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

## FIRST RESPONDENT'S SUBMISSIONS

### PART I: CERTIFICATION

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

### PART II: STATEMENT OF ISSUES

*Issues raised by the Appellant*

2. The notice of appeal seeks to raise two issues.

3. First, whether s 500(6H) of the *Migration Act 1958* (Cth) (the "Act") operates to prevent the Second Respondent (the "Tribunal") having regard to evidence given by a witness called by the Appellant in a responsive answer to a question put in cross-examination.

4. Secondly, whether the requirement in s 500(6H) for information in support of a review applicant's case to be set out in a written statement given to the First Respondent (the "Respondent") two business days "before the Tribunal holds a hearing" (for the Tribunal to have regard to that information) can be satisfied by providing the written statement to the Respondent two business days before any second or later day on which the Tribunal holds a hearing.

*Whether those issues need to be decided*

5. The first issue in terms does not need to be decided. As will later be explained, the Respondent does not dispute 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 and nor should the Full Court be seen as having so

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assumed. The exception, which applies in this case, is described later in these submissions at paragraph 14.

6. In respect of the Appellant's second issue, the question of statutory construction is also unnecessary to decide in circumstances where:

   a. the Appellant, who was represented before the Tribunal, "*acknowledged*" that "*the (Appellant) was prevented from eliciting oral evidence that may* have *supported his case in relation to these children as there was no reference to them in any written statements provided to the Minister at least two business days before the hearing*"[1];

   b. the Appellant did not request an adjournment; and

   c. the Tribunal had no independent obligation to consider the grant of an adjournment.

7. If, on the other hand, that question of statutory construction does need to be decided, the Respondent submits that the Appellant's second issue, as cast above, should be answered in the negative. The period "2 business days before the Tribunal holds a hearing (other than a directions hearing)" in relation to the decision under review expires 2 business days before the Tribunal first holds, or commences, any such hearing.

*Other issues raised by the Respondent*

8. There are also issues whether:

   a. the Tribunal was obliged to consider the best interests of two of the Appellant's five children in circumstances where the Appellant conducted his case on the basis that he only had three children;

   b. the Tribunal in this case, as a matter of fact, made findings relating to the information that it received concerning the Appellant's two extra children – for the purpose of determining whether that information was sufficient to enable it to be satisfied whether the best interests of the two extra children would be served by a decision to cancel the Appellant's visa or a decision not to cancel that visa; and

   c. any error made by the Tribunal[2] as to the application of s. 500(6H) to the information received by it relating to the two extra children was such that it could not have affected the Tribunal's decision (given the Tribunal's finding about that evidence in the last last sentence of [64][3]).

**PART III: SECTION 78B NOTICE**

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[1] AB 182 at [4] (Tribunal).
[2] Such error is not conceded.
[3] AB 199.

9. The Appellant has issued a notice under s 78B of the *Judiciary Act 1903* (Cth). The Respondent does not seek to rely upon the transcript of proceedings before the Tribunal. Nor does the Appellant. No Constitutional issue therefore arises.

## PART IV: FACTUAL BACKGROUND

10. Contrary to the Appellant's submissions[4], and ground one of the notice of appeal, it is not shown that any further evidence beyond the mere existence or identity of the two extra children was elicited through questioning by the Respondent's representative. The names of the two children appeared as visitors in Department of Corrective Services Inmate Profile documentation[5]. The Tribunal says that some information was elicited "during cross-examination"[6], or "under cross-examination"[7], of Ms Fatai (the Appellant's partner), but the record does not disclose whether the questions about the children beyond their existence / identity were asked by the Respondent or by the Tribunal itself. For reasons that follow however, whether the questioner was the Respondent's solicitor or the Tribunal is unlikely to be relevant.

11. The record in the Tribunal does not disclose the Appellant's reasons for failing to disclose the existence of his two extra children in his case-in-chief.[8] However, at first instance[9] and on appeal[10], the Appellant claimed that he adopted this course on the basis of legal advice. Also, the existence of the two extra children, much less their best interests, was never raised by the Appellant in the material prior to the Tribunal's hearing: see *per* Buchanan J at [10]-[14][11] and *per* the Full Court at [10]-[11][12].

