IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S277 of 2014**

BETWEEN: **PETER UELESE**
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: SUMMARY OF ISSUES

2. The issues in this appeal concern the construction and application of s 500(6H) of the *Migration Act 1958* (Cth) (***Migration Act***). That section provides that, in deciding an application by a person for review of a decision to refuse or cancel a visa on character grounds, the Administrative Appeals Tribunal (**AAT**) "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 (other than a directions hearing) in relation to the decision under review".

3. Two particular issues arise:

   (a) ***First***, does "information presented orally in support of the person's case" include a responsive answer given by a witness under cross-examination by the Minister? It is the appellant's submission that it does not. The Full Court's contrary construction does not advance the purpose of the provision, pays insufficient regard to the impact on the fundamental right to procedural fairness, and works such unpalatable consequences that it ought not be accepted.

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(b) ***Secondly***, consistent with the Full Court's view, is the reference to "a hearing" in s 500(6H) a reference only to the *first* day on which a final hearing is held? The appellant submits that it is not. In the appellant's submission, the AAT "holds a hearing" on any day of a final hearing, including a day on which a final hearing resumes after being adjourned part-heard. The Full Court's construction is not required by the purpose of s 500(6H), is inconsistent with the text of s 500(6H), and is contrary to the requirements of procedural fairness.

Part III: Section 78B notice

4. The appellant considers that, on the appeal as framed and proposed to be conducted by appellant, no notice need be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

5. However, over the objection of the appellant, the first respondent (**Minister**) has required portions of the transcript of the proceedings before the AAT to be included in the appeal book. That transcript was not in evidence before the Courts below (and did not form part of the record for the purposes of certiorari).[1] It was not considered by the Courts below. It therefore appears to the appellant that this Court may not, on an appeal under s 73 of the *Constitution*, receive or have regard to that transcript.[2]

6. In circumstances, therefore, where the Minister has foreshadowed reliance on new evidence that, in the appellant's submission, this Court has no power to receive by reason of the nature of appellate jurisdiction under s 73 of the *Constitution*, it is appropriate for the appellant to issue s 78B notices directed to that issue. Those notices will be issued shortly after these submissions are filed.

Part IV: Decisions below

7. The decision of the Full Court of the Federal Court (Jagot, Griffiths and Davies JJ) is reported at *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534 (**FCAFC Decision**).

8. The decision of the Federal Court (Buchanan J) is reported at *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13 (**FCA Decision**).

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1 *Craig v State of South Australia* (1995) 184 CLR 163 at 181; *Hockey v Yelland* (1984) 157 CLR 124 at 131, per Gibbs CJ; at 142-143, per Wilson J.

2 *Eastman v The Queen* (2000) 203 CLR 1 at [11]-[18], [67]-[78], [103]-[158], [181]-[196], [290]; *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd (No 2)* (2013) 303 ALR 84 at [19] (Hayne, Crennan, Kiefel, Bell and Gageler JJ); *Mickelberg v The Queen* (1989) 167 CLR 259. See also *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 at [28].

9. The medium neutral citation for the AAT decision is *Uelese v Minister for Immigration and Citizenship* [2012] AATA 793 (**AAT Decision**).

Part V: Factual background

10. On 3 September 2012, the Minister cancelled the appellant's visa under s 501(2) of the *Migration Act*. After a hearing on 30 and 31 October 2012, the AAT affirmed the Minister's decision on 14 November 2012. The appellant's self-represented appeals to the Federal Court and Full Court of the Federal Court were dismissed.

