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 REPLY

PART I: CERTIFICATION

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

PART II: SUBMISSIONS

A. Overview

2. These submissions are made in reply to the first respondent's (**Minister**) submissions filed on 12 December 2014 (**RS**) which, in turn, were made in response to the appellant's submissions filed on 21 November 2014 (**AS**).

B. The issues to be decided

3. This proceeding squarely raises the question of construction posed at AS [23]: cf RS [5]. That is, does s 500(6H) prevent the AAT having regard to information other than that voluntarily adduced by an applicant as part of his or her case-in-chief? Had the AAT adopted the construction advanced at AS [23]—as it ought— it would not have made the statements it did at [4] and [64]. There is nothing to indicate that the Full Court considered that the prohibition in s 500(6H) "will usually not arise in the case of a responsive answer to a question put in cross-examination": cf RS [5]. The Full Court did not say so; and the Minister did not put any such position before the Minister.

4. The proceeding also squarely raises the question of construction identified at AS [35]. That is, is a day two days before the AAT holds a hearing (other than a directions hearing) if it is two days before any day on which the AAT conducts a final hearing? The judgment under appeal, that of the Full Court, expresses an alternative construction at [33(b)]. The AAT's duty to consider the grant of an adjournment arose as an incident of its duties to afford procedural fairness and to "review". The content of those duties was affected, amongst other things, by the AAT's duty to determine the best interests of the appellant's children—being parties who were not represented before the AAT.

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C. Factual background

5. Information about the appellant's children came to light during cross-examination: AAT Decision at [4]. The AAT decided that the appellant was "prevented from eliciting oral evidence that may have supported his case in relation to th[o]se children": at [4]. The AAT decided, accordingly, that it could not "take any consideration of their situation into account": at [64]. In those circumstances, it does not matter whether the information which *was* given was given in response to questions by the Minister or the AAT. Plainly, it was not voluntarily adduced by the appellant as part of his case in chief. Further, plainly, the AAT considered that the appellant was prevented from eliciting any further evidence about those children which may have supported his case. The court therefore does not need to decide the issue of fact referred to at RS [10] and [16].

D. Section 500(6H) does not prevent consideration of information elicited during or under cross-examination

6. The appellant makes eight submissions in reply to those of the Minister concerning whether s 500(6H) prevents the AAT from considering information adduced under cross-examination.

7. First, the construction at RS [14], now proposed by the Minister for the first time in this matter, was not the construction adopted by the AAT, Federal Court or Full Court.

8. Secondly, the appellant adopts the proposition at RS [14] that s 500(6H) will ordinarily not apply to information provided in responsive answers to questions put to a witness in cross-examination.

9. Thirdly, the appellant does not, however, adopt the qualification to that proposition that s 500(6H) does not apply to information which "could reasonably have been anticipated to be supportive" of the applicant's case: cf RS [14], [18].

   (a) That qualification finds no support in the text of s 500(6H).[1]

   (b) The qualification also does not advance the accepted statutory purpose of preventing delay. It appears to contemplate that the AAT will be called to expend time and resources in inquiring into the "reasonable anticipation" of applicants each time any fresh information arises which could support the applicant's case.

   (c) The qualification appears to require an applicant to attempt to predict the way the Minister might advance his case, lest s 500(6H) kick in. Parliament ought not be taken to have intended that outcome, particularly before a decision-maker where many applicants may be unrepresented.

10. Fourthly, it can be accepted that there is no "strict demarcation" in the AAT between evidence-in-chief, cross-examination and evidence in reply: RS [18]. Section 500(6H), however, proceeds on the assumption that an applicant has a "case".

11. Fifthly, the Minister asserts that there is no "suggestion of any attempt having been made to lead any further evidence": RS [20]. Whatever the position—and it is simply unclear from the record—the AAT plainly would not have acceded to the attempt. The AAT said at [4] that the applicant was "prevented from eliciting oral evidence that may have supported his case" in relation to the two children. Also, aside from the AAT's

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[1] Contrast, eg, s 261A(2)(d) of the Act: "could not reasonably be expected to have known".

view of the law, there was nothing to prevent it from inquiring into the children's interests in discharge of its duty to have regard to their best interests as a primary consideration and make a determination as to those interests.

12. Sixthly, the statement at RS [21] that the AAT can have "no obligation to consider matters which formed no part of the case put by the Appellant" is overbroad. The AAT's fundamental duties are to conduct a "review" and to apply the law governing that review. The law governing that review included Direction No. 55. That direction required the AAT to have regard to, and determine, the best interests of the appellant's children. Discharge of those duties may require the AAT to consider matters which do not form part of an applicant's case in chief.

13. Seventhly, the AAT's reasons at [64] do not constitute a "finding showing that the evidence that had been given relating to the Appellant's two extra children could not have affected the Tribunal's decision": cf RS [23]. The better reading of the AAT's reasons is that it did not make any assessment of the weight which could be given to the evidence of the children. As it said, "I cannot take any consideration of their situation into account". In any event, the critical point is that the AAT plainly considered that it was prevented by s 500(6H) from considering any *further* evidence—whether adduced by the appellant, the Minister or the AAT and whether adduced immediately or after an adjournment. The AAT of course made no finding that any further evidence could not have affected its decision.