12. It is true that the record in the Tribunal does not expressly state whether the Appellant's legal representative applied for an adjournment to enable the Appellant to serve evidence concerning his two extra children.[13] However, the Court may comfortably infer that no adjournment application was made. This is because:

    a. The Tribunal's reasons, which are otherwise thorough, do not refer to any adjournment application;

    b. It is improbable that an adjournment application was made in circumstances where the Appellant's representative gave the acknowledgment described by the Tribunal at [4][14];

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[4] At [13].
[5] AB 199 at [64] (Tribunal); AB 243 (FC). The documentation in question is at AB 158-178.
[6] AB 182 at [4] (Tribunal).
[7] AB 199 at [64] (Tribunal).
[8] *cf.* Appellant's submissions at [16].
[9] AB 220 at [15] (TJ).
[10] AB 252 at [37] (FC).
[11] AB 219-220 (TJ).
[12] AB 243 (FC).
[13] Appellant's submissions at [15].
[14] AB 182 at [4] (Tribunal).

c. In the proceedings below and in the application for special leave, the Appellant did not contest the proposition that no adjournment application was made[15]; and

d. No evidence was given to the Federal Court that there had been an application for an adjournment.

## PART V: APPLICABLE LEGISLATION

13. The statement of applicable legislation set out in the Appellant's legislation is accurate and complete.

## PART VI: SUBMISSIONS

*(a) Does s 500(6H) prevent consideration of information elicited in cross-examination*

14. The Respondent accepts that s 500(6H) will not ordinarily apply to information provided in responsive answers to questions put to a witness in cross-examination. This general position is subject to the qualification that any information that is provided to the Tribunal in support of the review applicant's case (rather than merely in answer to the Respondent's case) will be subject to s 500(6H) where the information could reasonably have been anticipated to be supportive of the Appellant's case at least two business days prior to the time that the Tribunal holds a hearing.[16]

15. This appears to be the qualification envisaged by the Full Court in *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123 at [84]-[85], [87], [94] and [96]-[97][17] to the proposition that information in support of a review applicant's case will not include information provided in answer to the Respondent, or in answer to the Tribunal, or in reply.

16. The position is the same in relation to questions asked by the Tribunal as it is in relation to questions asked by the Respondent. Absent transcript, it is not shown whether information from the Appellant's partner regarding the Appellant's two extra children was elicited in questioning from the Respondent's solicitor, or the Tribunal, or both. However, the Respondent submits that there is no relevant difference for the purpose of the application of s 500(6H). There is no basis, in either the text of s 500(6H) or in the relevant context, to suggest that the section operates differentially depending on who (other than the review applicant, or his/her representative) asks the questions. Also, s 500(6H) cannot be defeated by the simple expedient of a review applicant persuading the Tribunal to ask questions.

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[15] AB 250 at [33(b)] (FC).
[16] It is acknowledged that this position differs from the position recorded as having been submitted on behalf of the Minister in *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123 at [80]-[82].
[17] *cf* [101].

17. Nor was the Full Court saying that the prohibition in s 500(6H) applies generally to responsive answers to questions asked by the Respondent or by the Tribunal: see *Jagroop* at [87].

18. There may in some cases be a question as to whether s 500(6H) applies to evidence in reply led by a review applicant. The Tribunal is a non-curial, inquisitorial body.[18] Concepts developed in adversarial proceedings in a curial context will not necessarily apply in proceedings in the Tribunal. There may be no strict demarcation between evidence-in-chief, cross-examination and evidence in reply. The question in each case is whether or not the evidence was "presented orally in support of the person's case". Information in support of a review applicant's case provided after or during cross-examination will be within the reach of s 500(6H), at least if the review applicant could reasonably have anticipated two business days prior to the commencement of the hearing that it would be information that supports his or her case. Such information should be the subject of the written notice and (as regards s 500(6H)) should be treated no differently than information that a review applicant does present in-chief.

19. In the present case, there was no evidence before the Federal Court that there was any further information that could have assisted the Appellant that he could not have included in a written statement given to the Respondent at least 2 business days before the hearing commenced, or which could not at that time have reasonably been anticipated to be evidence that may support his case.

