Federal Court of Australia

Nuon v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 197

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| Appeal from: | *Nuon v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 653 |
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| File number(s): |  |
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| Judgment of: | **LOGAN, O’CALLAGHAN AND BANKS‑SMITH JJ** |
|  |  |
| Date of judgment: | 13 December 2022 |
|  |  |
| Catchwords: | **MIGRATION** – where primary judge refused application for judicial review in original jurisdiction in relation to Minister’s non‑revocation decision under s 501C(4) of the Migration Act 1958 (Cth) – where appellant determined to not pass character test on the ground of being “sentenced to term of imprisonment for 12 months or more” under s 501(7)(c) on basis of detention in Youth Justice Centre while a minor – consideration of detention ordered under Children, Youth and Families Act 2005 (Vic) – where primary judge found that sentence of detention was “imprisonment” within the meaning of s 501 of the Migration Act 1958 (Cth) and dismissed the application – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 501, 501(2), 501(3), 501(6), 501(6)(a), 501(7), 501(7)(c), 501(8), 501(9), 501(12), 501C, 501C(4)  *Children, Youth and Families Act 2005* (Vic) ss 362, 412  *Children and Young Persons Act 1989* (Vic) (repealed) s 139  *Sentencing Act 1991* (Vic) s 5(1) |
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| Cases cited: | *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113  *CNK v The Queen* (2011) 32 VR 641  *Green v The Queen* [2011] VSCA 311  *RAC v The Queen* [2011] VSCA 294  *Veen v The Queen (No 2)* (1988) 164 CLR 465  *Webster (a Pseudonym) v The Queen* [2016] VSCA 66; (2016) 258 A Crim R 301 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 51 |
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| Date of hearing: | 17 November 2022 |
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| Counsel for the Appellant: | Mr N Wood SC with Mr JR Murphy |
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| Solicitor for the Appellant: | Victoria Legal Aid |
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| Counsel for the Respondent: | Mr R Knowles KC with Mr AF Solomon‑Bridge |
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| Solicitor for the Respondent: | Sparke Helmore Lawyers |

ORDERS

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|  | | VID 355 of 2022 |
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| BETWEEN: | SOMBEAU NUON  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  Respondent | |

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| order made by: | LOGAN, O’CALLAGHAN AND BANKS‑SMITH JJ |
| DATE OF ORDER: | 13 DECEMBER 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs, to be agreed or assessed.

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

REASONS FOR JUDGMENT

THE COURT:

# Introduction

1. The appellant is a citizen of Cambodia. He arrived with his mother in Australia in May 2015 when he was 14 years old, as the holder of a “Class WA Subclass 010 Bridging A visa”.
2. Within a little over two years, he had committed a string of crimes, including aggravated carjacking causing injury to a person, making a threat to kill, contraventions of a family violence intervention order, sexual assault of his mother, and assault of a police officer and emergency worker.
3. On 24 August 2018 he was convicted in the Children’s Court of Victoria of two charges of assault by kicking, possession of a controlled weapon without excuse, two charges of intentionally causing injury, two charges of robbery, affray, attempted robbery, committing an indictable offence while on bail, and unlawful assault. As the primary judge put it:

The offences related to unprovoked attacks and robberies on tourists who had attended the Australian Open tennis championship. One of the victims was put in an induced coma and ultimately required six plates to be inserted to connect the right side of his face to his skull, as well as two titanium plates in the left side.

1. For those offences, the appellant was convicted and ordered to be detained in a Youth Justice Centre for a period of 18 months (as an aggregate sentence).
2. On 22 April 2020, the Minister for Home Affairs cancelled the appellant’s visa under s 501(2) of the *Migration Act 1958* (Cth) (the **Act**).
3. That cancellation decision was subsequently quashed by consent.
4. On 22 March 2021, the Minister for Home Affairs cancelled the appellant’s visa under s 501(3) of the Act on the basis that he did not pass the character test – by the operation of s 501(6)(a) of the Act owing to his “substantial criminal record” – and that the cancellation was in the “national interest”.
5. The appellant was then invited to make representations about possible revocation of the visa cancellation decision, which he did.
6. On 6 July 2021, the respondent (the **Minister**) decided not to revoke the visa cancellation and gave reasons for that decision, in which he referred to the 2018 sentence with respect to the attacks and robberies at the Australian Open, and concluded:

I have read Mr NUON’s submissions in full. While I acknowledge these representations, I am not satisfied that Mr NUON passes the character test at s 501(6)(a) as defined by s 501(7)(c) as he has been sentenced to a term of imprisonment of 12 months or more, when he was ordered to be detained in a Youth Justice Centre for 18 months.

