HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, KEANE AND NETTLE JJ

PETER UELESE APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR RESPONDENTS

Uelese v Minister for Immigration and Border Protection
[2015] HCA 15
6 May 2015
S277/2014

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 2 and 3 of the order of the Full Court of the Federal Court of Australia made on 8 August 2013 and, in their place, order that:*

   (a) the appeal is allowed;

   (b) the order of Buchanan J made on 18 April 2013 is set aside and, in its place, it is ordered that:

      (i) a writ of certiorari issue directed to the second respondent, 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 decision of the second respondent made on 14 November 2012;

(iii) a writ of mandamus issue directed to the second respondent, requiring it to determine the applicant's application for review according to law; and

(iv) the first respondent pay the applicant's costs; and

(c) the first respondent pay the appellant's costs of the appeal.

3. The first respondent is to pay the appellant's costs of the appeal to this Court.

On appeal from the Federal Court of Australia

Representation

N J Owens with D P Hume for the appellant (instructed by Marque Lawyers)

G T Johnson SC with P M Knowles for the first respondent (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent

CATCHWORDS

Uelese v Minister for Immigration and Border Protection

Migration and citizenship – Visa cancellation – Character test – Administrative Appeals Tribunal – *Migration Act* 1958 (Cth), s 500(6H) precludes Tribunal from having regard to information presented orally in support of a person's case unless provided in written statement to Minister two days before Tribunal holds a hearing – Information arose regarding children during cross-examination of witness called on behalf of appellant – Tribunal required to consider best interests of minor children in Australia – Whether Tribunal erred in its application of s 500(6H) by not considering that information – Relevance of whether information could reasonably have been anticipated by appellant.

Migration and citizenship – Visa cancellation – Character test – Administrative Appeals Tribunal – Whether *Migration Act* 1958 (Cth), s 500(6H) precludes Tribunal from adjourning hearing so that notice requirements may be met – Whether day on which Tribunal "holds a hearing" includes day on which hearing resumes.

Words and phrases – "holds a hearing", "information presented orally in support of the person's case".

Migration Act 1958 (Cth), ss 499, 500(6H), 500(6L), 501.
Administrative Appeals Tribunal Act 1975 (Cth), ss 33, 40(1)(c).

1 FRENCH CJ, KIEFEL, BELL AND KEANE JJ. A delegate of the Minister for Immigration and Border Protection ("the Minister") cancelled the appellant's visa on character grounds under s 501(2) of the *Migration Act* 1958 (Cth) ("the Act"). The delegate was obliged, by directions given pursuant to s 499 of the Act, to have regard to the best interests of any minor children of the appellant who would be affected by the decision. The delegate exercised his discretion on the understanding that the appellant is the father of three children.

2 During the hearing of the appellant's application for review of the delegate's decision before the Administrative Appeals Tribunal ("the Tribunal"), it became apparent that the appellant is also the father of two other, younger children in Australia. This information had not previously formed part of the appellant's case; it was adduced in the course of the cross-examination of a witness called on behalf of the appellant.

3 Section 500(6H) of the Act provides that the Tribunal must not have regard to any information presented orally in support of an application for review unless it has been provided in a written statement to the Minister at least two days before the hearing. The Tribunal proceeded to determine the appellant's application on the footing that s 500(6H) of the Act precluded consideration by it of the interests of the appellant's two youngest children.

4 The Tribunal affirmed the delegate's decision. The appellant appealed unsuccessfully to the Federal Court of Australia, and then to the Full Court of the Federal Court of Australia. The appellant appeals to this Court, contending that s 500(6H) did not, on its proper construction, preclude consideration by the Tribunal of the interests of all his children, and that the Tribunal's failure to consider their interests was a jurisdictional error on its part.

5 The appellant's contention should be accepted and his appeal to this Court allowed. Section 500(6H) does not preclude the consideration of information which is not presented by or on behalf of an applicant for review as part of his or her case. In the present case, the Tribunal, acting upon its erroneous understanding of the effect of s 500(6H) of the Act, truncated the review which it was required to undertake. In particular, the Tribunal failed to have regard to whether the interests of the appellant's two youngest children would be best served by cancelling his visa. As a result, the Tribunal did not conduct the review required by the Act, and consequently acted beyond its jurisdiction[1].

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1 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 369 [85]; [2013] HCA 18.

The statutory framework

6 The appellant is a citizen of New Zealand. He was born in Samoa and moved to New Zealand with his family when he was three years old. He moved to Australia in 1998 at age 14, but is not an Australian citizen. He was granted a Class TY Subclass 444 Special Category (Temporary) visa, which allows him to remain in Australia indefinitely while he is a citizen of New Zealand. The appellant's parents, partner, children and extended family live in Australia.

7 Section 501 of the Act provides that the Minister has a discretion to refuse or cancel a visa on character grounds. In particular, s 501(2) of the Act provides that the Minister may cancel a visa granted to a person if the Minister reasonably suspects that the person does not pass the "character test" and the person does not satisfy the Minister that he or she passes the character test.

8 The appellant failed to satisfy the Minister that he passed the character test. Pursuant to s 501(6)(a), a person fails to satisfy the character test if he or she has a "substantial criminal record", which is defined in s 501(7)(c) to include a prison sentence of more than 12 months. The appellant has a history of criminal offences. He has served various periods of imprisonment. On 6 December 2011, he was sentenced to 36 months' imprisonment for recklessly causing grievous bodily harm in company. This was the longer of two sentences of over 12 months' duration imposed on the appellant.

9 On 3 September 2012, during the appellant's most recent term of imprisonment, a delegate of the Minister exercised the discretion conferred by s 501(2) to cancel the appellant's visa. On 6 September 2012, when the term of imprisonment ended, the appellant received notice of the cancellation and was placed in immigration detention.