11. At the time of the AAT's decision, the appellant was a father of five children.

12. The principal factors on which the AAT relied are summarised at [75]-[85] of the AAT Decision. The key factor relied on was the risk which the appellant posed to the Australian community. The AAT considered that that risk outweighed the best interests of three of the appellant's five children. In deciding whether to affirm the decision to cancel the appellant's visa, the AAT was required to take into account "[t]he best interests of minor children in Australia", to "make a determination about whether cancellation [was], or [was] not, in the best interests of the child" and to give "individual consideration" to the best interests of each child … to the extent that their interests may differ".[3] In considering the best interests of the child, the AAT was obliged, where relevant, to have regard to factors including "[t]he likely effect that any separation from the person would have on the child".[4]

13. The AAT declined to consider or make a determination as to the best interests of the appellant's two youngest children, then aged four and five.[5] Information as to those children's existence had not been adduced by the appellant. Their existence was, however, disclosed by documents tendered by the Minister.[6] Those documents revealed that the two children were listed among the appellant's visitors in prison. Further information about the children was elicited from the appellant's partner during cross-examination by the Minister.[7]

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3 Direction No. 55 made under s 499 of the *Migration Act* cll 7(1)(a), 8(1), 9.3(1), (3) (**Direction 55**); *Migration Act* s 499(2A).

4 Direction 55 cl 9.3(4)(d).

5 AAT Decision at [64].

6 AAT Decision at [64]; FCAFC Decision at [14]. See pages 511, 522, 541, 562, 572-3, 584, 588, 602, 643 of the "G Documents" filed by the Minister with the AAT.

7 AAT Decision at [4], [64].

14. The AAT held that it could not "take any consideration of their situation into account" because the *Migration Act* "prevented" the appellant from "eliciting oral evidence that may have supported his case in relation to th[o]se children";[8] and, in consequence, "[n]o evidence was able to be led regarding" the two children.[9] The appellant's legal representative "acknowledged" that s 500(6H) had that effect.[10] That acknowledgement was consistent with Federal Court authority to the effect that s 500(6H) applied to "all the information on which [an applicant] wishes to rely".[11]

15. The record does not indicate why the appellant did not identify his two youngest children in his case in chief. It can, however, be noted that the AAT observed that the appellant's legal representation was arranged "at short notice".[12]

16. The record also does not indicate whether the appellant's legal representative applied for an adjournment so as to serve evidence concerning the appellant's two youngest children. Such a course was, in any event, foreclosed by binding authority, namely *Goldie v Minister for Immigration & Multicultural Affairs* (2001) 111 FCR 378 at [31] (***Goldie***).

17. The appellant's appeal to the Federal Court was dismissed. Amongst other things, the appellant argued that the AAT unlawfully failed to adjourn the hearing so that the AAT could have regard to the information about his two youngest children. The core of Justice Buchanan's reasoning appears at [22]: "the AAT was obliged at all stages of the hearing before it (whether it was adjourned or not) to disregard any material emerging in oral evidence concerning Mr Uelese's two youngest children".

18. The appellant's appeal to the Full Court of the Federal Court was also dismissed. The Full Court held that, by reason of s 500(6H), the "AAT was disabled from having regard to the particular oral evidence (limited as it was) on that subject".[13]

19. The Full Court also held that it was not open to the AAT to adjourn the hearing to enable the Applicant to comply with s 500(6H).[14] In so holding, the Full Court

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8 AAT Decision at [4].
9 AAT Decision at [64].
10 AAT Decision at [4].
11 *Milne v Minister for Immigration and Citizenship* (2010) 52 AAR 1 at [40] (Gray J).
12 AAT Decision at [7]. The record also indicates that the matter was listed before the AAT "very quickly": Letter from Dale Watson to The Commissioner of Police (NSW) dated 3 October 2012 (page 5 of the "G Documents" filed by the Minister with the AAT).
13 FCAFC Decision at [33(a)].

followed *Goldie*, in which the Full Court had held that, for the purposes of s 500(6H), "[t]he resumption of an adjourned hearing is not a new hearing".[15] In consequence, any adjournment after the commencement of the AAT hearing would be futile: it would not reset the two-day time limit under s 500(6H).