…

… I find no reason to depart from Minister Dutton’s previous finding [i.e. in the cancellation decision] against the character test in Mr NUON’s case, having regard to the court outcome of 24 August 2018. Mr NUON has not satisfied me that he passes the character test (as defined by section 501, with particular reference to s 501(6)(a)).

As Mr NUON has not satisfied me that he passes the character test, the power under s 501C(4) of the Act to revoke the original decision under s 501(3) of the Act is not enlivened and the original decision to cancel his Class WA Subclass 010 Bridging A visa stands.

1. On 22 July 2021, the appellant applied for judicial review of the non‑revocation decision, and on 12 August 2021, he applied for an extension of time in which to seek judicial review of the cancellation decision.
2. The primary judge dismissed both applications. See *Nuon v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 653.
3. The appellant appealed against the primary judge’s decision to dismiss the application for judicial review on a single ground, being ground 2 below, namely:

The primary judge erred in failing to find that the Minister erred in not being satisfied that the Appellant passed the character test (as defined by section 501) for the purposes of s 501C(4)(b) of the *Migration Act 1958* (Cth) (**Act**).

1. The particulars of that ground were as follows:

i. The Minister was not satisfied that the Appellant passed the character test (as defined in s 501(6)) because the Appellant purportedly had a substantial criminal record (as defined in s 501(7)) with reference to s 501(7)(c), because the Appellant purportedly had been sentenced to a term of imprisonment of 12 months or more.

ii. The basis for the Minister not being satisfied that the Appellant passed the character test was that on 24 August 2018, the Appellant was convicted in the Children’s Court of Victoria and ordered to be detained in a Youth Justice Centre for 18 months.

iii. The order of the Children’s Court of Victoria made on 24 August 2018 was made under s 412 of the *Children, Youth and Families Act 2005* (Vic).

iv. That order was not a sentence to ‘a term of imprisonment’ within the meaning of s 501(7)(c) of the Act, because ‘imprisonment’ is defined in s 501(12) to include, albeit effectively exhaustively, ‘any form of punitive detention in a facility or institution’ and the order of 24 August 2018 was not an order for punitive detention.

# The reasons of the primary judge

1. The primary judge commenced by setting out the relevant sections of the Act.
2. Section 501(6)(a) of the Act relevantly provides that “a person does not pass the character test if … the person has a substantial criminal record (as defined in subsection (7))”.
3. Section 501(7)(c) relevantly provides that “a person has a substantial criminal record if … the person has been sentenced to a term of imprisonment for 12 months or more”. Sub‑section 501(12) relevantly provides that “imprisonment includes any form of punitive detention in a facility or institution” and that “sentence includes any form of determination of the punishment for an offence”.
4. At the hearing of the appeal, the appellant also made reference to ss 501(8) and (9), so it is convenient to set them out here:

**Periodic detention**

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person’s term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

**Residential schemes or programs**

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

1. The appellant’s argument below, and on appeal, centred on s 362 of the *Children, Youth and Families Act 2005* (Vic) (the **CYFA**) as it existed at 24 August 2018.
2. Section 412 of the CYFA empowered a court to “order that the child be detained in a youth justice centre”. Section 362 in turn provided:

**Matters to be taken into account**

(1) In determining which sentence to impose on a child, the Court must, as far as practicable, have regard to—

(a) the need to strengthen and preserve the relationship between the child and the child’s family; and

(b) the desirability of allowing the child to live at home; and

(c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and

(d) the need to minimise the stigma to the child resulting from a court determination; and

(e) the suitability of the sentence to the child; and

(f) if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law; and

(g) the need to protect the community, or any person, from the violent or other wrongful acts of the child—

(i) in all cases where the sentence is for a Category A serious youth offence or a Category B serious youth offence; or

(ii) in any other case—if it is appropriate to do so.

(h) if appropriate, the need to deter the child from committing offences in remand centres, youth residential centres or youth justice centres.

1. The primary judge summarised the appellant’s case with respect to s 362 as follows:

63 The Applicant submitted that it is important that s 362 refers to some of the traditional purposes of punishment (such as specific deterrence, community protection and, implicitly, rehabilitation) but does *not* include any reference to punishment, which is to be contrasted with s 5(1)(a) of the *Sentencing Act 1991* (Vic) (the ‘Sentencing Act’), which is headed ‘Sentencing guidelines’ and provides as one of its purposes for which sentences may be imposed: “to punish the offender to an extent and in a manner which is just in all of the circumstances”.

