



## 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

DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

**Part I: Certification**

1. The defendant (the **Minister**) certifies that this outline of oral submissions is suitable for publication on the internet.

**Part II: Outline of propositions**

*No misunderstanding of the law (ground one)*

2. In exercising a statutory discretion, an administrative decision-maker must act on a correct understanding of the applicable law. That principle requires the decision-maker to understand the test or criteria imposed by law on the making of the decision and the effect that it will have on legal rights and duties (Defendant's Submissions (**DS**) at [14]-[15]).
  - a) *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at 29-30 [75] (Gageler J) [**JBA vol 4, tab 19 at 446-447**].
3. The *applicable* law in this case was s 501(2) of the *Migration Act 1958* (Cth) (**Act**). Acting on a correct understanding of the *applicable* law did not mean that the delegate:
  - a) could not rely on evidence in the form of a police certificate that indicated that the plaintiff had been convicted as a juvenile [**ABD at 80-81**]; or
  - b) was required to appreciate the effect of other bodies of law that might be more or less relevant to the facts of a case (such as s 14 of the *Children (Criminal Proceedings) Act 1987* (NSW) (**CCPA**)) [**JBA vol 1, tab 3 at 26**].

4. The delegate found that the plaintiff had “convictions dating back to 1996 when he was aged 13” [ABD 74 at [9]], “a large number of previous convictions” for various offences [ABD 74 at [9]] and that he “first appeared in court as a 12 year old, and was convicted on a number of robbery offences” [ABD 74 at [14]]. Even if those findings were based on a misunderstanding of the effect of s 14 of the CCPA, the result, at best for the plaintiff, is an error within jurisdiction (DS at [18]).
5. In any event, there was no error. Section 14 of the CCPA cannot, by its own operation, determine what constitutes a “conviction” for the purpose of exercising the power under s 501 of the Act. It was not inaccurate to describe findings of guilt by the Children’s Court of New South Wales as convictions for the purposes of s 501 of the Act (DS at [20]).
  - a) s 501 of the Act [JBA vol 2, tab 8 at 92-96];
  - b) *Maxwell v The Queen* (1996) 184 CLR 501 at 507 (Dawson and McHugh JJ) [JBA vol 4, tab 15 at 306].
6. In reply submissions, the plaintiff seeks to recharacterise ground one as a failure to comply with Direction 55, made mandatory by s 499 of the Act (Reply [2]-[8]). That does not assist. The delegate did consider “*the nature and seriousness of the [plaintiff’s] criminal offending or other conduct*” (para 9.1.1(1)) and “*the sentence imposed by the court for a crime or crimes*” (para 9.1.1(1)(e)) [JBA vol 2, tab 6 at 76-77]. Whether or not the plaintiff’s “conduct” as a juvenile led to convictions under a State law, or whether or not the “sentences” imposed upon him were consequent upon a conviction under State law, were not matters that Direction 55 required to be taken into account.
7. In any event, any error was not material to the delegate’s decision. The delegate gave weight to the history and nature of the plaintiff’s offending as a juvenile, not the characterisation of that offending as convictions [ABD 75 [22]].

*Irrelevant considerations were not taken into account (ground two)*

8. This Court’s decision in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 97 ALJR 488 (*Thornton*) [JBA vol 4, tab 16 at 337] makes clear that whether or not s 85ZR(2) of the *Crimes Act 1914* (Cth) (**Crimes Act**) [JBA vol 1, tab


**5 at 59]** is engaged by a State law requires close consideration of the State law in question. *Thornton* is distinguishable for two reasons.

9. *First*, s 14(1)(a) of the CCPA is not a State law of the kind referred to in s 85ZR(2) of the Crimes Act because it is not a law which operates so that a person is “to be taken never to have been convicted of an offence”. Section 14(1) is not a deeming provision; rather it is a prohibition upon a court proceeding to, or recording, a conviction (DS [25]).
  - a) *Thornton* (2023) 97 ALJR 488 at 494 [24] (Gageler and Jagot JJ) and 500 [57] (Gordon and Edelman JJ) [**JBA vol 4, tab 16 at 343 and 349**];
  - b) *cf* ss 183(1) and 184(2) of the *Youth Justice Act 1992* (Qld) [**JBA vol 2, tab 11 at 108**].
10. *Secondly*, s 14(1) of the CCPA does not operate for “all purposes” and in “all circumstances”. Rather, it operates for the limited purpose, and in limited circumstances, to govern aspects of criminal procedure in a curial context. Accordingly, s 85ZR does not govern an exercise of power by a Commonwealth authority exercising a non-curial function in a context unrelated to the criminal law. There is no correspondence of circumstances or purpose (DS [26]-[29] and [31]-[32]).
  - a) ss 4, 14 and 15 of the CCPA [**JBA vol 1, tab 3 at 20, 26-27**];
  - b) *cf* ss 183(1) and 184(2) of the *Youth Justice Act 1992* (Qld) [**JBA vol 2, tab 11 at 108**];
  - c) *Thornton* (2023) 97 ALJR 488 at 497 [36] (Gageler and Jagot JJ), 500 [58], 501 [63] (Gordon and Edelman JJ) [**JBA vol 4, tab 16 at 346, 349-350**].



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**Bora Kaplan**