Federal Court of Australia

Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 23

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| Appeal from: | *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1500 |
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| File number: | QUD 363 of 2020 |
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| Judgment of: | **KATZMANN, SC DERRINGTON AND BANKS-SMITH JJ** |
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| Date of judgment: | 25 February 2022 |
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| Catchwords: | **MIGRATION** – appeal from decision of primary judge dismissing application for judicial review of decision not to revoke mandatory visa cancellation under s 501CA(4) of the *Migration Act 1958* (Cth) – whether Minister took into account an irrelevant consideration being unrecorded convictions as a juvenile – whether Minister failed to consider substantial or significant and clearly articulated claims – whether reasons fail to demonstrate an active intellectual process with respect to rehabilitative components of sentence – whether decision legally unreasonable**STATUTES** – interpretation – general approaches to interpretation – whether s 12(3) of the *Penalties and Sentences Act 1992* (Qld) and s 184 of the *Youth Justice Act 1992* (Qld) operate in manner contemplated by s 85ZR(2) of the *Crimes Act 1914* (Cth) |
| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AA*Acts Interpretation Act 1954* (Qld) s 14A*Crimes Act 1914* (Cth) ss 85ZR(2), 85ZZH*Migration Act 1958* (Cth) ss 279, 501(1), 501(3A), 501(6)(a), 501(7), 501CA *Penalties and Sentences Act 1992* (Qld), s 12(3)*Youth Justice Act 1992* (Qld) ss 148, 184(2) |
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| Cases cited: | *Bull v Attorney-General (NSW)* (1913) 17 CLR 370*Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503*Hartwig v P E Hack* [2007] FCA 1039*Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590*R v A2* 269 CLR 597*R v Briese; Ex parte Attorney-General (Qld)* [1997] QCA 10; [1988] 1 Qd R 487*R v MDD* [2021] QCA 235*SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 58 |
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| Date of hearing: | 25 February 2022  |
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| Counsel for the Appellant: | Mr G Rebetzke |
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| Solicitor for the Appellant: | Armstrong Legal |
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| Counsel for the Respondent: | Ms A L Wheatley QC with Mr A Scott |
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| Solicitor for the Respondent: | Clayton Utz |

ORDERS

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|  | QUD 363 of 2020 |
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| BETWEEN: | ROSS THORNTONAppellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSRespondent |

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| order made by: | KATZMANN, SC DERRINGTON AND BANKS-SMITH JJ |
| DATE OF ORDER: | 25 FEBRUARY 2022 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The respondent pay the appellant’s costs.
3. The orders of the primary judge made on 19 October 2020 be set aside and in their place it be ordered that:
	1. A writ of certiorari issue directed to the respondent quashing his decision of 26 April 2019;
	2. A writ of mandamus issue directed to the respondent requiring him to determine the applicant’s application according to law;
	3. The respondent pay the applicant’s costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from transcript)

**KATZMANN J:**

1. I call upon Justice Derrington to give the first judgment.

**SC DERRINGTON J:**

## Introduction

1. Mr Ross Thornton is a citizen of the United Kingdom who arrived in Australia with his family in 1999 at the age of three. 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.
2. On 21 February 2018, Mr Thornton’s visa was mandatorily cancelled pursuant to s 501(3A) of the ***Migration Act*** *1958* (Cth) following his conviction on 2 February 2018 for assaults occasioning bodily harm – domestic violence offence, for which he was sentenced to 24 months imprisonment, and for various other offences, for which he was sentenced to concurrent periods of imprisonment of one to 18 months, partly suspended. At the time, Mr Thornton was just 21 years of age.
3. Section 501(3A) of the *Migration Act* provides that the Minister must cancel a visa that has been granted to a person if the person does not satisfy the Minister that the person passes the character test.
4. Section 501(6)(a) provides that a person does not pass the character test if the person has a substantial criminal record. Section 501(7)(c) provides that a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more. There is no dispute that Mr Thornton did not pass the character test in s 501(1) of the *Migration Act*, because of the operation of subs (6)(a), on the basis of subs (7)(c).
5. Relevantly, s 501CA of the *Migration Act* provides:

(1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.