10 Section 500(1)(b) of the Act and s 25(4) of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act") together provide that applications may be made to the Tribunal for review of a decision of a delegate of the Minister to cancel a visa under s 501 of the Act. The appellant made an application to the Tribunal for review of the delegate's decision.

11 In the particular circumstances of the present case, a decision-maker under the Act was bound by written directions issued under s 499 of the Act, including Direction No 55 – Visa refusal and cancellation under s 501 ("Direction 55"), issued on 25 July 2012, when deciding whether a visa should be cancelled under s 501.

12 Direction 55 states by cl 6.3(2) that a non-citizen who has committed a serious crime should generally expect to forfeit the privilege of staying in Australia. Other circumstances are, however, also relevant to a decision in that regard. In particular, cl 6.3(6) states, inter alia, that:

> "the consequences of a visa refusal or cancellation for minor children … in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled".

13 Clause 7(1)(a) of Direction 55 provides that a decision-maker must take into account the considerations in Pt A or Pt B of Direction 55 "where relevant".

14 Part A of Direction 55 is concerned with the considerations relevant to visa holders. Clause 8(4) provides that "primary considerations" should generally be given greater weight than "other considerations". The first of the primary considerations in Pt A is the protection of the Australian community from criminal or other serious conduct: cl 9(1)(a).

15 Part A also includes cl 9.3(1) and (2), which provide that decision-makers "must make a determination about whether cancellation is, or is not, in the best interests of the child" if the child is under 18 years old at the time of the decision. Clause 9.3(4)(d) makes "[t]he likely effect that any separation from the person would have on the child" a primary consideration.

16 In deciding to cancel the appellant's visa, the Minister's delegate was of the understanding that the appellant had three young children. The delegate accepted that the interests of these children would be best served if the appellant were to remain in Australia, but decided that the appellant's criminal conduct and the need for protection of the Australian community tipped the balance in favour of cancelling the appellant's visa.

17 Of central importance in this matter was s 500(6H) of the Act, which provides that upon an application to the Tribunal for review of a decision made under s 501, 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."

The proceedings in the Tribunal

18 The appellant had the benefit of legal representation at the hearing by the Tribunal.

19 As a "body having functions or powers under [the] Act"[2], the Tribunal was obliged, as the Minister's delegate had been, to apply Direction 55. Accordingly, the Tribunal was obliged to consider the best interests of any minor children in Australia affected by the decision[3], and to have regard to factors including "[t]he likely effect that any separation from the person would have on the child"[4].

20 On 14 November 2012, the Tribunal affirmed the delegate's decision to cancel the appellant's visa for reasons similar to those given by the delegate[5]; but unlike the delegate, the Tribunal was aware that the appellant was the father of five children, not three as the delegate had understood the case to be.

21 The interests, and indeed the existence, of the appellant's two youngest children, who at the time of the Tribunal hearing were four and five years of age[6], did not form part of the appellant's case before the Tribunal. Statements provided on the appellant's behalf to the Tribunal prior to the hearing referred to the appellant having three children with his partner, Ms Peta Fatai.

22 In the course of the cross-examination of Ms Fatai by the Minister's representative, she said that the couple had been separated for a period, and that during this separation the appellant had fathered two further children with Ms Jessie Vakauta[7]. It is not apparent from the record whether the particular questions which elicited this information were asked by the Minister's representative or by the presiding member of the Tribunal; but neither party

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2 Act, s 499.

3 Direction 55, cll 7(1)(a), 8(1), 9.3(1)-(3); Act, s 499(2A).

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

5 *Re Uelese and Minister for Immigration and Citizenship* [2012] AATA 793 at [75]-[80], [83].

6 *Re Uelese and Minister for Immigration and Citizenship* [2012] AATA 793 at [4].

7 *Re Uelese and Minister for Immigration and Citizenship* [2012] AATA 793 at [4]; *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13 at 18 [14].

regarded this circumstance as significant. The existence of the two youngest children was confirmed in documents tendered by the Minister, which revealed that the children were amongst the appellant's visitors in prison.

23 It was, and remains, unclear why the appellant did not acknowledge the existence of his two youngest children, or seek to make their relationship with him part of his case. The Tribunal merely noted that the appellant's legal representation had been arranged "at short notice"[8]; but before the Federal Court, at first instance[9] and on appeal[10], it was said that the appellant adopted this course on the basis of legal advice.

The decision of the Tribunal

24 The Tribunal regarded s 500(6H) of the Act as precluding consideration by it of the position of the appellant's two youngest children. In this Court, the Minister sought to argue that the Tribunal did take into account the information concerning those children.

25 Given this contention by the Minister, it is necessary to refer to the detail of the Tribunal's reasons on this point. The Tribunal summarised[11] its view of the effect of s 500(6H) of the Act as follows:

> "The effect of s 500(6H) of the [Act], which was acknowledged by Mr Uelese's representative, was that the Applicant 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."

26 The Tribunal went on to conclude[12]:

> "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

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8 *Re Uelese and Minister for Immigration and Citizenship* [2012] AATA 793 at [7].

9 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13 at 18 [15].

10 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534 at 545 [37].

11 *Re Uelese and Minister for Immigration and Citizenship* [2012] AATA 793 at [4].

12 *Re Uelese and Minister for Immigration and Citizenship* [2012] AATA 793 at [64].

> 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) 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 in original)

27 It can be seen from the Tribunal's reasons that the Tribunal did not take account of the information concerning the appellant's two youngest children. The Minister's contention in this respect is untenable. The Tribunal could not have made its position any clearer than by the explicit statement: "I cannot take any consideration of their situation into account".

The Federal Court

28 The appellant appealed to the Federal Court, and then to the Full Court of the Federal Court[13]. The decision of the Tribunal is a "privative clause decision" under s 474(2) of the Act; and so, pursuant to s 476A(1) and (2) of the Act, the Federal Court had jurisdiction to review it only for jurisdictional error[14].

