022) 96 ALJR 497 at 508 [22]; 400 ALR 417 at 424.

27 *Plaintiff M1/2021* (2022) 96 ALJR 497 at 508 [24]; 400 ALR 417 at 425, and the authorities there cited.

28 *Plaintiff M1/2021* (2022) 96 ALJR 497 at 508 [24]; 400 ALR 417 at 425, citing *Tickner v Chapman* (1995) 57 FCR 451 at 495.

29 *Plaintiff M1/2021* (2022) 96 ALJR 497 at 508 [24]; 400 ALR 417 at 425, citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41, *Abebe v The Commonwealth* (1999) 197 CLR 510 at 580 [197] and *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 176 [33].

30 *Plaintiff M1/2021* (2022) 96 ALJR 497 at 509-510 [27]; 400 ALR 417 at 426-427.

31 *Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40. See also *R v Trebilco; Ex parte F S Falkiner & Sons Ltd* (1936) 56 CLR 20 at 27, 32, 33; *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 323, 327, 332; *Craig v South Australia* (1995) 184 CLR 163 at 179; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 572 [67].

his juvenile offending, if Mr Thornton's childhood offences for which no convictions were recorded were an irrelevant consideration for the purpose of the Minister coming to his decision as to whether to revoke the cancellation decision, he would be in error to consider those offences. Determining whether such an error occurred turns on the proper construction of s 85ZR(2) of the *Crimes Act* read with s 184(2) of the *Youth Justice Act*.

54 The task of construction must start with the text of each provision<sup>32</sup>, having regard to its context and purpose<sup>33</sup>. Further, the context is to be considered "at the first stage of the process of construction"<sup>34</sup>, where context is to be understood in its widest sense<sup>35</sup> as including "surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole"<sup>36</sup>.

*Construction of s 85ZR(2)(b) of the Crimes Act*

55 Part VIIC of the *Crimes Act* is headed "Pardons, quashed convictions and spent convictions". Section 85ZP(3) in Div 1 is important – it relevantly provides that nothing in Pt VIIC "authorises a person or body to disclose or take into account a conviction of an offence if to do so would contravene any Commonwealth law, State law, Territory law or foreign law". That is, relevantly, the Commonwealth law – Pt VIIC of the *Crimes Act* – does not contradict or detract from the operation of a State law.

56 Division 2 of Pt VIIC, headed "Pardons for persons wrongly convicted, and quashed convictions", complements s 85ZP. Section 85ZR(1) relevantly provides that where a person has been granted a free and absolute pardon for a Commonwealth or Territory offence on the basis they had been wrongly convicted, then, for all purposes, they are to be taken in any State or Territory, or by any

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32 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47].

33 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at 35 [15].

34 *R v A2* (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].

35 *CIC Insurance* (1997) 187 CLR 384 at 408; *Project Blue Sky* (1998) 194 CLR 355 at 384 [78], quoting Bennion, *Statutory Interpretation*, 3rd ed (1997) at 343-344.

36 *A2* (2019) 269 CLR 507 at 521 [33], 554 [148].

Commonwealth or State authority in a foreign country, never to have been convicted of the offence. Section 85ZR(2) then relevantly 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:*

...

(b) *the person shall be taken, in any State or foreign country, in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority in that State or country, never to have been convicted of that offence.*" (emphasis added)

Section 85ZM provides that, for the purposes of Pt VIIC, "a person shall be taken to have been convicted of an offence if", among other things, "the person has been charged with, and found guilty of, the offence but discharged without conviction".

57 The chapeau to s 85ZR(2) relevantly has as its starting premise that a "State law" exists under which "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". The words "to be taken" direct attention to a State law which has the effect of deeming a conviction never to have occurred. The words "in particular circumstances or for a particular purpose" direct attention to a State law which deems a conviction never to have occurred *at all* in two scenarios: first, in certain circumstances – that is, the State law sets out that in certain circumstances the person is taken never to have been convicted, but not in others ("in particular circumstances"); or second, for certain purposes – that is, the State law sets out that for some purposes the person is taken never to have been convicted, but not for others ("for a particular purpose").