…

(3) As soon as practicable after making the original decision, the Minister must:

(a) give the person, in the way that the Minister considers appropriate in the circumstances:

(i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

1. Subsequent to the cancellation of his visa, Mr Thornton made representations to the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs seeking revocation of the cancellation decision. On 26 April 2019, the Minister determined not to revoke the cancellation decision, not being satisfied that Mr Thornton passed the character test.
2. In considering whether there was ‘another reason’ why the cancellation decision should be revoked, the Minister said at [52]:

In reaching my decision about whether I am satisfied that there is another reason why the original decision should be revoked, I concluded that Mr THORNTON represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed any other considerations as described above. These include his lengthy residence and bonds, employment and familial ties to Australia and the hardship Mr THORNTON, his family and social networks will endure in the event the original decision is not revoked.

1. On 19 October 2020, the primary judge dismissed Mr Thornton’s application for judicial review of the Minister’s decision.
2. Mr Thornton raises four grounds of appeal:

1. The primary judge erred in rejecting ground 1 of the application before the Court (the application), by wrongly construing s 184(2) of the *Youth Justice Act 1992* (Qld) as being a provision which does not “deem a person ‘never to have been convicted of an offence’” for the purposes of s 85ZR(2) of the *Crimes Act 1914* (Cth).

2. The primary judge erred in rejecting ground 2 of the application by not accepting that the Respondent failed to take into account that a consequence of the decision would be to prevent the sentence imposed on the Appellant by the Magistrates Court of Queensland from being executed or carried out to its completion.

3. The primary judge erred in concluding that the Respondent actively engaged with the substantial or significant and clearly articulated claims raised by the Appellant as particularised in ground 3 of the application.

4. In relation to the unreasonableness ground (ground 4), the primary judge erred in not concluding that, while the Respondent considered the Appellant’s subjective intention to rehabilitate himself, the Respondent’s evaluation of risk was flawed by a failure to objectively consider the rehabilitative effect of the completion of the sentence imposed by the Magistrates Court of Queensland.

1. For the reasons that follow, the appeal must be allowed.

## Ground 1

1. As to Ground 1, the gravamen of Mr Thornton’s complaint is that the language of s 12(3) of the ***Penalties and Sentences Act*** *1992* (Qld) and s 184(2) of the ***Youth Justice Act*** *1992* (Qld) is relevantly distinguishable and that the primary judge was wrong to apply the reasoning in ***Hartwig*** *v PE Hack* [2007] FCA 1039 to Mr Thornton’s juvenile history. Mr Thornton contends that the combined effect of ss 148 and 184 of the *Youth Justice Act* is that the *Youth Justice Act* is State legislation that operates in the way contemplated by s 85ZR(2) of the ***Crimes Act*** *1914* (Cth) being that it ‘removes or disregards the conviction altogether’. Mr Thornton therefore contends that not only does the decision in *Hartwig* not preclude that conclusion, given that it was concerned only with the combined effect of s 12(3) of the *Penalties and Sentences Act* and s 85ZR(2) of the *Crimes Act*, but indeed is consistent with it (*Hartwig* at [8]).
2. The significance of s 85ZR(2) of the *Crimes Act* in the context of decisions made under the *Migration Act* was not something raised before the primary judge. Nevertheless, it is clear that Parliament has been concerned to delineate the extent to which the disclosure of convictions is to be treated by decision makers under the *Migration Act*.
3. Part VIIC, Division 6, Subdivision B—Exclusions (Division 3) of the *Crimes Act*, which is concerned with ‘spent’ convictions, is important in construing the relevance of s 85ZR(2) to a decision under the *Migration Act*. Section 85ZZH provides:

Division 3 does not apply in relation to the disclosure of information to or by, or the taking into account of information by a person or body referred to in one of the following paragraphs for the purpose specified in relation to the person or body:

…

(d) a person who makes a decision under the *Migration Act 1958* … for the purpose of making that decision.