29 Before the Federal Court (Buchanan J) the appellant submitted that the Tribunal erred in failing to consider the interests of his two youngest children. The appellant argued that his failure to disclose information about the two youngest children was a result of advice from his legal representative, and was therefore not his fault. Buchanan J rejected this argument, holding that there was no suggestion of fraudulent activity on the part of the appellant's legal representative and that, accordingly, the circumstance that the appellant might

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13 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13; *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534.

14 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13 at 16 [7].

have been poorly advised was not a defect in the proceeding before the Tribunal[15].

30 The appellant also argued that the Tribunal should have adjourned the hearing to allow evidence to be led in accordance with s 500(6H). Buchanan J rejected this argument, holding, in reliance on observations in *Goldie v Minister for Immigration and Multicultural Affairs*[16], that an adjournment cannot overcome the requirement of s 500(6H) that information be presented by an applicant to the Minister in writing two days before a hearing[17].

31 The appellant's third argument was that the Tribunal should itself have pursued the issue of his two youngest children's interests when it became aware of the children's existence. As to this argument, Buchanan J held that the Tribunal was "confined in the steps it could take"[18] and "obliged at all stages of the hearing before it ... to disregard any material emerging in oral evidence concerning Mr Uelese's two youngest children."[19] Thus, it can be seen that Buchanan J accepted the Tribunal's view of the preclusory effect of s 500(6H) of the Act.

The Full Court of the Federal Court

32 In the Full Court (Jagot, Griffiths and Davies JJ), the first ground of appeal was that Buchanan J erred in not concluding that the Tribunal denied the appellant procedural fairness in failing to consider the best interests of the two youngest children. Secondly, it was said that Buchanan J erred in failing to conclude that the Tribunal committed a jurisdictional error in failing to warn the appellant that the best interests of the two children would not be considered, in circumstances where there was a legitimate expectation that those interests would have been considered. Thirdly, it was said that Buchanan J erred in failing to

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15 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13 at 18-19 [16]-[17].

16 (2001) 111 FCR 378 at 391 [31].

17 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13 at 19-20 [20]-[23].

18 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13 at 18-19 [17].

19 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13 at 20 [22].

hold that the Tribunal was obliged, pursuant to Direction 55, to consider as a primary consideration the interests of all five of the appellant's children.

33 The Full Court rejected the appellant's arguments, holding that s 500(6H) is a constraint on a decision-maker's obligations under s 499 to comply with Direction 55[20]; accordingly, there had been no denial of procedural fairness or disappointment of a legitimate expectation because "the content of the appellant's procedural fairness entitlements ... was necessarily affected by the statutory constraint imposed on the [Tribunal] by s 500(6H) of the Act."[21]

34 The Full Court took the view, supported by dicta in *Goldie*[22], that the requirements of s 500(6H) of the Act are designed to prevent an applicant for review from changing the nature of his or her case[23], and concluded that the Tribunal was precluded from having regard to the oral evidence about the two children and could not adjourn the hearing to enable the requirement of two days' notice to be met[24].

35 The Full Court also held that the Tribunal was not obliged to make its own inquiries into the issue because the appellant's case was presented on the basis that he had only three children[25].

The grant of special leave to appeal

36 On 17 October 2014, Gageler and Keane JJ granted the appellant special leave to appeal to this Court. The grant of special leave was limited to two questions: whether the Full Court erred in failing to find jurisdictional error in the decision of the Tribunal that s 500(6H) of the Act prohibited it from having regard to information concerning the appellant's two youngest children; and

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20 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534 at 544-545 [34]-[36].

21 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534 at 543 [29].

22 (2001) 111 FCR 378 at 390 [26].

23 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534 at 543-544 [30]-[32].

24 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534 at 544 [33].

25 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534 at 544 [33].

whether the Full Court erred in failing to find jurisdictional error in the Tribunal's view that s 500(6H) precluded the grant of an adjournment to overcome the preclusory effect of that provision.

The appellant's arguments

37 The appellant submitted that s 500(6H) did not preclude the Tribunal from having regard to the information provided by Ms Fatai about the appellant's two youngest children. It was argued that information provided in the course of cross-examination of a witness called by an applicant, whether in response to questions from the Minister's representative or from the presiding member of the Tribunal, is not information "presented orally in support of" the applicant's case. The appellant argued that that information is "presented orally in support of the person's case" only if it is proffered by or on behalf of an applicant as part of his or her case.

38 In support of this submission, the appellant relied upon the recent decision of the Full Court of the Federal Court in *Jagroop v Minister for Immigration and Border Protection*[26], where it was said that the prohibition in s 500(6H) "would not preclude the [Tribunal] having regard to an applicant's answers in cross-examination", nor "information ... presented by an applicant in answer to the Minister's case, at least when the applicant could not reasonably have anticipated the evidence or issue raised".

39 The appellant's second submission was that, even if s 500(6H) had the preclusory effect attributed to it by the Tribunal, it was open to the Tribunal to adjourn the hearing so that the requirements of s 500(6H) could be met. The appellant argued that "two business days before" the Tribunal "holds a hearing" means two business days before any day on which the Tribunal conducts a final hearing, including a day on which the Tribunal resumes hearing a part-heard proceeding adjourned at an earlier date. It was said that the language of s 500(6H) does not refer to two business days before the hearing commences but rather to when the Tribunal "holds *a* hearing" (emphasis added): a body holds a hearing on any day it sits. Parliament did not speak of "*the* hearing", in contrast to s 33(2) of the AAT Act, which uses the phrases "where *the* hearing ... has not commenced" and "where *the* hearing ... has commenced" (emphasis added).