PART VI: SUBMISSIONS

First issue: information adduced by the Minister in cross-examination is not information "presented orally in support of" an applicant's "case"

20. It may be accepted that the statutory words, "information presented orally in support of a person's case", admit of constructional choices.

10 21. At one extreme, those words may be read, as the Minister submitted in *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123 at [80]-[82] (***Jagroop***), to apply to "every item of information presented … by an applicant … irrespective of the circumstances in which the information … is put before the AAT", unless the Minister had been notified of the information in writing two business days before the hearing commenced.

22. The Full Court in *Jagroop*, of course, adopted a narrower construction, holding (at [96]) that "the prohibition relates only to information … presented as part of an applicant's case-in-chief to support his or her own case, and not to information … which an applicant may wish to present in answer to the case presented by the Minister
20 and which, at the least, the applicant could not reasonably have anticipated". The Full Court made clear (at [97]) that, under that construction, the prohibition "would not preclude the AAT having regard to an applicant's answers in cross-examination", nor "the answers of an applicant in re-examination", nor "information … presented by an applicant in answer to the Minister's case" (in each case, subject to the qualification "at least when the applicant could not reasonably have anticipated the evidence or issue raised by the Minister").

23. In the appellant's submission, the choice which best coheres with the statutory scheme, basic principle, and the statutory object is this: information is "presented orally in support of a person's case" if but only if it is information voluntarily adduced by the

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14 FCAFC Decision at [33(b)].
15 *Goldie* at [31] (Gray J).

applicant as part of his or her case-in-chief. That is to say, it does not extend to information supportive of an applicant's case-in-chief that is adduced by the Minister in cross-examination (or otherwise), and it does not extend to information presented as part of the applicant's case in reply to the Minister's case. Furthermore, there is no basis in the text of the provision for reading in any qualification concerning the applicant's ability to reasonably anticipate such information being extracted or required.

24. It is submitted that the appellant's construction is preferable for the following reasons.[16]

25. ***First***, textually, the natural reading of the phrase "information presented orally in support of the person's case" is that it refers to information that is presented *by* that person. The phrase performs a similar function to the phrase "document submitted in support of the person's case" in s 500(6J), which is naturally read as referring to a document submitted by that person. Information adduced by the Minister—including information adduced in cross-examination—does not have that character.

26. ***Secondly***, s 500(6H) ought to be construed so as to minimise encroachment on the fundamental right to procedural fairness.[17] That is because "legislation affecting fundamental rights must be clear and unambiguous, and any ambiguity must be resolved in favour of the protection of those fundamental rights".[18] Having regard to the nature of the interests affected by a visa cancellation, the AAT is subject to a duty of procedural fairness when exercising the power. That duty would ordinarily include a derivative duty to give proper consideration to information received by the AAT which bears on the issues which the AAT must decide.[19] That duty takes on particular significance in cases such as the present where the issues which the AAT must determine concern the interests of vulnerable parties who are unrepresented before the

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16 Because the appellant does not submit that the information adduced by the Minister in cross-examination was evidence in reply to the Minister's case, the following submissions focus on the applicability of s 500(6H) to evidence adduced in cross-examination generally, rather than to oral evidence in reply to the Minister's case.

17 See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 242 at [11]-[12], [58]-[59] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [42] (French CJ).

18 *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174 at [86] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

19 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALR 1088 at [24] (Gummow and Callinan JJ), [95] (Hayne J).

Tribunal. An interpretation of s 500(6H) which would, on the one hand, prohibit the AAT from having regard to any information not provided to the Minister two business days before a hearing which is capable of assisting an applicant's case while, on the other, permitting the AAT to have regard to any information capable of assisting the Minister's case plainly imposes substantial burdens on the right to procedural fairness.