1. On its face, s 85ZZH(d) *requires* a person to disclose the circumstances of a ‘spent’ offence in the context of an application under the *Migration Act*. As is typical of Commonwealth legislative drafting, however, there is an exemption from the exception (to be found in another Act), at least in relation to persons seeking to be registered as migration agents. Part 3 of the *Migration Act*, *inter alia*, regulates migration agents. Section 279 of the *Migration Act* provides:

Despite paragraph 85ZZH(d) of the *Crimes Act 1914*, Part VIIC of that Act applies to this Part.

1. The consequence of this section is that applicants for registration as migration agents are *not* required to disclose a spent offence, despite the prima facie obligation to do so contained in s 85ZZH(d). Spent offences are not protected from disclosure in relation to any other decisions made under the *Migration Act*, including those relating to the cancellation or refusal of a visa.
2. By contrast, pardons or quashed convictions, dealt with in Division 2, remain protected from disclosure for all purposes related to decisions under the *Migration Act*, including those relating to the cancellation or refusal of visas. The express exclusion of ‘spent’ offences from the protective provisions of Division 3 of the *Crimes Act* evinces a legislative intention to retain the protection for offences captured by s 85ZR(2), which is in Division 2, even when a decision is to be made under the *Migration Act*. It follows that a decision-maker who takes into account a conviction that falls within the scope of s 85ZR(2) takes into account an irrelevant consideration.
3. The question which arose in *Hartwig* was whether the Administrative Appeals Tribunal was, by virtue of s 12(3) of the *Penalties and Sentences Act,* entitled to take account of the fact of conviction (albeit that none was recorded), being the acceptance of the record and the plea upon which it was based, together with such facts and circumstances as are necessary to provide an understanding of the offence, so far as they were relevant to the question before the AAT, which involved the purpose for which a person is said to be fit and proper.
4. In *Hartwig*, Kiefel J held:

8 The nature of the State legislation, to which s 85ZR(2) of the *Crimes Act* (Cth) refers, is one which deems a person never to have *been* convicted of an offence. The effect of the provision must be such as to take away the *fact* of the conviction, as a pardon might do. It is not without significance that the section is headed ‘*Pardons for Persons Wrongly Convicted’*. Other legislation of the type to which s 85ZR(2) refers maybe that which deems a person not to have been convicted after the lapse of a number of years.

…

11 Section 12(3) of the *Penalties and Sentences Act* (Qld) and s 85ZR(2) of the *Crimes Act* (Cth) are however dissimilar. The former is concerned that there be no record of a conviction. The Commonwealth provision envisages a state legislation provision, which removes or disregards the conviction altogether. Their common purpose might be said to be rehabilitation, but they arise in different ways, and from a different circumstance. In my view, the Commonwealth provision is not referring to a provision such as the non-recording provision in s 12(3) of the *Penalties and Sentences Act* (Qld). The Commonwealth provision does not operate on that provision in the way contended for.

1. Section 12 of the*Penalties and Sentences Act* provides:

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

(a) the nature of the offence; and

(b) the offender’s character and age; and

(c) the impact that recording a conviction will have on the offender’s —

(i) economic or social wellbeing; or

(ii) chances of finding employment.

(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;

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

(i)   in the records of the court before which the offender was convicted; and

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

(Emphasis added)

1. The *Youth Justice Act* provides, relevantly:

**183 Recording of a conviction**

(1) Other than under this section, a conviction is not to be recorded against a child who is found guilty of an offence.

…

**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 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 this or another Act, ***a finding of guilt*** without the recording of a conviction is not taken to be a conviction for any purpose.

(Emphasis added)

1. The primary judge held that the language of s 12(3) of the *Penalties and Sentences Act* was not relevantly distinguishable from the language of s 184(2) of the *Youth Justice Act*, the difference being ‘merely that “conviction” in s 12(3) of the *Penalties and Sentences Act* is separately defined, whereas s 184(2) of the *Youth Justice Act* is drafted to incorporate a similar definition’ (**Reasons** at [31]). His Honour concluded:

31 … Like s 12(3) of the Penalties and Sentences Act, s 184(2) of the Youth Justice Act does not deem a person “never to have been convicted of an offence”. Accordingly, s 85ZR(2) has no application.