64 It was submitted that judicial authority confirms that the Victorian adult and youth sentencing regimes are “strikingly different”: see *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 (‘*CNK*’) at [80] (the Court) and *Poutai v The Queen* [2011] VSCA 382 (‘*Poutai*’) at [21] (the Court). Just as general deterrence has been said to be “entirely foreign” to the sentencing of youths under the CYFA: see *Poutai* at [26], “denunciation” has been held to have no place: see *R v AM* [2021] VSC 397, [40] (Tinney J). Most relevantly for present purposes, the Applicant submitted that “the statutory framework for juvenile justice compels the court sentencing a young offender (almost always the Children’s Court) to adopt the offender‑centred (or ‘welfare’) approach, rather than the ‘justice’ or ‘punishment’ approach’: see *Webster (a Pseudonym) v The Queen* [2016] VSCA 66; (2016) 258 A Crim R 301, [28] (Maxwell P and Redlich JA).

65 The Applicant submitted that s 362 operates as a code insofar as it does not leave open the consideration of otherwise “established sentencing principles”: *RAC v The Queen* [2011] VSCA 294, [7]–[10] (Harper JA, Nettle JA agreeing). I interpolate here that their Honours did not in fact make such a broad statement, instead only confirming the Court’s ruling in *CNK* that s 362 of the CYFA precluded any consideration of general deterrence in relation to youthful offenders. The reasons of the Court in *CNK* at [6]‑[16], do not preclude the characterisation of a sentence against a child under the CYFA as “punitive” or a “punishment”. Indeed, the extrinsic materials referred to by the Court at [18] of its reasons (a report in response to which the precursor of the CYFA was said to be enacted in 1989) indicates that the concept of “punishment” remains central to the sentencing of young offenders, and that the matters at s 362 are mandatory additional principles for sentencing juveniles, over and above the other “universal principles of justice” set out in that report.

1. The primary judge held that the phrase “sentenced to a term of imprisonment” under s 501(7)(c) of the Act included the form of detention to which the appellant was sentenced while a minor.
2. His Honour so held for reasons that included the following:

69 First, the definition of “imprisonment” at s 501(12) is not an exhaustive definition, to which issue I will return. Further, even assuming that the sentence imposed on the Applicant must be “punitive” in nature to be “imprisonment” as defined in the Act, in my opinion the Applicant was clearly subject to “imprisonment” in the nature of “punitive detention”.

70 As defined in the Short[er] Oxford English Dictionary, the term “imprison” means “to detain in custody; to confine”, and the term “punitive” means “awarding, inflicting, or involving punishment”. The term “punish” means “**1a** To cause (an offender) to suffer for an offence; to subject to judicial chastisement as retribution or requital, or as a caution against further transgression; to inflict a penalty on. **b** To inflict a penalty for (something).” It can be seen that the definitions 1a and 1b of “punish” have a different emphasis, even though both refer to inflicting a penalty. Definition 1b refers to almost an objective or neutral concept of punishment that would seem to include almost any penalty or sentence imposed as a consequence of a finding of guilt for a criminal offence. Definition 1a connotes a stronger punitive purpose underlying the sentence. In my view, having regard to the following reasons, the definition which directs attention to inflicting a penalty on or for something at both 1a and 1b more relevantly informs the meaning of “punitive detention” within the definition of “imprisonment” at s 501(12) of the Act.

71 Therefore, I do not accept as a matter of general understanding that the detention of juvenile offenders in Victoria can involve no element of punishment whatever. As observed by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, subject to some limited exceptions not applicable here, the “involuntary detention of a citizen in custody by the State is penal or punitive in character and … exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt”. The emphasis of their Honours was detention following upon a judicial determination. Not all detention is “punitive detention” under the Act.

72 While I accept that the object of rehabilitation is a “primary consideration” when sentencing juvenile offenders (see *CNK* at [76]), that does not mean that the sentence is not itself punishment (in the broad sense indicated by the “1b” definition referred to above) for the crime for which there has been a finding of guilt.

73 Returning to the issue of the nature of the definition of “imprisonment” under the Act, there has been a great deal of discussion in the cases concerning the use of the word “includes” in a definition provision: see generally Pearce, *Statutory Interpretation in Australia* (9th ed, LexisNexis Butterworths, 2019) pp 265‑270 and Herzfeld and Prince, *Interpretation* (2nd ed, Lawbook Co., 2020) pp 478‑9.