27. ***Thirdly***, the appellant's construction should be adopted to avoid "plain unfairness and absurdity"[20] and a meaning "which appears irrational or unjust".[21] The effect of the Full Court's construction is that cross-examination becomes a risk-free enterprise for the Minister: he can take full advantage of helpful answers, but is immunised against unhelpful answers. As the Full Court in *Jagroop* observed (at [82]), the effect of such a construction would be to "render redundant, or at least substantially reduce the utility of, oral evidence on behalf of the applicant in a hearing in the AAT". The effect of the construction adopted in this case is that hearings have an inevitable trajectory, moving only in the Minister's favour from two business days before the hearing. The Full Court's construction requires the AAT to parse any information it receives, sifting that which is helpful to the Minister from that which is helpful to the applicant, a duty which conceivably extends to parsing information within the same sentence. That is not only unfair, it is unworkable. It is inconsistent with the "expedition" with which the AAT is obliged to conduct its proceedings.[22] In this context, s 500(6H) should not be ascribed its most extreme available meaning. Whatever meaning it is ascribed, it should not capture information adduced by the Minister in cross-examination.

28. ***Fourthly***, the object of s 500(6H) does not require a construction of the provision which prevents the AAT from having regard to information adduced by the Minister in cross-examination. It can be accepted that, if s 500(6H) has a discernible purpose, it was stated in the Explanatory Memorandum to the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998* (Cth), namely "to ensure that the review process is not used as a mechanism to prolong stay in

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20 See *Berenguel v Minister for Immigration and Citizenship* (2010) 114 ALD 1 at [26] (French CJ, Gummow and Crennan JJ).

21 *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [48] (French CJ, Hayne, Crennan and Kiefel JJ).

22 AAT Act s 33(1)(b).

Australia whose visa has been cancelled".[23] The purpose is clear: applicants should not be able to manipulate the system to avoid deportation. This purpose has no application where information is adduced, not by an applicant seeking to avoid deportation, but by the respondent Minister in circumstances where there is no finding that the late adducing of the information has been the result of some tactical decision by the applicant. There is then no question that the information is being adduced as a device to prolong stay in Australia. Nor is there then any question that the information has come to light at the last minute because of some colourable tactic by the applicant.

29. Section 500(6H) does not at all costs pursue the purpose of proscribing the AAT from having regard to information bearing on the issues it must decide. So far as it pursues that purpose, it must be taken to do so only so much as is necessary to achieve the purpose of discouraging review applicants from tactically delaying a decision. The appellant's construction achieves this.

30. ***Fifthly***, s 500(6H) must be construed harmoniously with other legislation on the same subject matter.[24] Because s 500(6H) concerns the exercise of jurisdiction by the AAT, that other legislation includes s 39(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), which obliges the AAT to "ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case". The AAT would be prevented from affording an applicant a reasonable opportunity to present his or her case if the AAT were permitted to have regard to all information helpful to the Minister, but prohibited from having regard to any information helpful to the applicant unless that information were served two days prior to the hearing.

31. Section 500(6H) must also be read in the context of other provisions of the AAT Act and the *Migration Act*. Those provisions disclose that the AAT's procedures are ordinarily flexible: accordingly, the AAT "may inform itself on any matter in such manner as it thinks appropriate".[25] A broad construction of s 500(6H) would cut down that flexibility. Those provisions also disclose that the AAT's power is a power to

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23 Explanatory Memorandum, *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998* (Cth) at 10 [38]. See also Senate, *Hansard* (11 November 1998) (Senator Rod Kemp) 60 ("it is essential that merits review cannot be used to prolong stay in Australia at taxpayers' expense").

24 See, eg, *Commissioner of Taxation of the Commonwealth of Australia v BHP Billiton Ltd* (2011) 244 CLR 325 at [45] (French CJ, Heydon, Crennan and Bell JJ). See also Leeming, *Resolving Conflicts of Laws* (2011) 44-5.