32 It follows that s 12(3) of the Penalties and Sentences Act, s 184(2) of the Youth Justice Act and s 85ZR(2) of the Crimes Act do not prohibit the Minister from taking into account a finding of guilt, or acceptance of a plea of guilty, and the facts and circumstances of the offence. To the extent that the Minister considered such matters in the exercise of his powers under s 501CA(4) of the Act, the Minister did not take an irrelevant consideration into account.

1. The question before the primary judge and before this Court concerns a matter of statutory construction. The applicable principles, which require consideration of the text, context and purpose, are well established: see, in particular, *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at [39]; *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; 248 CLR 378 at [25]-[26]; and *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14]. More recently, in *R v A2* [2019] HCA 35; 269 CLR 597, the High Court has reiterated, at [33] per Kiefel CJ and Keane J (with whose reasons Nettle and Gordon JJ agreed) that:

Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. “Mischief” is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.

(Footnotes omitted)

1. Drawing on the surrounding statutory provisions of both the *Youth Justice Act* and the *Crimes Act,* the mischief to which they were directed, and their relevance to the *Migration Act*, provides the necessary context for the proper construction of s 184(2) of the *Youth Justice Act*.
2. Both Mr Thornton and the Minister concentrated their submissions primarily on the textual differences between the relevant statutory provisions and did not develop in any depth their submissions with respect to the context or purpose of s 184(2) of the *Youth Justice Act*.
3. Mr Thornton contends that the text and context of the *Youth Justice Act* indicate that, unlike the position for adult offenders, it was the intention of the Queensland Parliament that child offenders should, as a rule, be treated as if they have never been convicted of an offence. He points to the adoption of the term ‘finding of guilt’ instead of ‘conviction’ in the *Youth Justice Act*, and the use of the indefinite article in s 184(2), ‘a finding of guilt without the recording of a conviction’, as evincing an intention not to treat a finding of guilt against a child as a conviction unless, exceptionally, the conviction is recorded. A further matter tending to support the conclusion that s 184(2) *Youth Justice Act* was intended to operate differently from s 12(3) of the *Penalties and Sentences Act* is that s 184(1) and s 12(2) (the factors to be taken into account when considering whether to record a conviction) are in virtually identical language. Inferentially, a deliberate decision was taken to use the phrase ‘a finding of guilt without recording a conviction’ in s 184(2) rather than ‘a conviction without recording the conviction’ in s 12(3). It is to be inferred that, in using different language, Parliament intended the language to bear a different meaning particularly in circumstances where both statutes were passed in the same parliamentary term.
4. Further, Mr Thornton points to the contextual fact that while the *Penalties and Sentences Act* provides specifically for a ‘conviction without recording the conviction’ to be entered in the record for certain purposes (s 12(3)(b)), the *Youth Justice Act* restricts any finding of guilt to the child’s criminal history as it is relevant to subsequent sentencing *as a child* but otherwise contains no similar authorisation to record, or use, a ‘finding of guilt’ for any purpose other than to ‘stop’ a subsequent proceeding against the child for the same offence (s 184(3)).
5. Section 148 of the *Youth Justice Act* is said to provide yet further context by providing that if no conviction is recorded, a finding of guilt against a child must not be admitted in subsequent proceedings against an adult for an offence. The effect of this section is to remove the fact of a finding of guilt as a child from being admissible in proceedings once that child reaches adulthood. This contrasts with the effect of the *Penalties and Sentences Act* where the fact of the exercise of the discretion not to record a conviction is admissible in any future sentencing proceedings. The Queensland Court of Appeal has recently reiterated, in *R v* ***MDD***[2021] QCA 235 at [21] per McMurdo JA with Fraser JA agreeing, that the exercise of the discretion as to whether a conviction should be recorded under the *Youth Justice Act*,

… involves a different weighing of considerations from those applying to adult offenders under the *Penalties and Sentences Act 1992* (Qld). Unlike the decision for adult offenders, s 183 proceeds from the primary position that a conviction is not to be recorded.