74 In my view, the use of the word “includes” in the definition of “imprisonment” is to remove doubt that certain things fall within the meaning of imprisonment: see for example the approach in *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201, at 206‑7 (per Mason ACJ, Wilson, Deane and Dawson JJ). It includes, but does not require, the detention to be punitive, provided that the detention answers the general description of “imprisonment”. Nevertheless, it must be noted that the function of the concept of “imprisonment” in the statutory context of s 501 is as part of the indicia of a person having a “substantial criminal record” for the purposes of the character test, as a part of the phrase “sentenced to a term of an imprisonment”. Accordingly, the concept of “imprisonment” should be read in that context as imprisonment as an incident of the adjudication of criminal guilt.

75 Detention in a Youth Justice Centre as a sentence upon the adjudication of a child’s criminal guilt, whatever the precise purpose of the sentence passed, fits within that concept of “imprisonment”. As pointed out by the Minister, even the Victorian Court of Appeal has from time to time used the word “imprisonment” to refer to detention in a Youth Justice Centre: see *R v O’Blein* [2009] VSCA 159 at [34]; *Director of Public Prosecutions (Vic) v Borg* (2016) 258 A Crim R; [2016] VSCA 53 at [82]; *DPP v Hodgson* [2019] VSCA 49 at [29]; *Ward v The Queen* [2018] VSCA 80; (2018) 55 VR 307 at [117].

76 The use of “facility or institution” in the inclusive definition evidences the breadth of the meaning of “imprisonment” in s 501. Such a phrase would comprise juvenile correctional facilities. The phrase “any form of punitive detention” is similarly wide. In addition, it ought to be noted that s 501(9) essentially deems an imprisonment where a person is convicted of an offence and the court orders the person to participate in a “residential drug rehabilitation scheme” or a “residential program for the mentally ill”. Such schemes or programs might not ordinarily be considered to be substantially punitive, but are taken to be a form of imprisonment for the purposes of s 501. However, while subsection (9) extends the meaning of “imprisonment” to include those schemes and programs, in my view it does not otherwise change or extend the essential meaning of “imprisonment” for the purposes of s 501.

1. His Honour next turned to consider the nature of detention in a Youth Justice Centre ordered under the CYFA and the specific order to detain the appellant (namely, his convictions and the order that he be detained in a Youth Justice Centre for a period of 18 months, as an aggregate sentence imposed as a consequence of those convictions).
2. The following description (at [79]) of the specific features of the CYFA relevant in this case was not criticised by the appellant’s counsel:

(a) Chapter 5 of the CYFA is titled “Children and the criminal law”. That Chapter provides for the minimum age of criminal responsibility of children, the commencement of criminal proceedings against children, the procedures and standard of proof for such proceedings, and sentences which may be imposed by the Children’s Court of Victoria upon a determination of criminal guilt, among other things.

(b) The CYFA provides for alternative mechanisms of dealing with a child accused in a criminal proceeding. For example, s 349 provides for referral of the matter to the Secretary of the relevant Department for investigation where grounds exist for the making of a protection application or a therapeutic treatment order in respect of the child. Division 3A of Part 5.2 also provides for diversion programs. When considering any type of diversion program to be ordered, s 356G(1)(a) provides that “the diversion program should not be more punitive than the sentence that would have been imposed had the child been found guilty”.

(c) Part 5.3 of the CYFA deals with sentences where a child is found guilty of an offence. Section 360 provides for a range of sentences, some of which may be imposed with or without conviction, and some which may only be imposed with a conviction. The s 360 orders are listed in hierarchical order (which I would describe as being from least punitive to most punitive, in the purposive sense), and s 361 requires the Court to consider the appropriateness of imposing any sentence in the order of that hierarchy. The last sentence enumerated at s 360(1)(j) is to “convict the child and order that the child be detained in a youth justice centre under section 412” (a ‘youth justice centre order’). A “youth justice centre” is a form of “corrective service” defined as being “for the care and welfare of persons ordered to be detained … under this Act”: s 478(c)

(d) Section 362, as extracted earlier in these reasons, provides for the matters to be taken into account by the Children’s Court in determining which sentence to impose on the child. Many of these matters are related to the wellbeing of the child, for example, paragraphs (1)(a)‑(e). Paragraph (f) is arguably directed to a more punitive consideration: “if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law.”