58 That construction is reinforced by s 85ZR(2)(b), which provides the machinery by which a Commonwealth authority<sup>37</sup> is to act upon the starting premise in the chapeau. When a State law engages the chapeau to s 85ZR(2), all Commonwealth authorities in that State shall take the person in that State, in corresponding circumstances or for a corresponding purpose, never to have been convicted of that offence. That is, where a State law provides that in "particular circumstances" a person is deemed never to have been convicted of an offence for any purpose, then if those circumstances exist, a Commonwealth authority in that State is to take that person as never having been convicted for any

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37 "Commonwealth authority" is relevantly defined in s 85ZL to include a Commonwealth Minister.

purpose. Likewise, if a State law deems a conviction never to have occurred for a particular purpose, then a Commonwealth authority in that State is to take that person as never having been convicted for *that* purpose.

59 Finally, it is to be emphasised that the chapeau to s 85ZR(2) expressly provides that the provision applies "[d]espite any other Commonwealth law". That is, it applies notwithstanding the requirement in s 501CA(4) of the *Migration Act* that the Minister is to take into account representations made by an applicant for revocation of a cancellation decision.

60 Section 85ZR must be read with s 85ZS, which expressly states the consequences of a State law engaging s 85ZR. Section 85ZS does not affect the generality of s 85ZR<sup>38</sup>. Section 85ZS(1)(d)(ii) relevantly provides that "where, under section 85ZR, a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence ... anyone else who knows, or could reasonably be expected to know, that section 85ZR applies to the person in relation to the offence *shall not* ... in those circumstances, or for that purpose, *take account of the fact that the person was charged with, or convicted of, the offence*" (emphasis added). In sum, if a State law engages s 85ZR – being relevantly a State law which, in particular circumstances, deems that a conviction has never occurred – then despite any other Commonwealth law – such as s 501CA(4) of the *Migration Act* – not only is any *conviction* not to be taken into account, but neither is the "fact that the person was charged with ... the offence"<sup>39</sup>.

61 As will be apparent, ss 85ZR(2) and 85ZS combine relevantly to operate so that where a State law provides that a person is to be taken never to have been convicted of an offence under a law of that State, then a Commonwealth authority shall not take account of the fact that the person was charged with, or convicted of, that offence. The Commonwealth law is not to contradict the State law.

62 The question: is there an applicable State law which provides that a person is to be taken never to have been convicted of an offence under a law of that State?

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38 *Crimes Act*, s 85ZS(2).

39 See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 May 1989 at 2545-2546.

*Construction of s 184(2) of the Youth Justice Act*

63 In this appeal, we are concerned with the *Youth Justice Act*, which provides "comprehensively for the laws concerning children who commit, or who are alleged to have committed, offences and for related purposes"<sup>40</sup>.

64 The principal objectives of the *Youth Justice Act* include to "establish a code for dealing with children who have, or are alleged to have, committed offences"<sup>41</sup> and to "ensure that courts that deal with children who have committed offences deal with them according to principles established under th[e] Act"<sup>42</sup>. The "charter of youth justice principles" that underlies the operation of the Act is in Sch 1<sup>43</sup>. The principles include that "[t]he youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing"<sup>44</sup>, and that "[a] child who commits an offence should be – (a) held accountable and encouraged to accept responsibility for the offending behaviour; and (b) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways"<sup>45</sup>.

65 The *Youth Justice Act* deals with several issues, including: policing and children (Pt 2); restorative justice processes (Pt 3); bail and custody of children (Pt 5); criminal procedure in relation to proceedings against children (Pt 6); sentencing of children (Pt 7); and detention administration (Pt 8).

66 Part 7 is headed "Sentencing" and contains several divisions, including: Div 1, headed "Sentencing generally", which provides for certain sentencing principles (s 150), procedures relating to pre-sentencing reports (ss 151-153A), disclosure of findings of guilt (s 154) and other procedural provisions; Div 2, concerning restorative justice process referrals; Div 3, concerning court referred drug assessment and education sessions before sentencing; and Div 4, concerning orders that may be made in relation to children found guilty of offences. Other divisions address certain sentencing options, including good

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40 *Youth Justice Act*, long title.