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26 (2014) 225 FCR 482 at 502 [97].

The Minister's arguments

40 In response to the appellant's first submission, the Minister argued that the appellant could reasonably be expected to have put the interests of his two youngest children in issue if he thought his case would be assisted by doing so. It was also said that the Tribunal was under no obligation to consider matters which did not form part of the appellant's case.

41 The Minister argued that no occasion for considering the appellant's second submission arises in this case. Given that the appellant did not make an application for an adjournment, the Tribunal had no obligation to consider whether to exercise its discretion to grant an adjournment, or to actually grant one. In addition, it was said that the view expressed in *Goldie* should be applied: once a hearing has commenced, "the entitlement of the appellant to rely on information and documents crystallised"[27] so that an adjournment may not be granted to allow an applicant to avoid the consequences of non-compliance with s 500(6H).

The preclusory effect of s 500(6H)

42 Considerations of text, context and legislative purpose[28] support the appellant's argument that the Tribunal misunderstood the preclusory effect of s 500(6H).

Textual considerations

43 Section 500(6H) is directed, in terms, at information presented orally in support of an applicant's case. It is not directed at *any* information, however that information may come before the Tribunal.

44 As a matter of ordinary usage, the phrase "presented … in support of the [applicant's] case" is apt to describe the active presentation of the case propounded by an applicant for review; but it is not at all apt as a description of the process of eliciting information under cross-examination. One would not ordinarily describe an answer given in response to a question posed on behalf of the Minister in the course of cross-examination as "information presented orally

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27 *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378 at 391 [31].

28 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]; [1998] HCA 28.

in support of the [applicant's] case". It is distinctly to strain the language of s 500(6H) to say that "information presented orally" in support of the case made by an applicant for review includes information elicited by the Minister's representative or by the Tribunal itself in the course of cross-examination of a witness called by the applicant.

45 In addition, it is well settled that a construction "which appears irrational or unjust"[29] is to be avoided where the statutory text does not require that construction. The view of s 500(6H) taken by the Tribunal in this case may be expected to lead to irrationality or injustice. For example, it would be irrational to hold that s 500(6H) precludes the Tribunal from receiving and acting upon an admission by an applicant for review elicited in the course of cross-examination that important aspects of the case he or she had presented in chief were false. And it would be distinctly unjust if the Minister could rely upon any answer elicited in cross-examination but the applicant could not.

46 In this Court, the Minister did not seek to sustain the Tribunal's view of the preclusory operation of s 500(6H). That view had been rejected by the Full Court of the Federal Court in *Jagroop*[30]. The Minister accepted that s 500(6H) will not generally preclude the Tribunal from having regard to information provided in response to questions put to a witness in cross-examination, whether by the Tribunal or by the representative of the Minister. It was said, however, that this general proposition was subject to the qualification that any information provided to the Tribunal in support of the case of the applicant for review (rather than merely in answer to the Minister's case) will be excluded by s 500(6H) where the information could reasonably have been anticipated to be supportive of the case of the applicant at least two business days prior to the date on which the Tribunal holds a hearing. This qualification was said to be supported by observations in *Jagroop*[31].

47 It may be said immediately that if the gloss on s 500(6H) urged by the Minister were to be accepted, that would mean that it was necessary for the Tribunal to determine whether the information provided by Ms Fatai could reasonably have been anticipated, at least two days before the hearing in the Tribunal, to be supportive of the appellant's case. And in this case the Tribunal

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29 *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 509 [48]; [2013] HCA 35.

30 (2014) 225 FCR 482 at 499-500 [80]-[83].

31 (2014) 225 FCR 482 at 502 [96]-[97].

made no such inquiry. As a matter of principle, however, the gloss on the statutory language urged by the Minister should not be accepted.

48 This aspect of the Minister's argument gains no support from the text of s 500(6H). The qualification propounded by the Minister is so awkward in its formulation that it cannot be regarded as implicit in s 500(6H). In addition, to accept the Minister's gloss would add a level of uncertainty to the operation of s 500(6H).

49 An attempt to determine whether an applicant might reasonably have anticipated certain information as being supportive of his or her case two days before the hearing is likely to encounter complications by reason of the applicant's entitlement to legal professional privilege in respect of instructions to his or her legal representatives, and their advice. Further in this regard, the question of whether new information could be anticipated to be supportive of the applicant's case two days prior to the hearing calls for an exercise in hindsight which may vary with the circumstances that obtain when the Tribunal is required to determine whether it may have regard to the new information. This point may be illustrated by reference to the circumstances of the present case.

50 Ms Fatai's information that the appellant was the father of two children not previously mentioned by him in relation to his application was not necessarily supportive of the appellant's case. It did not necessarily advance the appellant's case to reveal that there were five, rather than three, children who were entitled to depend upon him for material and emotional support and advancement, where that revelation was made in circumstances which at the same time revealed that he had failed to acknowledge even the existence of two of them. Considered on its own, Ms Fatai's information that the appellant's relationship with her and their children had been interrupted by another relationship could be seen as detrimental to any attempt by the appellant to present himself as a responsible member of a stable parental relationship who could be depended upon to provide for the welfare of his children if he were allowed to remain in Australia.

51 It may be that the appellant could have given a satisfactory explanation in response to these concerns; the sclerotic effect of the Tribunal's view of s 500(6H) prevented any such explanation emerging. The important point for present purposes, however, is that the gloss on the statutory language urged by the Minister would add a new and unacceptable level of complexity and uncertainty to the task of the Tribunal.

52 The observations of the Full Court of the Federal Court in *Jagroop*[32] to which the Minister referred were tentative observations which were appropriate in the circumstances of that case. Those observations do not support the Minister's gloss on the language of s 500(6H).

53 The conclusion that Ms Fatai's responses in cross-examination were not within the preclusory language of s 500(6H) of the Act is in accord with considerations of context and statutory purpose to which reference may now be made.