25 Section 33(1)(c).

"review" the Minister's decision.[26] In exercising that power of review, the AAT's duty is to make the "correct or preferable"[27] decision, having regard to the "state of affairs as they exist at the time that the Tribunal makes its decision".[28] A broad construction of s 500(6H) would mean that the "state of affairs" in the context of which the AAT must make its decision could only move in the Minister's favour from a time two business days before the AAT holds a hearing. That would not sit well with the AAT's duty to make a "correct or preferable" decision.

32. A broad construction of s 500(6H) would also imbalance the operation of s 33(2A)(a) of the AAT Act which permits the Tribunal to "require any person who is a party to the proceeding to provide further information in relation to the proceeding". It would mean that, after the two-day cut-off, s 33(2A)(a) assumes a one-sided character, being only capable of being used to gain information helpful to the Minister.

Second issue: a day on which the Tribunal "holds a hearing (other than a directions hearing)" is any day of a final hearing

33. Again, the statutory concept of the day on which the AAT "holds a hearing (other than a directions hearing)" admits of constructional choice.

34. In *Goldie*, the Full Court held (at [31]) that "once the Tribunal began a hearing, the entitlement of the appellant to rely on information and documents crystallised. ... The resumption of an adjourned hearing is not a new hearing." Doubt has, of course, been expressed about the correctness of that conclusion (see *Paerau v Minister for Immigration and Border Protection* (2014) 219 FCR 123 at [113]; *Jagroop* at [79]), but it represented the settled position at the time the AAT conducted the hearing in the present matter and was adopted by the Full Court in this case: at [32]. The result in this case, according to the Full Court, was that "it was not open to the AAT to adjourn the hearing to enable the appellant to comply with s 500(6H)" (at [33(b)]).

35. In the appellant's submission, the choice which best coheres with the statutory text, context, and purpose is this: a day is two business days before the AAT "holds a hearing (other than a directions hearing)" if it is two business days before any day on which the AAT conducts a final hearing, including a day on which the AAT resumes

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26 See *Migration Act* s 500(1)(b); AAT Act s 25(4).

27 See *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [98] (Hayne and Heydon JJ) (***Shi***).

28 *Shi* at [101] (Hayne and Heydon JJ).

part-heard. That is so, and the Full Court's alternative construction inappropriate, for the following reasons.

36. ***First***, it is useful to start by observing what s 500(6H) does *not* say: it does not refer to two days before "the hearing commences". In that case, it would have been abundantly clear that Parliament intended the two day period to be exhausted upon the commencement of the hearing. Instead, s 500(6H) refers to two days before the AAT "holds a hearing". The ordinary meaning of "holds a hearing" is this: a body holds a hearing on any day it sits. That ordinary meaning should not be strained, particularly when it is inconsistent with fundamental principle and is not required by the purpose of s 500(6H) for the reasons developed below.

37. The language in s 500(6H) can be contrasted with that in s 33(2) of the AAT Act, which confers certain powers on the AAT "where the hearing of the proceeding has not commenced" (s 33(2)(a)) and "where the hearing of the proceeding has commenced" (s 33(2)(b)). Parliament conspicuously did not use that language in s 500(6H).

38. ***Secondly***, as to fundamental principle, the Full Court's construction is inconsistent with the right to procedural fairness. Stated at the highest level of generality, that is because the Full Court's construction restricts the AAT adjourning to permit an applicant to address by way of evidence information raised by the Minister or the Tribunal itself. This can be tested by the following example. Suppose the Minister adduced evidence at the AAT hearing. Suppose also that the evidence called for rebuttal evidence by the applicant for review. Ordinarily, "a fundamental principle of natural justice" would mean that the AAT should give the applicant an opportunity to deal with the adverse information adduced against him or her.[29] If s 500(6H) cannot accommodate an adjournment giving time for the applicant to acquire rebuttal evidence and then have the AAT receive and have regard to that evidence, there would be a departure from that fundamental principle. For that reason, "before the Tribunal holds a hearing" should, if available, be ascribed a meaning which permits the AAT to adjourn a hearing to permit an applicant to obtain rebuttal evidence and for the AAT to receive and have regard to that evidence. The natural way of achieving that outcome is to read "before the Tribunal holds a hearing" as referring to any day on which the Tribunal holds a hearing.