41 *Youth Justice Act*, s 2(b). See also Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 June 1992 at 5922-5923.

42 *Youth Justice Act*, s 2(d).

43 *Youth Justice Act*, s 3.

44 *Youth Justice Act*, Sch 1, item 2.

45 *Youth Justice Act*, Sch 1, item 8.



behaviour orders (Div 5), fines (Div 6), restorative justice orders (Div 6A), community service orders (Div 8) and detention orders (Div 10).

67 Section 154, in Div 1, is headed "Finding of guilt as child may be disclosed while a child" and relevantly provides that:

- "(1) A finding of guilt against a child by a court for an offence, whether or not a conviction has been recorded, is part of the criminal history *of the child* to which regard may be had by a court that subsequently *sentences the child for any offence as a child*." (emphasis added)

As is self-evident, the use of a finding of guilt against a child is limited to when the offender is a child, and such a finding may only be had regard to by a court that subsequently "*sentences the child for any offence as a child*". "[F]inding of guilt" is defined to mean "a finding of guilt, or the acceptance of a plea of guilty, by a court, whether or not a conviction is recorded"<sup>46</sup>.

68 Division 4 of Pt 7 is headed "Orders on children found guilty of offences" and includes several types of orders that may be made upon the sentencing of a child. Section 183, in Div 4 of Pt 7, headed "Recording of conviction", provides:

- "(1) *Other than under this section, a conviction is not to be recorded against a child who is found guilty of an offence.*
- (2) If a court makes an order under section 175(1)(a) or (b), a conviction must not be recorded.
- (3) If a court makes an order under section 175(1)(c) to (g) or 176 or 176A, the court may order that a conviction be recorded or decide that a conviction not be recorded." (emphasis added)

69 Section 183 is the starting point. It provides that the default position concerning children found guilty of offences is that a conviction is not to be recorded otherwise than under that section. A conviction *must not* be recorded when certain sentencing orders are made (reprimands (s 175(1)(a)) and good behaviour bonds (s 175(1)(b))), and the court *may* order that a conviction be recorded or decide that a conviction not be recorded where other sentencing orders are made (including fines (s 175(1)(c)) and probation periods (s 175(1)(d)))<sup>47</sup>.

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46 *Youth Justice Act*, Sch 4, definition of "finding of guilt".

47 For his juvenile offending, Mr Thornton received reprimands (s 175(1)(a)), good behaviour bonds (s 175(1)(b)), fines (s 175(1)(c)) and probation periods (s 175(1)(d)).

70 Section 184, headed "Considerations whether or not to record conviction", provides as follows:

- "(1) In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including –
- (a) the nature of the offence; and
  - (b) the child's age and any previous convictions; and
  - (c) the impact the recording of a conviction will have on the child's chances of –
    - (i) rehabilitation generally; or
    - (ii) finding or retaining employment.
- (2) *Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose.*
- (3) A finding of guilt against a child for an offence without the recording of a conviction stops a subsequent proceeding against the child for the same offence as if a conviction had been recorded."  
(emphasis added)

71 Section 184(1) provides that all of the circumstances of the case must be had regard to in deciding whether to record a conviction, including certain enumerated circumstances. The key provision then is s 184(2). Subject only to two qualifications discussed below, the prohibition in s 184(2) is that a finding of guilt against a child without the recording of a conviction is *not* to be taken as a conviction *for any purpose*. That conclusion is reinforced by s 148, headed "Evidence of childhood finding of guilt not admissible against adult", which relevantly provides that in proceedings against an adult for an offence, evidence that the adult had been found guilty as a child of an offence, if a conviction was not recorded, is not admissible against the adult. That reinforces the fact that where s 184(2) applies, the finding of guilt is expunged from the criminal history of that person. That s 148 prohibits the use against an adult of evidence of a finding of guilt as a child where a conviction was not recorded reflects that both ss 148 and 184(2) further the stated purposes of the *Youth Justice Act*, which include rehabilitation and reintegration.