20. Nor, as noted above, is there any suggestion of any attempt having been made to lead any further evidence before the Tribunal. Such an attempt would have been inconsistent with the approach of the Appellant's counsel noted by the Tribunal at [4].[19]

21. Although the Appellant frames a question in terms of whether the prohibition in s 500(6H) applies to responsive answers in cross-examination, any error by the Tribunal as to the effect of s 500(6H) could not have had significance in relation to its decision. The Appellant conducted his case on the basis that he had three children; he made no reference to his two extra children.[20] He did so, apparently, on the basis of legal advice.[21] The Tribunal can have no obligation to consider matters which formed no part of the case put by the Appellant[22], particularly in circumstances where he could reasonably be expected to put the interests of his two extra children in issue if he thought that his case could be so assisted: see again the specific comments upon the present case made by the Full Court in *Jagroop* at [87].

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[18] *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424-425 *per* Brennan J.
[19] AB182.
[20] AB 217 at [6] and 219-220 at [10]-[14] (TJ); AB 242 at [10]-[11] (FC).
[21] AB 220 at [15] (TJ); AB 252 at [37] (FC).
[22] See, for example, *May v Australian Postal Corporation* [2014] FCA 406 at [72] per Buchanan J.

22. Further, the Tribunal in this case did make some findings about the evidence, such as it was, relating to the Appellant's two extra children. The Tribunal said (at [64]):

> *As already stated, Mr Uelese has been involved in an on and off relationship with Ms Fatai for approximately 12 years, and they have three children aged eleven, eight and six. No evidence was able to be led regarding a further two children of another woman, aged approximately five and four whose names appeared as visitors in a Department of Corrective Services Inmate Profile Document because there was no information relating to them contained in a written statement provided to the Minister at least two business days before the hearing as required by section 500(6H) (http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s500.html) of the Act. I cannot take any consideration of their situation into account in coming to a decision in this matter, although I note that Ms Fatai said that she knew their mother, and that the children come to the Uelese home.* ***Without any information about these children, other than a small amount of information that was provided by Ms Fatai under cross-examination, I am unable to determine whether or not visa cancellation would be in the best interests of these children*** (emphasis added).

23. The final sentence of [64] was 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, regardless of s 500(6H). Given the paucity of that evidence, it was open to the Tribunal to conclude, as it did, that it could not determine which decision (to cancel, or not to cancel) was in the best interests of those children.[23] In light of that finding, it was not necessary for the Tribunal to further consider the interests of those children when weighing the various factors relevant to its decision. On the Tribunal's findings of fact, the evidence was too lacking in detail for the best interests of those two children to ultimately be a relevant consideration to be weighed (one way or the other) in the Tribunal's decision.

24. Accordingly, if the Tribunal made an error as to the construction or reach of s 500(6H), which is not conceded, the error could not have affected the decision and was, accordingly, one which would not sound in relief. Either, on that

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[23] See *Paerau v Minister for Immigration and Border Protection* (2014) 219 FCR 504 at [27] *per* Buchanan J, concluding that "*there could be no objection in any case to the AAT concluding that the best interests of a child did not weigh either for or against cancellation of a visa, so long as the available material was assessed conscientiously*" and at [118]-[119] *per* Perry J, holding that such a conclusion by the Tribunal was one that "*equates in the language of the Direction to a finding that the consideration was not 'relevant'*" in the particular case, that the case was not one where the Tribunal had "*failed to complete its task of determining where the best interests of the children lay and taking that into account in balancing that primary consideration against other considerations*" and that, in any event, she would refuse relief because: "*Once the Tribunal found that, by reason of the paucity of evidence, it could not be satisfied about where the best interests of the children lay, and that was a finding lawfully open to it, there was nothing further for the Tribunal to do with respect to that consideration*", *cf.* [69] *per* Barker J.

basis, the error would be non-jurisdictional[24], or it ought not, in the discretion of the Court[25], sound in relief.