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29 *Saeed* at [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

39. ***Thirdly***, the Full Court's construction is not required by any legislative purpose of ensuring the AAT conducts reviews under s 500 expeditiously and within the 84 day "time limit"[30] in s 500(6L)(c). The existence of the time limit would be a material consideration in exercise of the AAT's discretion to adjourn. But there is no inconsistency between, on the one hand, the 84 day limit and, on the other, the AAT having power to adjourn and resume part-heard within that time period. That is illustrated by the present case. Both the hearing before the AAT (58 days) and the AAT's decision (72 days) were comfortably within the 84-day time limit.

Conclusion

40. For the reasons given above, the Full Court erred in its construction of s 500(6H), and thus erred in failing to find jurisdictional error on the part of the AAT. In particular:

(a) The AAT was wrong in holding that it could not "take any consideration" of the two children into account. Their existence was disclosed in documents placed before the Tribunal by the Minister, and s 500(6H) did not prohibit the AAT from having regard to the additional information about those children adduced in cross-examination by the Minister.

(b) The AAT's failure to adjourn, or to consider whether to adjourn, in circumstances where, properly construed, s 500(6H) would have permitted the appellant to place further information about the two children before the AAT following an adjournment, was a breach of procedural fairness, was unreasonable, and constituted a constructive failure to exercise its power of review.

PART VII: APPLICABLE PROVISIONS

41. Relevant statutory provisions are annexed.

PART VIII: ORDERS SOUGHT

42. The appellant seeks the orders set out in paragraphs 4 and 5 of the Notice of Appeal filed on 31 October 2014, namely:

(1) Appeal allowed with costs.

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[30] See House of Representatives, *Hansard* (2 December 1998) (Phillip Ruddock MP) 1232, referring to the introduction, by s 500(6L) of a "strict 84-day time limit".

(2) Set aside the orders of the Federal Court of Australia dated 8 August 2013 and in lieu thereof order that:

(a) the appeal be allowed with costs;

(b) the orders of Buchanan J dated 18 April 2013 be set aside and in lieu thereof order that:

(i) a writ of certiorari issue directed to the Administrative Appeals Tribunal quashing its decision made on 14 November 2012;

(ii) a writ of prohibition issue directed to the first respondent, prohibiting him from giving effect to the Administrative Appeals Tribunal's decision made on 14 November 2012;

(iii) a writ of mandamus issue directed to the Administrative Appeals Tribunal, requiring it to determine according to law the appellant's application for review;

(iv) The first respondent pay the applicant's costs.

PART IX: ORAL ARGUMENT ESTIMATE

43. The appellant estimates that he will require one hour for the presentation of his submissions.

Dated: 21 November 2014

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ANNEXURE – APPLICABLE STATUTORY PROVISONS

***Migration Act 1958* (Cth) (as at 14 November 2012, no subsequent amendments to extracted provisions)**

500 Review of decision

(1) Applications may be made to the Administrative Appeals Tribunal for review of:

(a) decisions of the Minister under section 200 because of circumstances specified in section 201; or

(b) decisions of a delegate of the Minister under section 501; or

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

(ii) paragraph 36(2C)(a) or (b) of this Act;

other than decisions to which a certificate under section 502 applies.

(2) A person is not entitled to make an application under paragraph (1)(a) unless:

(a) the person is an Australian citizen; or

(b) the person is a lawful non-citizen whose continued presence in Australia is not subject to any limitation as to time imposed by law.

(3) A person is not entitled to make an application under subsection (1) for review of a decision referred to in paragraph (1)(b) or (c) unless the person would be entitled to seek review of the decision under Part 5 or 7 if the decision had been made on another ground.