Contextual considerations

54 Section 500(6H) does not expressly limit the power of the Tribunal to conduct a review or authorise the Tribunal to give less than the "proper consideration of the matters before [it]" required by s 33 of the AAT Act.

55 Section 33(1) of the AAT Act provides generally that in a proceeding before the Tribunal the procedure of the Tribunal is within its discretion, that it is not bound by the rules of evidence, and that the proceeding is to be conducted with as little formality and technicality as, inter alia, a proper consideration of the matters before it permits.

56 Section 40(1)(c) of the AAT Act provides that, for the purpose of reviewing a decision, the Tribunal may "adjourn the proceeding from time to time."

57 Section 500(6H) should not be construed to restrict the flexibility of the Tribunal to ensure procedural fairness to the parties to a review beyond what is required by its terms. Specific powers under the AAT Act that would be restricted in their operation on the Tribunal's understanding of s 500(6H) include: s 39(1), which obliges the Tribunal to "ensure that every party to a proceeding ... is given a reasonable opportunity to present his or her case"; s 33(1)(c), which allows the Tribunal to "inform itself on any matter in such manner as it thinks appropriate"; and s 33(2A)(a), which allows the Tribunal to "require any person who is a party to the proceeding to provide further information in relation to the proceeding".

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32 (2014) 225 FCR 482 at 502 [96]-[97].

Considerations of purpose

58 The apparent purpose of s 500(6H) was to prevent applicants from manipulating the system in an attempt to delay deportation. The Explanatory Memorandum to the Bill that led to the enactment of s 500(6A) to (6L) of the Act stated[33] that:

> "These amendments are necessary in order to expedite review of decisions made by a delegate of the Minister under the new character provisions. The amendments balance the Government's concern to expedite review of character decisions against the need to ensure that the [Tribunal] has relevant information and sufficient time to properly review a particular decision to refuse to grant or to cancel a visa on the basis of a person's character."

59 The purpose of ensuring the expeditious determination of applications for review under s 500 of the Act by requiring that the Minister be given "an opportunity to answer the case to be put by the applicant for review without the necessity of an adjournment of the hearing"[34], which might result from a late change to the applicant's case, is not compromised by accepting that the preclusory effect of s 500(6H) is confined to information presented by or on behalf of the applicant for review in support of his or her case. Where information is adduced in cross-examination by the Minister or in response to inquiry by the Tribunal itself, it is inherently unlikely that the information is provided as part of an attempt to manipulate or delay the review process.

The best interests of the appellant's children

60 It is of particular importance that, in the circumstances of the present case, the Tribunal's erroneous understanding of s 500(6H) precluded it from making a determination about whether cancellation of the appellant's visa was or was not in the best interests of each of his children in Australia.

61 Counsel for the Minister developed a submission that the interests of the appellant's two youngest children were not "relevant" to the Tribunal's review

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33 Australia, Senate, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998, Explanatory Memorandum at 9, Item 21.

34 *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378 at 390 [25].

within the meaning of cl 7(1)(a) of Direction 55. It was said that because the appellant had not included their interests in the case he sought to present to the Tribunal, their interests were not relevant. This submission should be rejected for a number of reasons. First, it depends upon a misreading of cl 7(1)(a) of Direction 55: the best interests of an applicant's minor children in Australia are "relevant" if such children exist and that fact is known to the Tribunal.

62 Secondly, the Minister's submission seeks to import into the inquisitorial review function of the Tribunal notions appropriate to adversarial proceedings conducted in accordance with formal rules of pleading. That approach is inappropriate to the kind of review undertaken by the Tribunal.

63 In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[35], this Court cautioned against transposing the language and mindset of adversarial litigation to inquisitorial decision-making of the kind authorised by s 500 of the Act[36]. It is true, as the Full Court of the Federal Court rightly observed in *Jagroop*[37], that both s 500 of the Act and the AAT Act "contemplate participation by both the applicant and the Minister in the [Tribunal] hearing." Section 500(6H) expressly contemplates that the applicant will present a "case"; and it is implicit that the Minister will also present a "case". That having been said, it would be to give undue weight to conceptions drawn from adversarial litigation to accept that the Tribunal was not required to take into account the interests of the appellant's two youngest children because he had not sought to advance their interests as a positive part of his case.

64 Whether or not the appellant sought to make the interests of those children a positive aspect of his case, the Tribunal was obliged by s 499 of the Act and the terms of Direction 55 to take into account the interests of any minor children of which it was aware in determining his application for review. By virtue of s 499 and Direction 55, one of the primary considerations for the Tribunal concerned the interests of children who were not themselves represented in the proceedings before the Tribunal. The requirement of cl 9.3 of Direction 55 to consider the best interests of minor children in Australia affected by the decision is imposed on decision-makers in terms which are not dependent on whether an applicant for review argues that those interests are relevant as part of his or her "case".

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35 (2005) 225 CLR 88 at 98 [24]; [2005] HCA 72.

36 See also *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424-425; [1992] HCA 47.

37 (2014) 225 FCR 482 at 501 [92].

65 An aspect of the Minister's argument, developed by reference to the view that the Tribunal's functions were confined to a determination of issues relevant to the "case" presented by the appellant, was the contention that, if the Tribunal did misconstrue s 500(6H) by not considering the information adduced in cross-examination, that error did not affect the outcome of the review. The Minister argued that the paucity of evidence about the appellant's two youngest children in consequence of the way the appellant's case was presented meant that the Tribunal could not be satisfied one way or the other as to where the best interests of the appellant's children lay. This aspect of the Minister's argument must also be rejected.