(e) Section 362A provides for sentencing discounts for guilty pleas and s 362B provides for aggregate sentencing of detention. Section 475(3) also provides for the serving of concurrent sentences where a child is subject to a “sentence of detention” and a “sentence of imprisonment”. In my view, each are indicative of the punitive nature of a youth justice centre order, that is, the clear nature of such an order as a punishment as a consequence of an adjudication of criminal guilt.

(f) I do note that the CYFA generally distinguishes a “sentence of detention” from a “sentence of imprisonment” (eg s 475). Section 525(2) also refers to offences “punishable, in the case of an adult, by imprisonment”. In my view, this choice of language is necessary as a matter of clarity to distinguish between a sentence of detention under the CYFA and imprisonment in a prison.

(g) The CYFA also generally does not refer to “punishment” or other derivative forms of that word in referring to sentences imposed on a child, although there are two exceptions. First, s 528(3) concerns the Children’s Court’s powers in “punishing” a child for contempt of court by committing the child to a youth justice centre. Second, the definition of “young offender” within Schedule 2 relating to the interstate transfer of young offenders seemingly equates young offenders in Victoria who have been subject to an order under s 360(1)(f)‑(j) (which includes a youth justice centre order) and young offenders in another State who have been “dealt with under a law which applies in that State which relates to the welfare or *punishment* of such a person” (emphasis added).

1. Having set out those specific features of the CYFA, his Honour concluded:

80 In my view, although the CYFA may consistently distinguish between a child’s detention and imprisonment, whether as a matter of clarity or by a deliberate effort to avoid stigmatising further a child’s detention, and generally avoids use of the word “punishment”, it does not overturn the clear conclusion that a youth justice centre order is substantively a form of punitive detention as a consequence of a finding of criminal guilt and is therefore a sentence of “imprisonment” within the meaning of s 501 of the Act.

81 Having regard to all of the matters referred to above, I do not consider that the Minister erred in applying s 501(7)(c) to the Applicant.

1. In summary, his Honour reasoned as follows:
2. The definition of “imprisonment” in s 501(12) is not exhaustive.
3. But even assuming that the sentence imposed on the appellant must have been “punitive” in nature to be “imprisonment”, he was clearly subject to “imprisonment” in the nature of “punitive detention” because:
   1. “Imprison” means “to detain in custody; to confine”.
   2. “Punitive” means “awarding, inflicting, or involving punishment”.
   3. “Punish” means “**1a** [t]o cause (an offender) to suffer for an offence; to subject to judicial chastisement as retribution or requital, or as a caution against further transgression; to inflict a penalty on. **b** To inflict a penalty for (something)”.
   4. The definition which directs attention to inflicting a penalty on or for something at both 1a and 1b more relevantly informs the meaning of “punitive detention” within the definition of “imprisonment” at s 501(12) of the Act.
4. Therefore, the proposition that “the detention of juvenile offenders in Victoria can involve no element of punishment whatever” is wrong.
5. But in any event, because the definition of “imprisonment” in the Act is inclusive only, it thus includes, but does not require, the detention to be punitive, provided that the detention answers the general description of “imprisonment” as an incident of the adjudication of criminal guilt.
6. Detention in a Youth Justice Centre as a sentence upon the adjudication of a child’s criminal guilt, whatever the precise purpose of the sentence passed, fits within that concept of “imprisonment”.
7. Nothing in the CYFA suggests otherwise.

# The appellant’s submissions

1. The appellant submitted that detention in a Youth Justice Centre is not a form of punitive detention; not being punitive, such detention cannot fall within the meaning of “imprisonment” in s 501 of the Act because that term is exhausted by forms of punitive detention; and that the Minister thus misunderstood that concept and thus his state of non‑satisfaction was affected by jurisdictional error.
2. The submission in support of those propositions was put this way.
3. Section 362 of the CYFA (set out at [19] above) “refers to some of the traditional purposes of criminal sentencing, including specific deterrence, community protection and, implicitly, rehabilitation. However, there is no reference to other traditional purposes, such as general deterrence, denunciation or, most relevantly, punishment”. It was submitted that such “omissions cannot be thought to be accidental when regard is had to the regime Parliament established for the sentencing of adult offenders (and those children not sentenced under the CYFA)”, namely s 5(1) of the *Sentencing Act 1991* (Vic), which provides:

**Sentencing guidelines**

The only purposes for which sentences may be imposed are—

(a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or

(b) to deter the offender or other persons from committing offences of the same or a similar character; or

(c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or

(d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or

(e) to protect the community from the offender; or

(f) a combination of two or more of those purposes.