(Footnotes omitted)

1. As Dowsett J observed in *R v Briese; Ex parte Attorney-General (Qld)* [1997] QCA 10; [1998] 1 Qd R 487 at 496, the purpose of recording a conviction is not stated in the *Penalties and Sentences Act*. He observed that a decision not to record a conviction will seriously limit public access to information in which the public might have a legitimate interest in knowing that a person has been convicted of a certain offence and that ‘generally speaking, the more serious the offence, the greater the legitimate public interest’ in knowing of that offence (at 498). Similarly, no purpose of recording a conviction is stated in the *Youth Justice Act*. The Court of Appeal in *MDD* accepted that the power to order a conviction for a child offender requires a consideration of the same competing interests to which Dowsett J referred, adding that (*MDD* at [24] per McMurdo JA),

… in the case of child offender, greater weight is given to the interests of the offender. As I said in *R v SCU*, by several provisions of the *Youth Justice Act*, the consideration of rehabilitation will be given a priority which it will not always have for an adult offender.

(Footnotes omitted)

1. The different considerations encompassed by the *Penalties and Sentences Act* on the one hand and the *Youth Justice Act* on the other are also reflected in the respective Purposes (s 3) and Objectives (s 2) provisions of the Acts. The former is concerned, *inter alia*, with ‘providing for a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders, and, in appropriate circumstances, ensuring that protection of the Queensland community is a paramount consideration’. The latter is concerned, *inter alia*, with establishing the basis for administration of juvenile justice and ensuring that children are dealt with according to the principles established under the *Youth Justice Act*.
2. Those principles, contained in Schedule 1, emphasise the child-centric approach to juvenile justice and, in particular, include the principles that a child should be dealt with ‘in a way that allows the child to be reintegrated into the community’ and ‘to continue the child’s education training or employment without interruption or disturbance, if practicable’. Being a beneficial provision, it is one that is to be interpreted liberally to take account of and give effect to the purposes of the legislation, particularly as it is a provision directed at protecting the rights of a child. Any ambiguity is to be construed beneficially so as to give the fullest relief which the fair meaning of the language will allow: *Bull v Attorney-General (NSW)* [1913] FCA 60; 17 CLR 370 at 384 per Isaacs J.
3. Section 14A(1) of the *Acts Interpretation Act 1954* (Qld) stipulates that, in interpreting a provision of an Act, “the interpretation that will best achieve the purpose of the Act is to be preferred to any other purpose”: cf. *Acts Interpretation Act 1901* (Cth), s 15AA, which is in substantially the same terms.
4. The relevant provisions of the *Crimes Act* are found in Part VIIC—Pardons, quashed convictions and spent convictions. Section 85ZR deals with pardons for persons wrongly convicted and provides that:

**Division 2 – Pardons for persons wrongly convicted and quashed convictions**

**85ZR Pardons for persons wrongly convicted**

…

(2)  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.

…

1. Mr Thornton submits that the true construction of the combined effect of ss 148 and 184 of the *Youth Justice Act* is that it is state legislation that operates in the way contemplated by s 85ZR(2) of the *Crimes Act.* Mr Thornton’s submission must be accepted. It is tolerably clear that the *Penalties and Sentences Act* and the *Youth Justice Act* are directed at addressing different mischiefs. A construction of s 184(2) of the *Youth Justice Act* that removes or disregards a finding of guilt against a child in circumstances where a conviction has not been recorded is consistent with the mischief sought to be addressed by that Act.
2. It is also consistent with the ‘particular’ purpose referred to in s 85ZR(2) being that a finding of guilt on the part of a child is only to be taken as a conviction as provided for by the *Youth Justice Act* or some other Act. The Court has not been taken to any other Act which provides for such a finding of guilt to be taken into account in the context of a decision under s 501(CA)(4) of the *Migration Act*.
3. Although the term ‘pardon’ seems inapposite in the present context, s 184(2) of the *Youth Justice Act* is nevertheless an example of the type of state legislative provision expressly provided for in s 85ZR(2) as one ‘which removes or disregards the conviction altogether’, as was said by Kiefel J in *Hartwig* at [11], the effect of which ‘as to take away the fact of the conviction, as a pardon might do’ (*Hartwig* at [8]). Thus, the effect of s 85ZR(2) is that Mr Thornton is taken never to have been found guilty of any offence committed as a child and to prohibit the Minister from taking into account a conviction of a child where there has been an order that no conviction be recorded.
4. Before the primary judge, the Minister accepted in oral argument that he had taken into account findings of guilt in respect of offences where a court had ordered that no conviction be recorded (Reasons at [20]). The fact of the six findings of guilt against Mr Thornton when he was a child was an irrelevant consideration: *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40. It was an error to take those findings of guilt into account. The Minister conceded that, subject to the question of materiality, any such error would be jurisdictional.
5. The primary judge ought to have found that the Minister erred in taking into account Mr Thornton’s criminal history as a juvenile.