*(b) The appellant's second issue; Could an adjournment have assisted the Appellant?*

25. The Appellant submits that, for the purposes of s 500(6H), the Tribunal "holds a hearing (other than a directions hearing)" on any day of a final hearing. Thus, it is said to follow, the Tribunal could have adjourned the hearing to allow the Appellant to comply with the time limit in s 500(6H).[26]

26. The occasion to consider this submission does not arise. Again, the Appellant did not make an application for an adjournment.[27] His representative accepted the effect of s 500(6H). The Tribunal had no independent obligation to consider whether to exercise its discretionary power to grant an adjournment in the circumstances that presented, much less to grant such an adjournment.[28]

27. In any event, the construction of s 500(6H) adopted by the Full Court in *Goldie v Minister for Immigration*[29] is correct. Once the Tribunal hearing commenced, "*the entitlement of the appellant to rely on information or documents crystalised*".[30] This construction should be preferred for several reasons.

28. First, it is consistent with the ordinary meaning of the statutory text. A hearing spanning two days is not, in any ordinary sense, two separate hearings. The Tribunal does not "hold" a separate "hearing" when it resumes a hearing that was previously adjourned. The period "2 business days before the Tribunal holds a hearing..." expires two business days before a hearing commences. The task of statutory construction, starts and ends with the text, as described in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]. That approach would give effect to the clear and intractable meaning of the words in question.

29. Secondly, contrary to the submissions of the Appellant[31], the use of the indefinite article "a hearing" does not run counter to the reasoning in *Goldie*. Again, the Tribunal holds a hearing on the first of the days of a hearing (other than a directions hearing) of the application for review. Once that time passes, s 500(6H) prevents the Tribunal from having regard to oral information in

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[24] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 570 [64] *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[25] *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 *per curiam*; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 108-109 [56]-[58] *per* Gaudron and Gummow JJ.
[26] Appellant's submissions at [34].
[27] See above at [12].
[28] *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 603 [22] (http://www.austlii.edu.au/au/cases/cth/HCA/2011/1.html#para22), 618-619 [75]-[76]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 374 [102].
[29] (2001) 111 FCR 378 at 391 [31]; AB 250 at [33(b)] (FC).
[30] Ibid.
[31] Appellant's submissions at [36].

support of an applicant's case that has not already been set out in a written statement given to the Respondent. There is no indication in the section that the time period re-starts, or re-fixes, after a day of hearing comes to an end. Further, this remains so whether or not the Tribunal can have more than one "hearing" (other than a directions hearing) "in relation to the decision under review", but, as submitted above, in those cases where a hearing extends over more than one day, there is still only one hearing.

30. Thirdly, the Appellant relies on what s 500(6H) *does not* say.[32] The task of statutory construction is focused on consideration of the statutory text, read in context. The fact that a word or expression is not used, does not mean that the words which are used must necessarily be read other than according to their ordinary meaning. There is more than one way in which Parliament may express its intention. Simply because Parliament did not adopt one particular form of words does not determine the question. The focus must remain on the words actually used. It would add nothing to the words that are used in s 500(6H) to adopt the language suggested by the Appellant in paragraph 36.

31. Fourthly, the Appellant is seeking to read into s 500(6H) words that are not there – such as "any one or more days on which" before the words "the Tribunal holds a hearing". The Court should not accept that invitation. It is simply not shown that all of the usual conditions[33] for the reading in of words are met – and, in particular, that the purpose of the provision requires such a course. Further, to read in words in the way that the Appellant implicitly invites would be to depart from the words that the legislature has enacted, which do not admit of the construction for which the Appellant contends: see *Taylor v Owners Strata Plan 11564* (2014) 86 ALJR 473 at 482-483, especially at 483 [39]-[40].

32. Fifthly, the reasoning in *Goldie*[34] is consistent with the context of s 500(6H), including the broader statutory scheme and the purpose[35] of the provision. That context includes s 500(6L) and the Full Court referred at [30] to the statutory purpose, citing *Goldie* especially at [9] and [25]. That purpose involves both ensuring that the Respondent is given a pre-hearing opportunity to consider and answer information that an review applicant will present orally in support of his/her case and also reducing the risk of adjournments being necessary that may otherwise cause the Tribunal to risk effluxion of time leading to an outcome deemed in accordance with s 500(6L). That sub-section operates to deem the decision under review to be affirmed if the

