

## **UELESE v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S277/2014)**

Court appealed from: Full Court of the Federal Court of Australia  
[2013] FCAFC 86

Date of judgment: 8 August 2013

Special leave granted: 17 October 2014

Mr Peter Uelese is a New Zealand citizen who has lived in Australia since 1998. On 3 September 2012 the visa permitting Mr Uelese's indefinite residence in Australia was cancelled by a delegate of the First Respondent ("the Minister"). This was on character grounds, on the basis of a substantial criminal record, under s 501 of the *Migration Act* 1958 (Cth) ("the Act").

With legal representation, Mr Uelese obtained a review of the Minister's cancellation decision by the Administrative Appeals Tribunal ("the Tribunal"). In carrying out that review, the Tribunal considered a Ministerial direction dated 28 July 2012 ("Direction 55"), which applied to visa cancellation decisions under s 501. The Act obliged the Tribunal to consider Direction 55, which required decision-makers to have regard to certain "primary considerations". Such considerations included the best interests of any children of the visa-holder.

Although Mr Uelese is the father of five children, the documents before the Tribunal (and provided to the Minister) only addressed the interests of Mr Uelese's three children by his partner, Ms Peta Fatai. The fact that he had two other children emerged only during the cross-examination of Ms Fatai.

On 14 November 2012 the Tribunal affirmed the decision to cancel Mr Uelese's visa. This was after disregarding the evidence that he had more than three children. The Tribunal found that it was compelled to disregard that evidence by s 500(6H) of the Act, which provides that "*the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing ...*".

An appeal to the Federal Court was then dismissed by Justice Buchanan, who held that the Tribunal was obliged by s 500(6H) to disregard any material that arose from the oral evidence concerning two of Mr Uelese's children. His Honour found that that would have been so even if the Tribunal hearing had been adjourned to a later date. Mr Uelese again appealed.

The Full Court of the Federal Court (Jagot, Griffiths & Davies JJ) unanimously dismissed Mr Uelese's appeal. Their Honours found that the Tribunal had not denied Mr Uelese procedural fairness by failing to consider the best interests of two of his children, as the extent of procedural fairness was limited by s 500(6H) of the Act. The Full Court held that it was not open to the Tribunal to adjourn the hearing to enable Mr Uelese to provide further documents to the Minister on the basis that such provision would comply with the timeframe prescribed by

s 500(6H). Their Honours also held that the Tribunal was not itself obliged to collect further information on Mr Ueese's other two children, as their existence and interests were not critical facts in Mr Ueese's case as it had been presented.

On 26 November 2014 a "Section 78B" notice was filed in this matter. As at the time of writing, no Attorney-General had intervened in this matter.

The grounds of appeal are:

- The Full Court erred in failing to find jurisdictional error in the decision of the Tribunal, namely, that the Tribunal erred in law in holding that s 500(6H) of the Act prohibited it from having regard to information concerning two of the Appellant's children either tendered by the First Respondent, or adduced in cross-examination of a witness by the First Respondent, unless the Appellant had set out that information in a written statement to the First Respondent at least two days before the hearing.
- The Full Court erred in failing to find jurisdictional error in the decision of the Tribunal, namely, that the Tribunal erred in law in holding that the date upon which the Tribunal "holds a hearing" for the purposes of ss 500(6H) and 500(6I) of the Act is the first day of any such hearing, and does not include the date upon which an adjourned hearing is resumed.