### Was the error material?

1. In his representations to the Minister, Mr Thornton did not dispute the information in the National Police Certificate dated 23 May 2018. That certificate included the six offences for which no conviction was recorded when he was aged 16 and 17 and detailed offences of going armed to cause fear, and serious assaults on police. There is no suggestion on the material that the Minister’s attention was drawn to s 85ZR(2) of the *Crimes Act*. Subsequent to reaching his majority in September of 2014, Mr Thornton was dealt with for two drug offences committed before he turned 18 and again no conviction was recorded.
2. Between January 2015 and February 2018, Mr Thornton had convictions recorded for approximately 23 offences including various drug offences, contraventions of domestic violence orders, assaulting police, and ultimately, the assault occasioning bodily harm (domestic violence offence) for which he received a two-year period of imprisonment.
3. Mr Thornton bears the onus of establishing that, had the error not been made, it could realistically have resulted in a different decision by the Minister, as stated by the High Court in *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590 at [60] per Kiefel CJ, Gageler, Keane and Gleeson JJ.
4. In considering the nature and seriousness of Mr Thornton’s criminal conduct, the Minister made particular note of his juvenile offences at [28]:

28. I note the MR THORNTON has a history of mainly drug-related and violent offences since he was 16 years old. Between 2012 and 2014 he appeared in juvenile courts three times and adult courts twice, for assaults of police and some other offences, without any convictions being recorded, though he was fined and placed on probation.

1. The Minister at [30] referred to the sentencing remarks of the Magistrate who noted that Mr Thornton had been on bail from earlier domestic violence offences when he assaulted his 19-year old victim, breaking her nose. The Magistrate had called the offence ‘pretty awful’ and referred to domestic violence as ‘an insidious, prevalent and serious problem in our society’ (Minister’s reasons at [30]).
2. The Minister next referred Mr Thornton’s repeated commission of ‘offences of or related to domestic violence, and other assault offences’ which ‘adds more gravity to his offending’ (Minister’s reasons at [31]). From the information contained in the National Police Certificate, it would seem that the reference to the ‘other assault offences’ was largely informed by the several quite serious assaults committed by Mr Thornton as a child.
3. In his summation, the Minister said:

49. …in considering whether I was satisfied that there is another reason why the original decision should be revoked, I gave significant weight to the serious nature of the crimes committed by Mr THORNTON, that are of a violent nature.

50. Further, I find that the Australian community could be exposed to harm should Mr THORNTON reoffend in a similar fashion. I could not rule out the possibility of further offending by Mr THORNTON.

51. I am cognisant that where harm could be inflicted on the Australian community even other strong countervailing considerations may be insufficient for me to revoke the original decision to cancel the visa, even applying a higher tolerance of criminal conduct by Mr THORNTON, than I otherwise would, because he has lived in Australia for most of his life.

52. In reaching my decision about whether I am satisfied that there is another reason why the original decision should be revoked, I concluded that Mr THORNTON represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed any other consideration as described above. These include his lengthy residence and bonds, employment and familial [ties] to Australia, and the hardship Mr THORNTON, his family and social networks will endure in the event the original decision is not revoked.

1. In my view, there is a realistic possibility that, had the Minister’s reasoning not been tainted by Mr Thornton’s criminal history as a child, a different decision could have been made by the Minister.
2. Ground 1 is upheld.