66 It is apparent that the paucity of evidence referred to in the last sentence of the passage from the reasons of the Tribunal cited above was not due to the unavailability of material evidence. The Tribunal not only declined to act upon the information which was put before it by Ms Fatai, but it also failed to make even the most cursory inquiry to follow up on this information. This is not a case like *Paerau v Minister for Immigration and Border Protection*[38], on which the Minister sought to rely; here, the paucity of evidence was a consequence of the view taken by the Tribunal of the preclusory effect of s 500(6H).

67 It is not necessary here to seek to chart the boundaries of the Tribunal's obligation to inquire after the best interests of the children of an applicant for review. There may be cases, hopefully rare, where the evidence presented by the parties does not alert the Tribunal that minor children in Australia may be affected by the decision. There may also be cases where the evidence is such that the only determination which can be made in obedience to cl 9.3(1) of Direction 55 is that cancellation is neutral so far as the best interests of any minor child are concerned. In this regard, it is to be noted that cl 9.3(1) requires a "determination *about* whether cancellation is, or is not, in the best interests of the child" (emphasis added). Sometimes the best decision "about" whether cancellation is, or is not, in the best interests of the child may be that it is neither.

68 It is not necessary to canvass these possibilities further because the issue in this case is not whether the Tribunal failed to go far enough to discharge its obligation to conduct its review having regard to the interests of all the appellant's children; rather, the point is that the Tribunal, by reason of its misunderstanding of the effect of s 500(6H), failed to address one of the primary

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38 (2014) 219 FCR 504 at 512 [27], 518 [69], 527-528 [118]-[119].

considerations affecting the decision required of it. It failed to conduct the review required by the Act, and thereby fell into jurisdictional error[39].

Section 500(6H) and the power to adjourn

69 Because s 500(6H) did not apply to preclude the reception by the Tribunal of information concerning the appellant's two youngest children, it is, strictly speaking, unnecessary to determine the question whether the Tribunal could and should have granted him an adjournment to enable the Tribunal to examine Ms Fatai's evidence at a later date and so deal with it on the merits. In addition, no adjournment of the hearing before the Tribunal was sought by the appellant's representative. On behalf of the Minister, it was said that this is a further reason not to deal with the adjournment issue.

70 It is a matter for concern, however, that the failure on the part of the appellant's representative to seek an adjournment seems to have reflected a view, common to all parties, that s 500(6H), as understood in *Goldie*[40], left the Tribunal no discretion to grant an adjournment to enable the parties to deal with Ms Fatai's "surprising" revelation. Further, the effect of s 500(6H) upon the power of the Tribunal to grant an adjournment was one of the principal issues agitated by the parties in this Court. In these circumstances, it is desirable that this Court should express its opinion on the issue[41]. In particular, it is desirable to make it clear that s 500(6H) does not fetter the power of the Tribunal to grant an adjournment in order to ensure that its review is conducted thoroughly and fairly.

71 The source of the view that s 500(6H) restricts the power of the Tribunal to adjourn proceedings is the passage in *Goldie*[42] where Gray J said:

> "Once the Tribunal began a hearing, the entitlement of the appellant to rely on information and documents crystallised. That entitlement was limited to information contained in a statement or statements given to the Minister … at least two business days before the hearing began. The resumption of an adjourned hearing is not a new hearing."

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39 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 369 [85].

40 (2001) 111 FCR 378 at 391 [31].

41 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 512; [1993] HCA 74.

42 (2001) 111 FCR 378 at 391 [31].

72 Three points may be made in relation to this passage. First, the reference in *Goldie* to the "crystallisation" of an entitlement to rely on information is an inaccurate paraphrase of the language of s 500(6H). Section 500(6H) does not, on any view of its language, deny an applicant an "entitlement" to rely upon evidence adduced by the Minister or elicited by the Tribunal itself, if that evidence happens to be supportive of the applicant's case.

73 Secondly, while s 500(6H) is obviously concerned to prevent the Minister being taken by surprise by late changes to an applicant's case, it does not suggest an intention to fetter the power of the Tribunal to grant an adjournment where the fair conduct of the review hearing requires it and where the applicant has not sought to surprise the Minister. Nothing in the text of s 500(6H) warrants the imposition of a rigid limit upon the otherwise flexible power of the Tribunal to ensure that the proceedings before it are conducted fairly to all parties.

74 Thirdly, to say that the resumption of a hearing is not a new hearing is distinctly not to say that the notice requirements of s 500(6H) may not be satisfied by the exercise by the Tribunal of its power of adjournment where an appropriate case is made out for the exercise of its undoubted power in that regard under ss 33 and 40 of the AAT Act. If either party had sought an adjournment on the ground that it was surprised and disadvantaged by Ms Fatai's evidence and required an adjournment of the hearing to meet that disadvantage, then the question whether or not the fair determination of the application for review could only be achieved by granting the adjournment would have arisen for the Tribunal to resolve.

75 It was argued by the Minister that applicants for review might cynically withhold oral evidence in order to have it presented later in the course of a hearing so as to precipitate an adjournment with its attendant delay. It may be noted immediately that delaying tactics of this kind would expose an applicant to the risk of a deemed affirmation of the decision under review by operation of s 500(6L). Section 500(6L) provides that, if the Tribunal has not made a decision upon the review within 84 days after the day on which the applicant was notified of the decision under review, the Tribunal is taken, at the end of that period, to have decided to affirm the decision under review.

76 In any event, there is no reason to suppose that, in exercising its discretion, the Tribunal would not be mindful of the time frame established by s 500(6L) of the Act for the determination of review applications.

77 In summary, the purpose of ensuring that reviews under s 500 are dealt with expeditiously does not require a blanket limitation on the Tribunal's power to adjourn a hearing. Section 500(6H) should not be given an operation beyond

that warranted by its language in order to pre-empt the hypothetical possibility that the Tribunal might grant adjournments, supinely or unreasonably, to an applicant seeking to take cynical advantage of surprises occasioned by information introduced late in support of his or her case.