(4) The following decisions are not reviewable under Part 5 or 7:

(a) a decision under section 200 because of circumstances specified in section 201;

(b) a decision under section 501 ...

...

(5) In giving a direction under the *Administrative Appeals Tribunal Act 1975* as to the persons who are to constitute the Tribunal for the purposes of a proceeding for review of a decision referred to in subsection (1), the President must have regard to:

(a) the degree of public importance or complexity of the matters to which that proceeding relates; and

(b) the status of the position or office held by the person who made the decision that is to be reviewed by the Tribunal; and

(c) the degree to which the matters to which that proceeding relates concern the security, defence or international relations of Australia; and

(d) if:

(i) the person to whom the decision relates has been convicted of, or sentenced for, an offence; and

(ii) that conviction or sentence is relevant to the matters to which that proceeding relates;

the seriousness of that offence; and

(e) if:

(i) the person to whom the decision relates has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; and

(ii) that acquittal is relevant to the matters to which that proceeding relates;

the seriousness of that offence;

and must not have regard to any other matters.

(5A) Section 23B of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to a proceeding for review of a decision referred to in subsection (1) of this section.

...

(6A) If a decision under section 501 of this Act relates to a person in the migration zone, section 28 of the *Administrative Appeals Tribunal Act 1975* does not apply to the decision.

(6B) If a decision under section 501 of this Act relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be lodged with the Tribunal within 9 days after the day on which the person was notified of the decision in accordance with subsection 501G(1). Accordingly, paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the *Administrative Appeals Tribunal Act 1975* do not apply to the application.

(6C) If a decision under section 501 relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be accompanied by, or by a copy of:

(a) the document notifying the person of the decision in accordance with subsection 501G(1); and

(b) one of the sets of documents given to the person under subsection 501G(2) at the time of the notification of the decision.

(6D) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

section 37 of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to the decision.

(6E) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

the Registrar, a District Registrar or a Deputy Registrar of the Tribunal must notify the Minister, within the period and in the manner specified in the regulations, that the application has been made. Accordingly, subsection 29(11) of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to the application.

(6F) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

then:

(c) the Minister must lodge with the Tribunal, within 14 days after the day on which the Minister was notified that the application had been made, 2 copies of every document, or part of a document, that:

(i) is in the Minister's possession or under the Minister's control; and

(ii) was relevant to the making of the decision; and

(iii) contains non-disclosable information; and

(d) the Tribunal may have regard to that non-disclosable information for the purpose of reviewing the decision, but must not disclose that non-disclosable information to the person making the application.

(6G) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not:

(c) hold a hearing (other than a directions hearing); or

(d) make a decision under section 43 of the *Administrative Appeals Tribunal Act 1975*;

in relation to the decision under review until at least 14 days after the day on which the Minister was notified that the application had been made.

(6H) If:

(a) an application is made to the Tribunal for a review of a decision under section 501; and

(b) the decision relates to a person in the migration zone;

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 (other than a directions hearing) in relation to the decision under review.

(6J) If:

(a) an application is made to the Tribunal for a review of a decision under section 501; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not have regard to any document submitted in support of the person's case unless a copy of the document was given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review. However, this does not apply to documents given to the person or Tribunal under subsection 501G(2) or subsection (6F) of this section.

(6K) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone; and

(c) the Tribunal is of the opinion that particular documents, or documents included in a particular class of documents, may be relevant in relation to the decision under review;

then:

(d) the Tribunal may cause to be served on the Minister a notice in writing stating that the Tribunal is of that opinion and requiring the Minister to lodge with the Tribunal, within a time specified in the notice, 2 copies of each of those documents that is in the Minister's possession or under the Minister's control; and

(e) the Minister must comply with any such notice.

(6L) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone; and

(c) the Tribunal has not made a decision under section 42A, 42B, 42C or 43 of the *Administrative Appeals Tribunal Act 1975* in relation to the decision under review within the period of 84 days after the day on which the person was notified of the decision under review in accordance with subsection 501G(1);

the Tribunal is taken, at the end of that period, to have made a decision under section 43 of the *Administrative Appeals Tribunal Act 1975* to affirm the decision under review.