72 The two qualifications to the prohibition in s 184(2) that a finding of guilt against a child without the recording of a conviction is not to be treated as a conviction for any purpose are found in ss 154 and 184(3). By s 154, as has been

seen<sup>48</sup>, the finding of guilt against a child is provided to be part of the *child's* criminal history for the purpose only of a court having regard to it in sentencing *the child*. That is, it mandates that, only in the specific circumstance of the *child* being sentenced, that finding of guilt may be considered. By s 184(3), the finding of guilt against a child, which is otherwise expunged for all other purposes<sup>49</sup>, has the effect of stopping a subsequent proceeding *against the child* for the same offence as if a conviction had been recorded. These matters reinforce that a finding of guilt against a child without a conviction being recorded, for all purposes except two *in relation to the child*, is taken never to have been a conviction.

#### *Intersection of s 85ZR of the Crimes Act and Youth Justice Act*

73 Section 184 of the *Youth Justice Act* engages s 85ZR of the *Crimes Act*. The "particular circumstance[]" – the condition – referred to in s 85ZR(2) is found in s 184(2): a finding of guilt against a child has been made, and the court has decided, or been mandated, under s 183 not to record a conviction. Section 184(2) deems a person never to have been convicted of an offence and takes away the adverse consequences which attend a conviction. In sum, consistent with s 85ZR of the *Crimes Act*, ss 183 and 184 of the *Youth Justice Act* prescribe a particular circumstance in which a person – a child – is taken never to have been convicted of an offence under the law of Queensland.

74 Accordingly, s 85ZS(1)(d)(ii) of the *Crimes Act* engages s 184(2) of the *Youth Justice Act* so that the Minister could not take into account under s 501CA(4) of the *Migration Act* any of the findings of guilt made against Mr Thornton when he was a child for which no convictions were recorded, and, having regard to the express wording of s 85ZS(1)(d)(ii) and the expanded definition of when "a person shall be taken to have been convicted of an offence"<sup>50</sup>, the Minister could not take into account that Mr Thornton had been *charged* with offences committed when he was a child for which no convictions were recorded. The Minister therefore took into account an irrelevant consideration.

#### **Jurisdictional error**

75 The next question is whether the Minister's error in taking into account the irrelevant consideration of the findings of guilt made against Mr Thornton when he was a child, for which no convictions were recorded, was "material" in the sense that it deprived Mr Thornton of a realistic possibility that the decision made by the

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48 See [67] above.

49 Save for the qualification in s 154 of the *Youth Justice Act*.

50 *Crimes Act*, s 85ZM.

Minister could have been different if that irrelevant consideration had not been taken into account, so as to give rise to jurisdictional error<sup>51</sup>.

76 The starting point, and what is critical, is the nature of the error in this case<sup>52</sup>. Consideration of the nature of the error involves identifying the relevant "historical facts" as to what occurred in the making of the Minister's decision<sup>53</sup>.

77 There is no bright line to be drawn<sup>54</sup> to determine whether the particular error in a given case falls into one of the categories of error identified by the principal joint judgment in *MZAPC v Minister for Immigration and Border Protection* which necessarily result in "a decision exceeding the limits of decision-making authority without any additional threshold [of materiality] needing to be met" by an applicant<sup>55</sup>. The nature of the error has to be worked out in each case in the context of a particular decision under a particular statute<sup>56</sup>; that is, 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"<sup>57</sup>.

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51 *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 at 747-748 [32], 750 [45]-[46], 753 [63]; 403 ALR 398 at 410, 413, 417. See also *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 465 [101]; 390 ALR 590 at 615; see also (2021) 95 ALJR 441 at 449 [2], 457 [51], 462-463 [85]-[86], 478 [164]; 390 ALR 590 at 592, 603, 610-611, 631-632.

52 *Nathanson* (2022) 96 ALJR 737 at 747-748 [32], 750 [46], 753-754 [65]; 403 ALR 398 at 410, 413, 418. See also *MZAPC* (2021) 95 ALJR 441 at 454 [38]; 390 ALR 590 at 599.

53 *Nathanson* (2022) 96 ALJR 737 at 747-748 [32], 750 [46], 755 [75], 763 [114]; 403 ALR 398 at 410, 413, 420, 430. See also *MZAPC* (2021) 95 ALJR 441 at 454 [38]; 390 ALR 590 at 599.