1. It was next said that because the cases, including *RAC v The Queen* [2011] VSCA 294, have held that “general deterrence has been said to be ‘entirely foreign’ to the sentencing of youths under the CYFA and ‘denunciation’ has been held to have no place”, then “[o]n that logic, the same must also be true of punishment, which was also deliberately omitted from the exhaustive list of sentencing considerations in s 362”.
2. The appellant also relied on the joint judgment of Maxwell P and Redlich JA in *Webster (a Pseudonym) v The Queen* [2016] VSCA 66; (2016) 258 A Crim R 301 at [28] to the effect that “the statutory framework for juvenile justice compels the court sentencing a young offender (almost always the Children’s Court) to adopt the offender‑centred (or ‘welfare’) approach, rather than the ‘justice’ or ‘punishment’ approach”.
3. The primary judge’s conclusion that the definition of “imprisonment” in the Act is inclusive only was not dealt with by the appellant in counsel’s oral address. It was addressed in writing, principally as follows:

The definition of ‘imprisonment’ in s 501(12) uses the word ‘includes’. Whether or not a definition using the word ‘includes’ is designed to extend or simply elucidate the ordinary meaning of the defined term is to be answered by consideration of the statutory text, context and purpose of the definition.

Here, the most significant aspect of the statutory text and context is that the definition appears alongside two other definitions in s 501(12) that also use the word ‘includes’ – see above at [6]. Of those, the use of ‘includes’ in the first definition (of ‘court’) is extensive, because it seeks to bring within the defined term (‘court’) a concept (‘military tribunal’) that would otherwise be debateable or at the margins of the term’s ordinary meaning.

By contrast, the second and third definitions (of ‘imprisonment’ and ‘sentence’) combine the words ‘includes’ and ‘any’ to elucidate the meaning of the defined term. The latter two definitions thus operate as for‑the‑avoidance‑of‑doubt provisions. What the definition of ‘imprisonment’ in s 501(12) achieves, then, is the clarification that any and all forms of punitive detention will come within the definition of imprisonment.

At least, insofar as the definition of ‘imprisonment’ does extend rather than elucidate the meaning of that term in s 501(7)(c), it only does so by extending it to include any form of punitive detention ‘in a facility or institution’ even if that might not ordinarily be understood to amount to imprisonment.

(Footnotes omitted.)

1. In his oral address, senior counsel for the appellant made the following submission about the significance of ss 501(8) and (9) of the Act:

[They are] significant because the ultimate question of construction that confronts the court is the construction of “imprisoned for 12 months or more”. Our point is that it’s only if it’s punitive in purpose, and with sub (8) and sub (9), the proposition that ultimately we will be advancing is that outcomes, whether periodic detention or, in sub (9), residential schemes, have been regarded as not falling within the concept naturally, or in the ordinary meaning, of “sentenced to a term of imprisonment”, perhaps because they might not be regarded as orders being imposed for a punitive purpose. And that’s why, in the architecture of the Act, dispositions of that kind in sub (8) and sub (9) have been deemed in, because otherwise they would not naturally fit within the scope of the concept of “sentenced to a term of imprisonment”.

Similarly, with (9) … if a person has been convicted and the court orders the person to participate in a residential drug rehab scheme or residential program, the person is taken to have been sentenced to a term of imprisonment and thereby deems in something that would not otherwise naturally fit within the meaning of that concept, which again provides a constructional clue to the very limits of the idea of what a sentence of imprisonment is, which we say, as I said at the outset, has at its heart the notion of a punitive purpose, not merely being a disposition at the end of a criminal process that results in confinement or detention per se.

1. We were also taken to particular passages in *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113 that were said to relate to those propositions, namely at [7]‑[9] (Rares J) and [73], [83]‑[85], [103], [109], [110] (Nicholas J).