## Grounds 2, 3, and 4

1. In light of the conclusion that I have reached in relation to Ground 1, it is strictly unnecessary to consider the further grounds of appeal. They can, however, be dealt with briefly. Mr Thornton invited the Court to deal with Grounds 2, 3, and 4 together. He submitted that the same considerations that underpinned Grounds 2 and 3 were relevant to Ground 4.
2. The primary judge found, correctly with respect, that the Minister had not failed to take into account that a consequence of the decision would be to prevent the sentence being imposed on Mr Thornton from being executed or carried out to its completion, nor had the Minister failed to consider substantial or significant and clearly articulated claims by Mr Thornton relating to the effect of his parole and probation requirements. Both claims, although significant to Mr Thornton’s position, were not extensive.
3. As was observed by the primary judge, the Minister referred expressly to the period of probation in [32] of his reasons and, at [40]–[41], to the intent of the three-year parole order. Contrary to Mr Thornton’s submissions, the Minister did grapple with the fact that Mr Thornton would not be unconditionally released into the community and that the orders had been crafted with the intention of facilitating Mr Thornton’s rehabilitation. The Minister referred specifically to Mr Thornton’s requirement to report to a parole officer for three years with regular drug testing, and his psychologist’s assessment that ‘if Mr Thornton can abide to the parole condition…his risk of re-offending will be reduced’. The Minister discussed the relative difference between avoiding drugs and alcohol within a prison environment as compared with the true risk of recidivism in the community. He also observed that Mr Thornton’s claimed protective factors of employment and family support and been in existence in the past but had not prevented his offending. In light of his consideration of all these matters, the Minister found that Mr Thornton’s risk of reoffending was lower than it was at the time of his most recent offending, but there was still an ongoing risk that Mr Thornton will reoffend and that it could result in physical and psychological harm to members of the Australian community. By contrasting the progress Mr Thornton had made while in a custodial environment with the pressures of being in the community, the Minister did not limit his consideration of rehabilitation to in-prison rehabilitation, contrary to Mr Thornton’s submissions. No error on the part of the Minister has been established in this respect.
4. Mr Thornton contends further that the primary judge ought to have found that, while the Minister considered his subjective intention to rehabilitate himself, the Minister’s evaluation of risk was flawed by a failure to objectively consider the rehabilitative effect of the completion of the sentence imposed by the Magistrates Court of Queensland and so was legally unreasonable.
5. As was held by the primary judge, this contention cannot be sustained. At [35]–[41] of his reasons, the Minister considered Mr Thornton’s representations as to why he would not reoffend if released into the community after serving his period of imprisonment. In particular, the Minister referred to Mr Thornton’s representations that, while on bail, he lived with his family, was employed, did not use drugs or alcohol, and ‘totally turned his life around’; he has sought professional assistance; his rehabilitative efforts will be supported by his family and monitored by parole officers; he will attend a domestic violence perpetrators program and report to a parole officer for three years with regular drug tests.
6. Nevertheless, as was within the Minister’s scope of decisional freedom, he concluded that there remained an ongoing risk that Mr Thornton will reoffend, noting that avoiding alcohol and drugs was easier in a custodial environment and that the protective factors of employment and family support had not prevented Mr Thornton’s previous offending. As the primary judge held at [58], this conclusion ‘was logically and reasonably available, given his history of drug and alcohol addiction and his criminal record’. The Minister found expressly that the ongoing risk was lower than it was at the time of his most recent offending and that finding followed logically from the Minister’s consideration of the rehabilitative measures encompassed by his periods of parole and probation. Mr Thornton cannot demonstrate that there was no evident and intelligible justification for the decision.
7. No error on the part of the Minister having been established, Grounds 2, 3, and 4 cannot succeed.

## Disposition

1. For these reasons, the appeal must be allowed.

**KATZMANN J:**

1. I agree.

**BANKS-SMITH J:**

1. I also agree.

**KATZMANN J:**

1. The orders of the Court will be:
2. The appeal be allowed.
3. The respondent pay the appellant’s costs.
4. The orders of the primary judge made on 19 October 2020 be set aside and in their place it be ordered that:
	1. A writ of certiorari issue directed to the respondent quashing his decision of 26 April 2019;
	2. A writ of mandamus issue directed to the respondent requiring him to determine the applicant’s application according to law;
	3. The respondent pay the applicant’s costs.

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| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Katzmann, SC Derrington and Banks-Smith. |

Associate:

Dated: 25 February 2022