54 See *Nathanson* (2022) 96 ALJR 737 at 756 [78]; 403 ALR 398 at 421.

55 (2021) 95 ALJR 441 at 453 [33]; 390 ALR 590 at 598.

56 *MZAPC* (2021) 95 ALJR 441 at 465 [101]; 390 ALR 590 at 615, quoted in *Nathanson* (2022) 96 ALJR 737 at 756 [78]; 403 ALR 398 at 421.

57 *MZAPC* (2021) 95 ALJR 441 at 454 [38]; 390 ALR 590 at 599.

78 The error in this case was "relevant to the actual course of the decision-making"<sup>58</sup>. It was not suggested that it was an error that was, without any additional threshold, necessarily material. In this case, the course of the Minister's decision-making reveals that his taking into account of the findings of guilt made against Mr Thornton as a child, without convictions being recorded, infected the whole of his reasoning<sup>59</sup> in coming to the conclusion that there was not "another reason" why the cancellation decision should be revoked.

79 First, it is to be emphasised that, when read as a whole, the Minister's reasons indicate that he gave primacy to his conclusion that Mr Thornton represents a risk of harm to the Australian community. So much can be seen from the Minister's statements in the concluding sections of his reasons<sup>60</sup>. Second, the Minister's reasons<sup>61</sup>, being "historical facts" as to what occurred in the making of his decision<sup>62</sup>, show that his repeated references to Mr Thornton's childhood offending were bound up in his assessment of Mr Thornton's offending *generally*. Read fairly and as a whole, in circumstances where in coming to his conclusion the Minister expressly gave primacy to Mr Thornton representing a risk of harm to the Australian community, those references cannot be disentangled; they infected his reasoning to that conclusion.

80 The reasonable conjecture that the decision *could* have been different had the error not occurred cannot, on the face of the Minister's reasons, be displaced. The error was jurisdictional.

81 Finally, it is worth addressing the Minister's submission that the present case was indistinguishable from the Federal Court decision of *Hartwig v Hack*<sup>63</sup>, which considered s 12(3) of the *Penalties and Sentences Act 1992* (Qld) and its intersection with s 85ZR(2) of the *Crimes Act*. That contention must be rejected. The *Youth Justice Act* and the *Penalties and Sentences Act* are different legislative

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58 *MZAPC* (2021) 95 ALJR 441 at 465 [101]; 390 ALR 590 at 615; see also (2021) 95 ALJR 441 at 463 [87]; 390 ALR 590 at 611.

59 *Nathanson* (2022) 96 ALJR 737 at 749 [39], 752 [56], 755 [72], 761 [105]; 403 ALR 398 at 411-412, 416, 419, 428.

60 See [49] above.

61 See [48]-[49] above.

62 *Nathanson* (2022) 96 ALJR 737 at 747-748 [32], 750 [46], 755 [75], 763 [114]; 403 ALR 398 at 410, 413, 420, 430. See also *MZAPC* (2021) 95 ALJR 441 at 454 [38]; 390 ALR 590 at 599.

63 [2007] FCA 1039.

schemes. The provisions are differently worded and directed at different legislative purposes. This appeal is concerned with the construction of the *Youth Justice Act*, not the *Penalties and Sentences Act*. The construction of the latter Act is not relevant to, let alone determinative of, the proper construction of the *Youth Justice Act* and the intersection of that Act with s 85ZR(2) of the *Crimes Act*<sup>64</sup>.

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**64** *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 661 [40]. See also *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 632-633 [62], quoted in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 270 [31].

82 STEWARD J. When a youth, the respondent, who was born in the United Kingdom and came to Australia at a very young age, appeared in court on four separate occasions for assaults on police and other offences. In accordance with s 183 of the *Youth Justice Act 1992* (Qld) no convictions were recorded for these offences; instead, he was fined and placed on probation. As an adult, he committed more serious offences. This triggered the cancellation of his visa pursuant to s 501(3A) of the *Migration Act 1958* (Cth). The respondent sought revocation of this decision pursuant to s 501CA(4) of the *Migration Act*. In the material that was put before the Minister by the respondent or on his behalf, the respondent's juvenile offending was expressly referred to on four occasions<sup>65</sup>. Accordingly, in deciding that there was not another reason to revoke the cancellation of the respondent's visa, the Minister relied upon this offending, and the respondent's adult offending, in assessing the risk to the community were the respondent to remain in Australia.