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[32] Appellant's submissions at [36].
[33] *Taylor v Owners Strata Plan 11564* (2014) 86 ALJR 473 at 480-483 at [22]-[25] and [37]-[40].
[34] (2001) 11 FCR 378 at 390 [25].
[35] Section 15AA of the *Acts Interpretation Act 1901* (Cth)*; Lacey v Attorney-General (Qld) (http://www.westlaw.com.au/maf/wlau/app/document?&src=doc&docguid=Ie8dd49539d6c11e0a619d462427863b2&hitguid=I1bc2f221ff8c11e08eefa443f89988a0&snippets=true&startChunk=1&endChunk=1&isTocNav=true&tocDs=AUNZ_AU_ENCYCLO_TOC&extLink=false#anchor_I1bc2f221ff8c11e08eefa443f89988a0)* (2011) 242 CLR 573 at 592-593 [45].
(http://www.westlaw.com.au/maf/wlau/app/document?&src=rl&docguid=I2505b433ff8c11e08eefa443f89988a0&hitguid=I1be79121ff8c11e08eefa443f89988a0&snippets=true&startChunk=1&endChunk=1&isTocNav=true&tocDs=AUNZ_AU_ENCYCLO_TOC&extLink=false#anchor_I1be79121ff8c11e08eefa443f89988a0)

Tribunal fails to make a decision within 84 days of the applicant being notified of the cancellation decision. The imperative for the Respondent to have an opportunity to consider and deal with information to be presented orally by a review applicant in support of his/her case and for the Tribunal to make its decision within the time described in s 500(6L) supports a construction of s 500(6H) which caps two business days prior to the time that the Tribunal commences its hearing the time for the review applicant to give written notice to the Respondent of such information. Section 500(6H) was specifically enacted to avoid delay and to prevent merits review being abused by an applicant seeking to prolong his or her stay in Australia.[36] It may also be noted in this respect that section 500(6G) of the Act prevents the Tribunal from holding a hearing in a case such as this "until at least 14 days after the day on which the Minister was notified that the (review) application had been made".

33. Sixthly, the construction contended for by the Appellant would defeat the purpose of the provision. If, as the Appellant submits at paragraph 23, the command to the Tribunal in s 500(6H) operates only in relation to information that a review applicant chooses to adduce as part of his case-in-chief, a review applicant could choose to temporarily withhold (but on a later date still present) oral information, even though it was apparently supportive of his case and could reasonably have been anticipated to be in support of the review applicant's case two business days prior to a hearing commencing. Even assuming that the Respondent and the Tribunal would then be given a reasonable opportunity to deal with and test that evidence, the process could conceivably continue to another cycle.

*(c) Further submissions regarding both of the issues formulated by the Appellant*

34. Contrary to the Appellant's submissions[37], no procedural unfairness is involved in the Respondent's approach. Nor, contrary to those submissions[38], does the Respondent's approach involve absurdity, irrationality, unworkability or injustice. The Appellant's approach, however, may involve such vices, imperilling the Minister's opportunity to deal with information in support of an Applicant's case, and the Tribunal's ability to consider the matter, without the 84 day period in s 500(6L) expiring. The Respondent's approach also works consistently with the general provisions of the *Administrative Appeals Tribunal Act 1975* (Cth) to which the Appellant refers, but s 500(6H) is nonetheless a provision which is a lead provision in the event that some reconciliation is called for: see by way of analogy the reasoning of the Full Court at [36], comparing s 499 and s 500(6H). With respect to the example given by the Appellant at paragraph 20, the Respondent's approach does not at all affect the ability of an Appellant to give evidence that truly is limited to rebuttal of the Respondent's case.

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[36] See Explanatory Memorandum to the *Migration Legislation Amendment (Strengthening of provisions relating to Character and Conduct) Bill 1998* (Cth) at pp. 3, 9-10.
[37] Paragraphs 26- 27 and 38.
[38] Including at paragraph 27.

35. The Appellant's contention[39] that the Tribunal engaged in a breach of procedural fairness, or was unreasonable, or constructively failed to exercise its power, would appear to go beyond the construction issues to which the grant of special leave was limited.[40]

**PART VII: TIME ESTIMATE**

36. It is estimated that the Minister will require one hour for the presentation of his oral submissions.

Dated 12 December 2014

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[39] Ultimately in paragraph 40(b).
[40] Special leave was limited to grounds 2 and 4 of the draft Notice of Appeal filed on 14 February 2014: [2014] HC Trans 239 at page 15 of 15.