HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
Appellant

and

ROSS THORNTON
Respondent

APPELLANT'S REPLY

Part I: CERTIFICATION

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

Part II: ARGUMENT IN REPLY[1]

Appeal issue 1: The construction of s85ZR(2) of the Crimes Act and s184(2) of the YJA

2. ***Section 184(2) is not a provision which engages s85ZR(2)***. The question on this appeal is whether s85ZR(2) applies because it is engaged by s184(2) of the YJA. Contrary to the Respondent's Submissions (**RS**) at [2], [11], [19] and [30], the question is not whether s184(2) is only about "*record-keeping*". The question is whether s184(2) is a State law where a person is taken never to have been convicted of an offence, that is, does it take away the fact of a conviction altogether?

3. Contrary to RS[35] the Explanatory Memorandum does provide extrinsic support for the Minister's position. The Respondent's approach should not be accepted (RS[36] and [39]); first, s85ZR(2) must be construed, with the applicable definitions from ss85ZL and 85ZM[2] and secondly, then s184(2) is construed to determine whether it is a provision which engages the terms of s85ZR(2) (AS[18]-[26] and [54]-[55]).

4. On a consideration of the text, context and purpose, ss85ZR(2) and 184(2) are provisions directed to different things. Section 85ZR(2) applies where a State law operates in particular circumstances or for a particular purpose, so that a person is taken never to have been convicted of that offence, the person, in corresponding circumstances or for a corresponding purpose, "*is … to be taken never to have been*

[1] Defined terms used in Appellant's Submissions (**AS**) are adopted, without re-defining, in this reply.
[2] See for example *Frugtniet* at [7] (Kiefel CJ, Keane and Nettle JJ).

convicted of an offence …" (emphasis added) by a Commonwealth authority (s85ZL). The particular circumstances are not attaining adulthood (c.f RS[21], [22], [29] and [31]); here the circumstances are the Minister (being the Commonwealth authority) considering whether the Respondent's visa cancellation should be revoked pursuant to s501(3A) of the Act. There is no corresponding circumstances or purpose.

5. Further, the Respondent appears (RS at [13] and [31]) to make a distinction between an adult who was, in the past, dealt with for an offence under the YJA, without a conviction being recorded and presumably a child who was, in the past, dealt with for an offence under the YJA. The conclusion in RS[29], (without authority), that "*[o]nce [a juvenile offender] obtain[s] the age of majority, the deeming effect [of s184(2)] is taken to have accorded the person a clean slate*" appears to require assistance from s148 (RS[24]). Section 148 applies in "*…a proceeding against an adult for an offence …*". The Minister's consideration under s501(3A) of the Act is not such a proceeding.

6. The language of s184(2) is in the present tense, "*is not taken to be…*" (emphasis added). *Culleton*[3] considered a deeming provision also expressed in the present tense, i.e. "*as if no conviction …*" (emphasis added). That was held "*not [to] purport retrospectively to treat the conviction as if it had never occurred*", it was a situation where "*the conviction ought not to stand, not that there never was in fact a conviction*".[4] The analogy is apposite (cf. RS[39]).

7. ***Comparison between s12(3) and s184(2).*** The Respondent's focus on s12(3) of the PSA as compared to s184(2) of the YJA (RS[2], [13]-[30], [37]), while of some assistance, is not the issue which requires determination (AS [2]). The construction task is that of s85ZR(2) and s184(2), to determine whether s85ZR(2) applies.

8. The error by the FC, repeated in the RS, is to engage in *ex post facto* reasoning to seek to justify a different construction of s184(2), from s12(3), by focusing on purported differences in the language, context and purpose of those provisions (but without regard to relevant defined terms) to conclude that s184(2), unlike s12(3), is a provision to which s85ZR(2) applies. The errors in that approach are dealt with in AS[42]-[53].[5]

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[3] Contrary to RS[39], the analogy which the Minister seeks to draw is with the prospective language of that provision, which is similar in that it is prospective-looking, which is the language of s184(2) (and s12(3)), as opposed to the retrospective "*ab initio*" effect of quashing a conviction considered in *Cavanough* (at 225 and 227-228).
[4] *Culleton* at [29]; also see *Gallagher* at 204-205.
[5] Added to that, contrary to RS[17] and [29], a conviction is not recorded "*exceptionally*" under the YJA, but the discretion is more liberally applied (AS at [46]). To the extent that reliance is placed on the two Acts being *introduced* in the same parliamentary term, no authority or principle of construction is identified from such a circumstance. It is not

The Respondent does not engage with the authorities which hold that s12(3) and s184(2) are, in substance, the same: (AS[42] and [47]). Moreover, despite seeking to elucidate differences between s12(3) and s184(2), the Respondent does not then explain why the virtually identical words "*is not taken to be*" in s184(2) and "*is taken not to be*" in s12(3) should be given a different meaning (cf. RS[29] and [30]).

9. Sections 12(3) and 184(2) having the same construction is also supported by s9A of the Rehabilitation Act (AS[48]), which relevantly does not differentiate between adult and juvenile offending. The language is consistent with a prospective effect being given to s12(3) and s184(2), which implicitly recognises that the fact of the conviction (or finding of guilt) has survived and can, in particular circumstances, be disclosed.