83 The Full Court of the Federal Court of Australia decided that the Minister had taken into account an irrelevant consideration, which amounted to jurisdictional error<sup>66</sup>. The respondent's juvenile offending was irrelevant, it was said, because s 85ZR(2) of the *Crimes Act 1914* (Cth) made it so<sup>67</sup>. The Minister's decision was therefore set aside<sup>68</sup>. With respect, that conclusion was mistaken. For the reasons which follow, s 85ZR(2) is concerned with the pardoning of an offender who has been wrongly convicted. It is not concerned with a juvenile who is found guilty of an offence for which no conviction is recorded. It follows that the appeal should be allowed.

### The Queensland legislation

84 One should commence with the applicable Queensland legislation. Section 2(d) of the *Youth Justice Act* provides that one of the principal objectives of the Act is that courts should deal with children who have committed offences according to certain "principles" established under the Act. The principles are set out in a "Charter of youth justice principles" which is contained in Sch 1 to the

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65 In two submissions made by the respondent's representative; in the National Police Certificate; and in the psychologist's report.

66 *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 10 at 19 [37].

67 *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 10 at 18-19 [33]-[36].

68 It was not suggested that the Minister had erred in taking into account the respondent's adult offending.

Act. They include the need to deal with a child in way that allows him or her to be "reintegrated into the community"<sup>69</sup>.

85 Section 183(1) of the *Youth Justice Act* provides that a conviction is not to be recorded against a child who is found guilty of an offence, unless s 183(3) applies. The guilty child may nonetheless still be the subject of "sentence orders" pursuant to ss 175, 176 and 176A of the *Youth Justice Act*. These include, amongst other things, the giving of a reprimand, the payment of a fine, or detention. Section 184(2) was important to the respondent's case. It provides as follows:

"Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose."

86 The appellant and the respondent disagreed about the ambit of this provision. The appellant said it was limited to the non-disclosure of the record of a conviction, where the finding of guilt remains; the respondent said it deemed the finding of guilt by a court not to have occurred, granting "the person a clean slate" once he or she had obtained the age of majority. The appellant also said that the provision was effectively the same as that found in s 12(3) of the *Penalties and Sentences Act 1992* (Qld). That provision had been the subject of a decision of Kiefel J (as her Honour was then) in *Hartwig v Hack*<sup>70</sup>, in which her Honour decided that s 85ZR(2) did not engage s 12(3) – a provision which also provided for the non-recording of a conviction in the case of an adult offender. This was said to favour the appellant's argument. The respondent disagreed. He said that the two provisions were materially different having regard to their statutory purpose and context.

87 These difficulties do not need to be resolved. Whatever its reach, the Queensland legislation did not apply to the Minister<sup>71</sup>. The answer thus lies in the Commonwealth legislation. It had the potential to apply to the Minister.

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69 *Youth Justice Act*, Sch 1.

70 [2007] FCA 1039.

71 cf *Crimes Act*, s 85ZP(3), which, amongst other things, merely provides that nothing in Pt VIIC of the *Crimes Act* authorises a person or body to take into account a conviction if to do so would contravene a State law; it was not suggested that any provision in Pt VIIC did this.



## The Commonwealth legislation

### *The Crimes Legislation Amendment Act 1989 (Cth)*

88 Part VIIC of the *Crimes Act* is headed "Pardons, quashed convictions and spent convictions"<sup>72</sup>. It was introduced into the *Crimes Act* by the *Crimes Legislation Amendment Act 1989* (Cth). The Explanatory Memorandum to the Bill that became that Act explained, in general terms, the purpose of Pt VIIC as follows<sup>73</sup>:

"Proposed Part VIIC of the *Crimes Act 1914* establishes a scheme which will prohibit the disclosure of, or discrimination against a person on the basis of a spent conviction, a quashed conviction or a conviction for which the person has received a pardon. The amendments also provide that where a person is pardoned after having been wrongly convicted, then the person shall be taken never to have been convicted of the offence. The amendments are designed to encourage and assist the rehabilitation of minor offenders who have not re-offended for 10 years (5 years where the person is a juvenile) or have had the benefit of a pardon or the quashing of their conviction."