14. Eighthly, the Minister overreaches in his statement RS [24] that the AAT's error of construction "could not have affected" its decision.

    (a) First, taking the AAT's own views. The AAT plainly considered that s 500(6H) affected the course of its review. It said that, by reason of s 500(6H), "[n]o evidence was able to be led" regarding the children and the appellant "was prevented from eliciting oral evidence that may have supported his case in relation to" the children: at [64], [4].

    (b) Secondly, taking natural inferences from the evidence. The best interests of the appellant's children was a primary consideration for the AAT. They were aged approximately four and five. The AAT considered that the interests of the appellant's other three (older) children weighed against cancellation of the appellant's visa: at [80], [83]. In those circumstances, it cannot be said that the outcome would not have been different had the AAT not considered that s 500(6H) prevented regard to information concerning the appellant's two youngest children.

E. A day is two business days before a hearing if it is two business days before a day on which there is a hearing

15. The appellant makes five submissions in reply to those of the Minister concerning the construction of "2 business days before the Tribunal holds a hearing (other than a directions hearing)".

16. First, the issue plainly arises: cf RS [26]. Aside from anything else, it arises on the face of the Full Court's reasons in this case.

17. Even if it be correct, it is not determinative that the appellant did not apply for an adjournment.

(a) The AAT was bound by *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 11 FCR 378. It was obliged to reject any adjournment application.

(b) In any event, the AAT had a duty to consider granting an adjournment: cf RS [26]. That duty arose either as an incident of its duty to review or as an element of its duty to afford procedural fairness. It arose because the interests it was obliged to determine were those of persons not before the court. Any statement in *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 (***SZGUR***) at [22] to the effect that there was no duty to consider whether to exercise the power because there is no duty to exercise the power rises no higher than a statement concerning the particular provision there in issue: cf RS [28] (fn 28). The statement in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [102] on which the Minister relies at RS [28] (fn 28) makes the very point which the appellant advances: circumstances may arise in which a tribunal *is* required to consider whether to adjourn.

18. Secondly, the appellant's construction does not require conceiving of a hearing running over two days as being "two separate hearings": cf RS [28]. It requires only that a day be two days "before the Tribunal holds a hearing" be two days before a day on which the Tribunal holds a hearing.

19. Thirdly, it can be accepted that the effect of the appellant's construction is that what is "2 business days before the Tribunal holds a hearing" will depend on how long the hearing runs for. There is nothing inconsistent with the text or purpose of the section in that proposition: cf RS [29]. As to text, it is consistent with the ordinary meaning which underpins the appellant's construction. As to purpose, that construction ensures that the provision gives the Minister ample time to obtain and adduce responsive evidence at a hearing. In any event, the idea that what is "2 business days before" a hearing might vary is implicit in the very fact that when a Tribunal holds the hearing (including its first day) will vary with the requirements of the Tribunal and the parties. In other words, the Minister's construction does not avoid the vice he identifies in that of the appellant.

20. Fourthly, the appellant does not contend that words should be read into s 500(6H): cf RS [31]. Indeed, nowhere does the appellant even mention the words referred to by the Minister in the first sentence of RS [31]. The appellant simply gives "2 business days before the Tribunal holds a hearing" its ordinary meaning.

21. Fifthly, the distorting possibility raised by the Minister at RS [33] can readily be addressed by a discretionary decision not to adjourn.

F. Response to RS [34] and [35]

22. The appellant makes five submissions in reply to the miscellaneous submissions made by the Minister at RS [34]-[35].

23. First, the Minister furnishes no reason as to why his approach involves "no procedural unfairness". It is difficult to see how extending the scope of a one-sided, "drastic" provision ,which permits the AAT to have regard to information in support of the government's case but not information in support of the case of a person whose visa might be cancelled, could be described as anything but an approach which abrogates procedural fairness.

24. Secondly, the appellant's construction does not imperil the Minister's opportunity to deal with information: cf RS [34]. The Minister will always have at least two business days to respond to information. That places the Minister in a far better position than the vast majority of parties in courts or tribunals.

25. Thirdly, neither does the appellant's construction imperil the AAT's ability to consider the matter before the time limit expires: cf RS [34]. The time limit will be a permissible, perhaps, mandatory consideration in the exercise of any power to adjourn. The root constraint on the AAT's power to properly consider the issues is the 84-day time limit.

10 26. Fourthly, both the appellant's and the Minister's constructions involve the reconciliation of different provisions of the *Migration Act 1958* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth). The question is how to reconcile, not whether reconciliation should occur: cf RS [32].

27. Fifthly, the appellant's contentions concerning procedural fairness, unreasonableness and constructive failure to exercise jurisdiction go to whether the AAT's error was jurisdictional: cf RS [35]. Indeed, the Minister's submissions that the errors did not jurisdictionally affect the exercise of the AAT's power seem to necessarily invite attention to the matters identified by the appellant at AS [40(b)].

20 Dated: 19 December 2014

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