# The Minister’s submissions

1. The Minister adopted the entirety of his Honour’s reasons with respect to what was ground 2 before him.
2. He emphasised the following matters in support of his Honour’s reasons.
3. First, s 362 of the CYFA is not an exhaustive list of sentencing considerations. Additional considerations, including specific deterrence, may be taken into account (citing *CNK v The Queen* (2011) 32 VR 641 at [10] and [38]‑[39]).
4. Secondly, as the primary judge said, s 362 of the CYFA “replicates” s 139 of the earlier *Children and Young Persons Act 1989* (Vic), and the extrinsic material relating to that earlier regime was replete with references to punishment as a purpose of the sentencing of young offenders (citing *CNK v The Queen* (2011) 32 VR 641 at [17]‑[18]).
5. Thirdly, and relatedly, “[a]lthough factors such as rehabilitation may assume greater significance in the sentencing of young offenders, it does not mean that punishment is an irrelevant factor to which a sentencing judge must not have regard. Nor does it follow that the [a]ppellant’s particular sentence was not punishment (or was not capable of being regarded as such)” (citing *CNK v The Queen* (2011) 32 VR 641 at [76] for the first proposition and *Webster (a Pseudonym) v The Queen* [2016] VSCA 66; (2016) 258 A Crim R 301 at [80] for the second).
6. Fourthly, the appellant’s approach “would cause uncertainty of operation of the Migration Act” because “the decision‑maker under s 501 would have to make complicated investigations and assessments of State and Territory justice systems, and look to case law peculiar to each jurisdiction, only then to make fine judgments as to whether or not a particular system, or perhaps the sentence in a particular case, was ‘punitive’” (citing *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113 at [9] (Rares J, Moore J agreeing)).
7. As to the appellant’s submission about ss 501(8) and (9), senior counsel for the Minister submitted:

The work that [s 501(8)] is seeking to do is provide clarification as to the duration of detention when detention is periodic. It’s not about whether or not detention is or is not detention for the purposes of a sentence of imprisonment. It’s about calculation of the number of days that that detention is for, and the reason why that is important is because it goes to matters such as those raised in paragraph (c) of subsection (7) or, for instance, paragraph (d), for that matter. So that point of clarification is not one where there is doubt about whether or not this – regardless of what might have existed previously, the terms of the provision go to clarification about duration of detention.

As for [s 501(9)], we do say that that is, for the avoidance of doubt or, alternatively, to make it deemed, either way, though, if there is some doubt about a residential drug rehabilitation scheme or a residential program for the mentally ill, that is removed by virtue of subsection (9), because in those circumstances, it may be that a person is not, on the ordinary meaning of the word “detention” even detained at all. So that is why subsection (9) is in section 501. It’s clarification, not to whether or not something is punitive, but for an antecedent purpose as to whether or not it is even detention in the first place.

# Consideration

1. The appellant’s basal proposition that detention in a Youth Justice Centre is not a form of “punitive” detention – that is, a form of detention that involves punishment – is not only contrary to the ordinary meaning of the word, as the primary judge held, it is inconsistent with conclusions reached by the Victorian Court of Appeal about the meaning and effect of s 362(1) of the CYFA. In *CNK v The Queen* (2011) 32 VR 641 at [10], for example, the Court observed that the language of s 362(1)(g), which provides that the Court must as far as practicable take into account “the need to protect the community, or any person, from the violent or other wrongful acts of the child” is “[p]lainly enough … concerned with the protection of the community through specific deterrence, that is, deterrence of the particular child offender”. And such deterrence obviously involves an element of punishment. See, by way of example only, *Green v The Queen* [2011] VSCA 311 (“The principle of specific deterrence is premised on the assumption that an appropriate punishment will operate to deter an offender from repeating the same or similar conduct in the future”).
2. Further, the legislative history to which the primary judge referred, and on which the Minister relies, makes it as plain as a pikestaff that “punishment” is an important part of sentencing principles applicable to juveniles or “young offenders”.
3. As the Court of Appeal in *CNK v The Queen* (2011) 32 VR 641 explained (at [17]), s 362 of the CYFA replicated s 139 of the *Children and Young Persons Act 1989* (Vic). That Act was enacted in response to the Child Welfare Practice and Legislation Review, which reported to the Victorian Government in 1984, including as follows in respect of young offenders:

(a) *Basic Principles of Justice*

The adult standard of ***punishment*** must constitute the outer limit for juvenile dispositions. This standard is expressed in the following sentencing principles:

(i) *Determinate*. Every sentence should have a fixed maximum period. The setting of a clear limit is a statement by society of the measure of ***punishment*** appropriate to a particular offence. It tells offenders when their debt to society has been paid.

(ii) *Specific*. All offenders have a right to know the precise nature of the ***punishment*** being imposed. Vague sanctions, such as simply to be of “good behaviour”, fail to tell young people what is acceptable and unacceptable behaviour. ***Punishment*** which is not specific is also unfair.

(iii) *Proportional*. ***Punishment*** should fit the crime. Proportional ***punishment*** is the measure of a given society’s gradation of criminal behaviour. The seriousness of a crime should be reflected in the nature of the ***punishment*** imposed.