Conclusion and orders

78 The appeal should be allowed.

79 Paragraphs 2 and 3 of the orders of the Full Court of the Federal Court dated 8 August 2013 should be set aside and, in their place, it should be ordered that:

(a) the appeal to that Court be allowed;

(b) the order of Buchanan J dated 18 April 2013 be set aside and in its place order that:

(i) a writ of certiorari issue directed to the second respondent, 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 decision of the second respondent made on 14 November 2012;

(iii) a writ of mandamus issue directed to the second respondent, requiring it to determine the applicant's application for review according to law; and

(iv) the first respondent pay the applicant's costs; and

(c) the first respondent pay the appellant's costs in that Court.

80 The first respondent is to pay the appellant's costs of the appeal to this Court.

81 NETTLE J. Section 500(6H) of the *Migration Act* 1958 (Cth) ("the Migration Act") 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 ("the 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".

82 The two questions for decision in this appeal are:

(a) whether "information presented orally in support of the person's case" includes a responsive answer given by a witness under cross-examination by counsel for the Minister or under questioning from the AAT; and

(b) whether "a hearing" is a reference only to the first day of a hearing or includes a day on which a final hearing resumes after being adjourned part-heard.

The facts

83 The appellant was born in Samoa in 1984 and moved with his family to New Zealand at the age of three. He is a citizen of New Zealand but at the age of 14 he came to Australia and he has remained here ever since. Although he has not become an Australian citizen, he was granted a Class TY Subclass 444 Special Category (Temporary) visa which entitled him to stay in Australia so long as he remained a New Zealand citizen. Beginning at the age of 15, he acquired a history of convictions for criminal offences, including convictions for violent offences for which he was sentenced to imprisonment. The nature of the offences and the terms of imprisonment to which he was sentenced were such that he ceased to satisfy the "character test" set out in s 501(6) of the Migration Act[43]. That gave the first respondent ("the Minister") a discretion to cancel the visa[44].

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43 Section 501(6) of the Migration Act relevantly provides that:

> "For the purposes of this section, a person does not pass the ***character test*** if:
>
> (a) the person has a substantial criminal record (as defined by subsection (7))".

(Footnote continues on next page)

84 On 10 May 2012, during his last term of imprisonment, the appellant was informed that the Minister was considering cancelling his visa and, on 6 September 2012, when the term of imprisonment concluded, he was notified that the Minister had cancelled the visa.

85 The delegate of the Minister who made the decision was required to take into account a direction made under s 499 of the Migration Act – "Direction No 55 – Visa refusal and cancellation under s 501" ("Direction 55") – concerning matters relevant to the cancellation of a visa under s 501. Direction 55 includes the following:

> "**6.3 Principles**
>
> (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.
>
> ...
>
> (6) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.
>
> ..."

In turn, s 501(7) relevantly provides that:

> "For the purposes of the character test, a person has a ***substantial criminal record*** if:
>
> ...
>
> (c) the person has been sentenced to a term of imprisonment of 12 months or more".

44 Migration Act, s 501(2).

8. Taking the relevant considerations into account

(1) Decision-makers must take into account the primary and other considerations relevant to the individual case ...

(4) Primary considerations should generally be given greater weight than the other considerations.

...

9. Primary considerations – visa holders

(1) In deciding whether to cancel a person's visa, the following are primary considerations:

(a) Protection of the Australian community from criminal or other serious conduct;

(b) The strength, duration and nature of the person's ties to Australia;

(c) The best interests of minor children in Australia;

(d) Whether Australia has international non-refoulement obligations to the person.

...

9.3 Best interests of minor children in Australia affected by the decision

(1) Decision-makers must make a determination about whether cancellation is, or is not, in the best interests of the child.

(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to cancel the visa is expected to be made.

(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

(4) In considering the best interests of the child, the following factors must be considered where relevant:

(a) The nature and duration of the relationship between the child and the person ...

(b) The extent to which the person is likely to play a positive parental role in the future ...

(c) The impact of the person's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

(d) The likely effect that any separation from the person would have on the child, taking into account the child's ability to maintain contact in other ways;

(e) Whether there are other persons who already fulfil a parental role in relation to the child;

(f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

(g) Evidence that the person has abused or neglected the child in any way ...

(h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the person's conduct."

86 At the time of determining to cancel the visa, the delegate proceeded on the basis that the appellant had three children. He accepted that it would be in the interests of those children if the appellant's visa were not cancelled. The delegate took the view, however, that the gravity of the appellant's criminal conduct and the consequent risk to the community of the appellant reoffending so outweighed the interests of the three children that the appellant should not be allowed to remain in Australia.

87 The appellant sought review of the delegate's decision under s 25(4) of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act") (read with s 500(1)(b) of the Migration Act) and was legally represented before the AAT. He relied on a number of written statements of evidence, including statements by himself, various members of his family, his de facto wife (Ms Fatai) and a psychologist, in support of his case.

88 Several of the written statements referred to the appellant having three children born to him by Ms Fatai, aged eleven, eight and six respectively. Some of the written statements contained information bearing on the best interests of those children. There was also written evidence, in the form of a pre-sentence report in proceedings in the New South Wales District Court in late 2011, which referred to the three children. Thus, to begin with, the appellant's case before the

AAT was put on the basis that he had just three children whose interests required "primary consideration".

89 In the course of Ms Fatai's cross-examination by counsel for the Minister, it emerged that, in addition to the three children born of Ms Fatai, the appellant had two further children, aged approximately five and four at the time of the hearing, born to him by another woman with whom he had associated during a separation from Ms Fatai in 2005. Although it is not clear whether the information was elicited by questions asked by counsel for the Minister or questions asked by the AAT, Ms Fatai said that she knew the other woman and that the two further children came to the appellant's home. Counsel for the Minister also tendered two "Inmate Profile" documents issued by the New South Wales Department of Corrective Services which confirmed that the appellant had been visited in prison by both Ms Fatai and her three children and the other woman and her two children.