10. ***Section 184(3) and autrefois convict.*** Section 154 provides that a finding of guilt, whether or not a conviction is recorded, is part of the criminal history of the child. Section 184(3) provides clarity to ensure the application of the *autrefois convict* doctrine, despite using the language "*a finding of guilt*" rather than conviction. Section 12(4)(b)(iv) of the PSA also confirms the doctrine's application. That each Act ensures this doctrine applies in circumstances where no conviction is recorded, supports a consistent approach to s12(3) and s184(2).

11. ***Sections 154 and 148 of the YJA.*** The Respondent relies on (RS[24]) both s148 and s184(2) to engage s85ZR(2). That is telling. It means that s184(2) alone does <u>not</u> have the operation for which the Respondent contends. If s184(2) did treat the offender as never having been convicted of the offence, there would be no need for s148. It is implicit from s148 that there is a finding of guilt, the fact of which survives the non-recording of a conviction in s184(2). Further, s148 cannot have the wider import that the Respondent seeks to give it, for it only applies in "…*a proceeding against an adult for an offence*…".

12. Section 154 also does not assist the Respondent. It, like s148, goes to the question of admissibility of evidence of the fact of a finding of guilt.[6] Contrary to RS[19], it does not substantively determine whether or not a finding of guilt exists or ceases to exist. It proceeds upon the basis that there is a finding of guilt which persists but it specifies, *first,* that a conviction, whether or not recorded, is part of the offender's criminal

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submitted that the two Acts are part of the same legislative scheme: *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [9]-[12], and [97]-[101].

[6] *R v Hodcroft* [1997] QCA 379 at 4 (Pincus JA and de Jersey J, with whom McPherson JA agreed).

history, and *secondly*, like s12(4)(b), the circumstances in which the fact of that conviction can be considered by a court. Section 184(3) operates harmoniously with s154 and s148. Contrary to RS[18]-[19] and [21]-[24], the effect of ss184, 154 and 148 of the YJA is substantively the same as s12(3)-(4) of the PSA.

13. ***The regimes and purposes of the YJA and the PSA.*** The Respondent claims differing regimes and purposes of the PSA and the YJA (RS[20], [26]-[28]). That the regimes differ, at least in part, can be accepted (AS[46] and [52]). However, (AS[46]-[51]), the aspects relied upon by the Respondent (RS[20]) go to the antecedent stage of exercising the sentencing discretion of whether or not to record a conviction. Neither the Respondent nor the FC explain how that difference impacts, once the discretion is exercised, to record or not record a conviction.

14. No support for the Respondent's contention can be derived from "*The Beijing Rules*" (cf RS[27]).[7] The reference in the second reading speech is directed to detention orders for child offenders and the new detention system established by that Bill.[8] The YJA as passed[9] defined a child (in part) as a person who had not turned 17.[10] Hence 17 year olds were dealt with under the PSA.[11] Seen in context,[12] the reference to the *Beijing Rules* has nothing to do with the effect of not recording a conviction. The Respondent also refers to the *Convention on the Rights of the Child*[13] (RS[28]), without explanation as to how that is submitted to effect the interpretation of s184(2). The child focused purposes of that convention (RS[28]) are consistent with the Youth Justice Principles and the purposes of the YJA.[14] However, regard to that convention does not assist the interpretation regarding the effect of recording a conviction.

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[7] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, General Assembly Resolution No. 40/33 (29.11.85) ("*The Beijing Rules*").
[8] Hansard, 18 June 1992, at 5926.
[9] Being the *Juvenile Justice Act 1992* (Qld).
[10] Cf. *Acts Interpretation Act 1954* (Qld) and the *Beijing Rules.*
[11] Then made 18 years: *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld).
[12] The context shown must be a reference to rule 26.3 of the *Beijing Rules* about keeping juveniles separately imprisoned.
[13] United Nations Convention on the Rights of the Child, General Assembly Resolution No. 44/25 (20.11.89).
[14] However, no regard is paid by the Respondent to the sentencing purposes in that Act (AS[52]). See also: *Nuon v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2022] FCAFC 197 at [42]-[45].

Appeal issue 2: Materiality

15. The Respondent does not take issue with the principles regarding materiality stated at AS[61]-[65], however states the issue (RS[3]) seeking to apply an incorrect formulation. A "*state of satisfaction*" threshold is not incorporated into materiality. The test for materiality is not that the decision maker "*may have*" materially altered her or his decision (RS[40]) nor is it whether or not the reasoning is "*tainted*" (RS[45]). The question is whether, having regard to the facts as found by the Minister and the drawing of inferences from those facts, was there was a realistic possibility that the decision *could* have differed; was the error of such marginal significance as to not make such a difference (AS[61]-[65]).

16. The Respondent's argument appears to be that because the Minister took into account his juvenile offending, the error was material (RS[46]-[49]). That is not to consider the Decision from the Minister's point of view. It is to place emphasis on the juvenile offending (as identified by the FC) that the Minister did not place. It is not sufficient (cf RS[46]) to identify that juvenile offending informed part of the Minister's analysis of the gravity of the offending without looking at whether, absent that addition, there was a realistic possibility that the Minister *could* make a different decision.

17. When regard is had to the Decision as a whole (AS[69]-[70]), the juvenile offending was of such "*marginal significance*" as to not give rise to a possibility of a different outcome. It *could* not have been different. The marginal significance which was placed by the Minister on the "*other assault offences*" as compared to the more serious domestic violence offences is apparent. That justifies a conclusion that any error (if made, which is not accepted) was not material.

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