(iv) *Reviewable*. A system of ***punishment*** must be applied consistently and equally. Ensuring that a ***punishment*** is reviewable keeps the system healthy and prevents decision makers ordering inappropriate ***punishments*** in individual cases.

(Emphasis added.)

1. Further, as Beach JA observed in *Webster (a Pseudonym) v The Queen* [2016] VSCA 66; (2016) 258 A Crim R 301 at [80] (dissenting in the result, but not on this fundamental point):

While it may be accepted that rehabilitation is the paramount consideration in the sentencing of a person under 18 years, just punishment is also a relevant issue. That is not to say that aspects of punishment in the sentencing of a person under 18 years of age assume anything like the significance they might in the sentencing of an adult — only that the issue of punishment must be appropriately factored into the sentencing synthesis along with other relevant matters (including those set out in s 362(1) of the CY&F Act).

1. Further, as the Minister submitted, the meaning of the expression “sentenced to a term of imprisonment” in s 501(7) of the Migration Act cannot have been intended to depend on the different sentencing regimes in diverse jurisdictions. As Rares J said in *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113 at [9] (Moore J agreeing), in the passage cited by the Minister, “[t]he construction of the expression ‘sentenced to a term of imprisonment’ in s 501(7) cannot depend on the vagary or intricacies of different sentencing regimes in many jurisdictions”.
2. The appellant submitted that his sentence was not a sentence to “a term of imprisonment” within the meaning of s 501(7)(c) of the Act, “because ‘imprisonment’ is defined in s 501(12) to include, ***albeit effectively exhaustively***, ‘any form of punitive detention in a facility or institution’ and the order of 24 August 2018 was not an order for punitive detention”. See particular (iv) to the ground of appeal at [13] above.
3. We do not accept the appellant’s submission (set out at [32] above) that the word “includes” is in some fashion or another to be read as rendering exhaustive the definitional words. Read in context and as a matter of ordinary English, a “term of imprisonment” is a sentence of imprisonment (detention in custody or confinement) for a period imposed upon conviction in respect of a criminal offence. According to orthodox sentencing principles, a factor in that imposition will be retribution and thus punishment, although other factors may additionally be at large, e.g. protection of society. See *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477. A punitive quality is inherent in such a term of imprisonment. The sentence imposed on the appellant may well fall within the ordinary meaning of “term of imprisonment”. However, the evident purpose of the inclusion in the definition is out of an abundance of caution to make clear that a form of detention which perhaps might not be regarded as imprisonment but which entails loss of liberty and has a punitive quality nonetheless falls within the definition. The adjective “punitive” serves to exclude from the definition other forms of detention which do not have a punitive quality. The sentence imposed on the appellant offers a paradigm example of the type of detention captured by the inclusive part of the definition out of an abundance of caution.
4. The appellant submitted that it was instructive to have regard as a matter of context to s 501(8) and (9) of the Act (see [33] above). We disagree. As Rares J explained, in *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113 at [7]‑[8] those sub‑sections do not limit, but expand, the natural and ordinary meaning of the word:

The structure of s 501 recognises that there are varying degrees of punishment sufficiently serious to amount to a substantial criminal record for the purposes of ss 501(6)(a) and (7). The definitions of “imprisonment” and “sentence” in s 501(12) are in the inclusive form; that is, each definition elucidates but does not limit the ordinary and natural meaning of the word. A sentence of imprisonment for not less than 12 months that is wholly suspended is a very serious penalty…

The role of ss 501(8) and (9) is to amplify, not qualify, the meaning of the cognate expression “sentenced to a term of imprisonment” in s 501(7). The circumstances of compulsory deprivation of liberty described in ss 501(8) and (9) are deemed by those provisions to be a sentence to a term of imprisonment. When s 501 was substituted into the Act in 1998, it included ss 501(8), (9) and (12). Those elucidatory provisions did not derogate from, or confine, the existing and accepted meaning of the expression “sentenced to a term of imprisonment” in s 501(7). Rather, ss 501(8) and (9) expanded the nature of punishments falling within that expression to include the aggregate of the days spent by a person in complying with the requirements of periodic detention or participation in the relevant residential scheme or program.

1. In our view, the detailed and careful reasons of the learned primary judge were unimpeachable, and to the extent that we have not dealt with any of the views his Honour expressed, we adopt them.

# Disposition

1. It follows that the appeal must be dismissed, with costs.

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| I certify that the preceding fifty‑one (51) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, O’Callaghan and Banks‑Smith. |

Associate:

Dated: 13 December 2022