(7) In this section, ***decision*** has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

(8) In this section:

business day means a day that is not:

(a) a Saturday; or

(b) a Sunday; or

(c) a public holiday in the Australian Capital Territory; or

(d) a public holiday in the place concerned.

501 Refusal or cancellation of visa on character grounds

Decision of Minister or delegate—natural justice applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

(2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

...

Administrative Appeals Tribunal Act 1975 (Cth) (as at 14 November 2012, no subsequent amendments to excerpted provisions)

25 Tribunal may review certain decisions

Enactment may provide for applications for review of decisions

(1) An enactment may provide that applications may be made to the Tribunal:
  (a) for review of decisions made in the exercise of powers conferred by that enactment; or
  (b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.

(2) The regulations may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by a Norfolk Island enactment.

(3) Where an enactment makes provision in accordance with subsection (1) or (2), that enactment:
  (a) shall specify the person or persons to whose decisions the provision applies;
  (b) may be expressed to apply to all decisions of a person, or to a class of such decisions; and
  (c) may specify conditions subject to which applications may be made.

Delegations, acting appointments and authorisations

(3A) Where an enactment makes provision in accordance with this section for the making of applications to the Tribunal for the review of decisions of a person made in the exercise of a power conferred on that person, that provision of that enactment applies also in relation to decisions made in the exercise of that power:
  (a) by any person to whom that power has been delegated;
  (b) in the case where the provision specifies the person by reference to his or her being the holder of a particular office or appointment—by any person for the time being acting in, or performing any of the duties of, that office or appointment; or
  (c) by any other person lawfully authorized to exercise that power.

Tribunal's power to review decisions

(4) The Tribunal has power to review any decision in respect of which application is made to it under any enactment.

...

33 Procedure of Tribunal

(1) In a proceeding before the Tribunal:
  (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;
  (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and
  (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

Decision-maker must assist Tribunal

(1AA) In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

Directions hearing

(1A) The President or an authorised member may hold a directions hearing in relation to a proceeding.

Who may give directions

(2) For the purposes of subsection (1), directions as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal may be given:

(a) where the hearing of the proceeding has not commenced—by a person holding a directions hearing in relation to the proceeding, by the President, by an authorised member or by an authorised Conference Registrar; and

(b) where the hearing of the proceeding has commenced—by the member presiding at the hearing or by any other member authorized by the member presiding to give such directions.

Types of directions

(2A) Without limiting the operation of this section, a direction as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal may:

(a) require any person who is a party to the proceeding to provide further information in relation to the proceeding; or

(b) require the person who made the decision to provide a statement of the grounds on which the application will be resisted at the hearing; or

(c) require any person who is a party to the proceeding to provide a statement of matters or contentions upon which reliance is intended to be placed at the hearing.

...

39 Opportunity to make submissions concerning evidence

(1) Subject to sections 35, 36 and 36B, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.

(2) This section does not apply to a proceeding in the Security Appeals Division to which section 39A applies.

40 Powers of Tribunal etc.

(1) For the purpose of reviewing a decision, the Tribunal may:

(a) take evidence on oath or affirmation;

(b) proceed in the absence of a party who has had reasonable notice of the proceeding; and

(c) adjourn the proceeding from time to time.

Summons

(1A) Subject to subsection (1B), for the purposes of the hearing of a proceeding before the Tribunal, the member presiding at the hearing, the Registrar, a District Registrar or a Deputy Registrar may summon a person to appear before the Tribunal at that hearing:

(a) to give evidence; or

(b) to give evidence and produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons; or

(c) to produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons.

(1B) A summons under subsection (1A) may require a person to appear at a directions hearing to produce books, documents or things instead of at the hearing before the Tribunal.

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