



## HIGH COURT OF AUSTRALIA

### NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Nov 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

#### Details of Filing

File Number: S12/2023  
File Title: Lesianawai v. Minister for Immigration, Citizenship and Multi  
Registry: Sydney  
Document filed: Form 27F - Outline of oral argument  
Filing party: Plaintiff  
Date filed: 16 Nov 2023

#### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN:

**ISAAC LESIANAWAI**

Plaintiff

and

**MINISTER FOR IMMIGRATION, CITIZENSHIP  
AND MULTICULTURAL AFFAIRS**

Defendant

### **PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS**

#### **Part I: Certification**

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

#### **Part II: Outline of the Propositions**

2. The decision the subject of judicial review was made under the *Migration Act 1958* (Cth) (the **Act**), s 501(2). The matters to which the defendant could have regard were at large, subject relevantly to s 499 of the Act and *Ministerial Direction 55*, and, in this case, ss 85ZR and 85ZS of the *Crimes Act 1914* (Cth) (the **Crimes Act**).
3. Section 85ZR (and through it, s 85ZS) are engaged by the statutory scheme under the *Children (Criminal Proceedings) Act 1987* (NSW) (the **Children Act**); see ss 3, 6, 10, 11, 14, 15, 28, 31 and 33.
4. The statutory scheme under the Children Act is to be contrasted with that applicable to adults under, for example, the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A.
5. The statutory scheme under the Children Act is indistinguishable, at least in any sense favourable to the defendant, from the *Youth Justice Act 1992* (Qld) (the **Youth Justice Act**) considered by the Court in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17; 97 ALJR 488 (*Thornton*).
6. *Thornton* is determinative of the outcome in this proceeding: see *Thornton* at [4], [6]-[7], [12]-[14], [23], [27], [30], [32]-[33], [35]-[37], [53]-[54], [59]-[60], [74], [78]-[79], [81].

7. Contrary to the defendant's submissions, because of the prohibition against a court "proceed[ing] to, or record[ing], a conviction" under s 14(1)(a) of the Children Act, it is unnecessary for the Children Act to say what is found in s 184(2) of the Youth Justice Act. It is unnecessary to deem away that which is prohibited from ever occurring. The circumstance required to exist "under" the Children Act for the engagement of s 85ZR exists in mandatory and absolute terms in s 14(1)(a); an additional provision deeming the non-existent "conviction" not to exist would add nothing.
8. The delegate recounted that he had considered all material before him in relation to the plaintiff and the proposed cancellation of his visa: CB72; CB73[4]. This included the departmental Issues Paper: CB54ff. It also included the National Police Certificate: CB78ff.
9. There was nothing before the delegate addressing any facts or circumstances of juvenile offending other than the National Police Certificate. Both the Issues Paper and the delegate's reasons referred repeatedly to "convictions" from the age of 12, by reference to nothing more than the charges laid; *contra* s 85ZS(1)(d) of the Crimes Act.
10. Ground 1 is made out because the delegate plainly misunderstood the law concerning juvenile offending and this led to him wrongly to conclude that the plaintiff's "convictions" in respect of conduct when aged under 16 years made him an unacceptable risk to the community: CB75[22]. The delegate did not differentiate between conduct upon which s 14(1) of the Children Act (and ss 85ZR and 85ZS of the Crimes Act) did operate and that upon which it did not. Disentanglement is impossible. As in *Thornton*, the misunderstanding of the law went directly to the subject matter of the instant decision and was jurisdictional, as the defendant conceded was the case on weaker facts in *Thornton* (assuming the statutory construction to be as the plaintiff contended); it impeded the exercise of power according to law.
11. Ground 2 is made out because the delegate had regard to an irrelevant consideration in the form of the false "convictions". It is no answer to say that the defendant was entitled to consider the underlying conduct because, *first*, there was no material before the delegate informing as to the facts or circumstances of any such conduct;

and, *secondly*, s 85ZS(1)(d) prohibited the defendant from taking account of even the charging of the plaintiff in respect of conduct when aged under 16 years. The charges and, as a matter of law, their disposition under s 14(1) of the Children Act were the only information on the subject, and they were mandatorily irrelevant: s 85ZS(1)(d).

12. Materiality in this case is patent. As much was conceded by the defendant on weaker facts in *Thornton*. The reasoning in *Thornton* at [4], [37], [76]-[80] applies with equal or greater force on the facts of this case.

Dated: 15 November 2023



**David Hooke SC**  
E: [hooke@jackshand.com.au](mailto:hooke@jackshand.com.au)