89 Division 1 of Pt VIIC is headed "Interpretation and application of Part". Section 85ZL contains a series of definitions. Section 85ZM(1) provides that a person shall be taken to have been convicted of an offence if, amongst other things, "the person has been charged with, and found guilty of, the offence but discharged without conviction"<sup>74</sup>. Section 85ZM(2) provides a definition of "spent conviction". No one suggested that it applied here. Section 85ZN provides that a person's conviction is taken to have been quashed where, amongst other things, if the person was found guilty of an offence but discharged without conviction, the finding of guilt has been quashed or set aside<sup>75</sup>. Again, it was not suggested that the respondent's findings of guilt as a juvenile offender had in any way been quashed.

90 Division 2 is headed "Pardons for persons wrongly convicted, and quashed convictions". It includes s 85ZR. For reasons set out below, its provisions are directed at those two subject matters. No one suggested that the respondent had

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72 The heading is part of the Act: s 13(2)(d) of the *Acts Interpretation Act 1901* (Cth).

73 Australia, House of Representatives, *Crimes Legislation Amendment Bill 1989*, Explanatory Memorandum at 4.

74 *Crimes Act*, s 85ZM(1)(b).

75 *Crimes Act*, s 85ZN(b).

been pardoned for his juvenile offending, or, as already mentioned, that his juvenile findings of guilt had been quashed.

91 Division 3 addresses "Spent convictions" and Div 4 addresses certain further offences. Again, it is not suggested that the respondent's juvenile offending fell into either Division. Division 5 covers complaints to the Information Commissioner and Div 6 sets out a series of exclusions from the rules created by Divs 2 and 3.

*Division 2 of Pt VIIC of the Crimes Act*

92 Division 2 of Pt VIIC comprises four provisions. Section 85ZR, which is the provision the respondent relies upon, and which was dispositive below, is headed "Pardons for persons wrongly convicted". Section 85ZS is headed "Effect of pardons for persons wrongly convicted". It only applies if s 85ZR is engaged. Section 85ZT is headed "Quashed convictions". Section 85ZU is headed "Effect of quashed convictions". There is no provision which addresses the non-recording of a conviction of a youth offender who is guilty of an offence.

93 Section 85ZR has two sub-sections. Sub-section (1) applies where a person has been granted a pardon for a Commonwealth offence or a Territory offence because the person was wrongly convicted. Two consequences follow: first, the person is taken in any State or Territory never to have been convicted of the offence; and secondly, if the person is in a foreign country, he or she is to be taken to have never been convicted of the offence by any Commonwealth authority or State authority in that country. Section 85ZR(1) thus provides:

"Despite any other Commonwealth law or any State law or Territory law, where a person has been granted a free and absolute pardon for a Commonwealth offence or a Territory offence because the person was wrongly convicted of the offence:

- (a) the person shall be taken, in any State or Territory, for all purposes, never to have been convicted of the offence; and
- (b) the person shall be taken, in a foreign country, by any Commonwealth authority or State authority in that country, for all purposes, never to have been convicted of the offence."

94 Section 85ZR(2) deals with the corresponding position where the applicable offending has taken place under a foreign or State law. It 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:

31.

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

95 The Full Court reasoned that s 85ZR(2)(b) applied to the respondent's juvenile offending because there is a State law whereby "in particular circumstances" the respondent is taken never to have been convicted of an offence under a law of that State. That State law was said to be s 184(2) of the *Youth Justice Act*<sup>76</sup>.

96 When read in context, that is not how s 85ZR(2) is to apply. It is true that the language which s 85ZR(2) uses is different from that found in s 85ZR(1); it deploys words of much greater generality. Thus, instead of referring to "a person [who] has been granted a free and absolute pardon ... because the person was wrongly convicted" as in s 85ZR(1), it refers to a person who is, "in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence". But the reason for the use of this different and more generalised language is obvious. The heading to s 85ZR tells us that its subject matter is "Pardons for persons wrongly convicted". Sub-section (1) uses that very language for Commonwealth and Territory offending. But the same language cannot be used in sub-s (2), which, of necessity, must deploy language of greater generality, and which is more neutral in nature, precisely because it must do the work of dealing with pardons for wrongful conviction across a great many different foreign countries. Different jurisdictions may well use a large variety of different legal forms to express the concept of pardoning of a person who has been wrongly convicted. The far more generalised language deployed in s 85ZR(2) is used to address that issue.

97 In this way it can be seen that the subject matter of s 85ZR(2) remains the same as s 85ZR(1), save that the former is dealing with convictions under foreign and State law, and the latter is dealing with Commonwealth and Territory convictions. Any other conclusion would be entirely incongruous. If the Full Court is correct, it would mean that the ambit of protection afforded by s 85ZR(1) would be much less than that afforded by s 85ZR(2). There is nothing to suggest that this was in any way intended. It would also squarely contradict the heading to the provision.

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76 *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 10 at 18-19 [36].

98 The Explanatory Memorandum to the *Crimes Legislation Amendment Bill 1989* (Cth) unequivocally confirms the foregoing conclusion. It describes s 85ZR(2) as applying where a "pardon is granted" under a foreign or State law "in corresponding circumstances" to that applicable under sub-s (1)<sup>77</sup>. It thus states<sup>78</sup>:

"Proposed section 85ZR provides that where a person is granted a complete pardon for a Commonwealth or external Territory offence because he or she has been wrongly convicted, then the person is to be taken never to have been convicted of the offence.

Subsection (2) provides that where a pardon is granted *in corresponding circumstances* under State or foreign law, the pardon is to receive the same recognition from a Commonwealth authority and within a Territory as a pardon for a Commonwealth offence."

99 Because the respondent was not pardoned by reason of having been wrongly convicted, s 85ZR(2) does not apply to his circumstances. Nothing in the text or purpose of the *Youth Justice Act*, nor any perceived differences between the *Youth Justice Act* and the *Penalties and Sentences Act*, changes that fact. It therefore follows that the Minister was entitled, in determining whether there was "another reason" to revoke the visa cancellation decision, to take the respondent's juvenile offending into consideration. As this Court said in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane*<sup>79</sup>:

"What is 'another reason' is a matter for the Minister. Under this scheme, Parliament has not, in any way, mandated or prescribed the reasons which might justify revocation, or not, of a cancellation decision in a given case. It follows that there may be few mandatorily relevant matters that the Minister must consider in applying s 501CA(4)(b)(ii)."

100 It also follows from the foregoing that there may be few mandatorily irrelevant matters that the Minister must not consider in applying s 501CA(4)(b)(ii). As this Court also observed in *Viane*<sup>80</sup>:

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77 Australia, House of Representatives, *Crimes Legislation Amendment Bill 1989*, Explanatory Memorandum at 16 [42].

78 Australia, House of Representatives, *Crimes Legislation Amendment Bill 1989*, Explanatory Memorandum at 16 [41]-[42] (emphasis added).

79 (2021) 96 ALJR 13 at 17-18 [13]; 395 ALR 403 at 407.

80 (2021) 96 ALJR 13 at 19 [18]; 395 ALR 403 at 408.

33.

"[T]here are simply no limitations on the sources of information that may be considered by the Minister in determining whether to reach the state of satisfaction prescribed by s 501CA(4)(b)(ii)."

101        Nothing in s 85ZS justifies a contrary conclusion. That provision only applies when s 85ZR is engaged. Because of the terms of s 85ZR(2), s 85ZS also deploys the same generalised language to describe the various ways in foreign countries a person may be pardoned because they have been wrongly convicted.

102        It is, of course, open to the Federal Parliament to amend the *Crimes Act* to take account of juvenile offending in the way provided for by the *Youth Justice Act*. For the reasons set out above, it has yet to do so.

103        The appeal should be allowed.