90 The AAT took the view that, because the appellant had not given a written statement of information about the other two children to the Minister at least two business days before the hearing, the AAT was precluded by s 500(6H) of the Migration Act from having regard to Ms Fatai's oral evidence concerning the two children. It is not clear but it may also be that the AAT considered that the Inmate Profile documents tendered by counsel for the Minister were similarly excluded. In its reasons, the AAT stated:

> "Mr Uelese has three children aged eleven, eight and six with Ms P Fatai whom he says he plans to marry in early 2013 if he is permitted to stay in Australia. Mr Uelese also has two other children aged approximately five and four. The information about the other two children came to light during cross-examination of Ms Fatai. ...
>
> ...
>
> 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) of the [Migration] 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 in original)

Decisions of the Federal Court and the Full Court of the Federal Court

91 The appellant applied to the Federal Court for judicial review on several grounds, including jurisdictional error the result of the AAT failing to consider the interests of the other two children. Although self-represented at that stage of proceedings, he argued that he had relied on legal advice concerning the conduct of the hearing before the AAT and, thus, that it was not his fault that notice of the two children had not been given to the Minister before the hearing. He also submitted that, once it emerged that he had two further children, the AAT should have adjourned the hearing to allow him to give the necessary notice to the Minister and also that the AAT had been bound to inquire into the matter of its own motion.

92 Buchanan J dismissed the application. He considered that he was bound to follow[45] the interpretation of s 500(6H) adopted by the Full Court of the Federal Court in *Goldie v Minister for Immigration and Multicultural Affairs*[46]. In *Goldie*, Gray J, with whom R D Nicholson and Stone JJ agreed[47], held that[48]:

> "Once the Tribunal began a hearing, the entitlement of the appellant to rely on information and documents crystallised. That entitlement was limited to information contained in a statement or statements given to the Minister, and to documents copies of which he had given to the Minister, at least two business days before the hearing began. The resumption of an adjourned hearing is not a new hearing."

93 Buchanan J was also of the view that the exception in the case of fraud on the part of a legal adviser identified by this Court in *SZFDE v Minister for Immigration and Citizenship*[49] was inapplicable, because there was no suggestion that the appellant's former legal adviser had been fraudulent[50].

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45 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 13 at 20 [22].

46 (2001) 111 FCR 378.

47 (2001) 111 FCR 378 at 394 [40], [41].

48 (2001) 111 FCR 378 at 391 [31].

49 (2007) 232 CLR 189 at 193-194 [7] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ; [2007] HCA 35.

50 *Uelese* (2013) 60 AAR 13 at 18-19 [17].

94 In the result, Buchanan J held that the AAT's conduct of the matter was constrained by s 500(6H) and, since Ms Fatai's oral evidence concerning the other two children was excluded, the AAT had not erred in deciding that it was not possible to say whether cancellation of the visa would be in those children's best interests[51]. His Honour also said it was to be doubted that the AAT's assessment would have been markedly affected if it had taken the interests of the two children into account, but emphasised that "the real difficulty" was that s 500(6H) precluded consideration of Ms Fatai's oral evidence concerning those children[52].

95 The appellant appealed to the Full Court of the Federal Court on grounds that Buchanan J erred in not finding that the AAT had denied the appellant procedural fairness by failing to warn him that it was not disposed to take the interests of the two children into account, and committed jurisdictional error by failing to consider the best interests of the two children[53].

96 The Full Court unanimously rejected the appeal. Their Honours considered that the construction of s 500(6H) which was adopted in *Goldie* was correct[54] – the legislative scheme was "designed to disadvantage an applicant for review" and "to advantage the Minister" by forewarning the Minister as to the entirety of the applicant's case such that he or she "is better able to respond"[55] and, without exception, confining the applicant to that case. It followed, they said, that there was no error in the AAT excluding Ms Fatai's oral evidence concerning the two children, or in not affording the appellant an adjournment in which to serve a notice of information concerning the children, or in failing to inquire into the circumstances of the two children[56].

"Information presented orally in support of the person's case"

97 The decision of the Full Court was handed down on 8 August 2013. Just over a year later, on 23 September 2014, a differently constituted Full Court

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51 *Uelese* (2013) 60 AAR 13 at 20 [23].

52 *Uelese* (2013) 60 AAR 13 at 19 [19]-[20].

53 *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534 at 541 [23] per Jagot, Griffiths and Davies JJ.

54 *Uelese* (2013) 60 AAR 534 at 544 [32].

55 *Goldie* (2001) 111 FCR 378 at 390 [26] per Gray J, cited in *Uelese* (2013) 60 AAR 534 at 543 [30] per Jagot, Griffiths and Davies JJ.

56 *Uelese* (2013) 60 AAR 534 at 544 [33].

handed down the decision in *Jagroop v Minister for Immigration and Border Protection*[57]. In the latter case it was held that, subject to one possible exception, the words "in support of the person's case" in s 500(6H) and (6J) relate only to information and documents presented as part of an applicant's case-in-chief and, therefore, do not apply to information or documents which an applicant may wish to present in answer to the Minister's case or to an applicant's response to a matter raised by the AAT of its own initiative[58]. The one possible exception was said to be the circumstances which arose in this case.

98 Putting aside the possible exception for the moment, what was said in *Jagroop* about the meaning of s 500(6H) was correct. As the Full Court in *Jagroop* rightly observed[59], the proscriptions in s 500(6H) and (6J) do not refer to "any" information presented or document submitted by an applicant. In terms, they are precisely limited to "information presented orally in support of the [applicant's] case" and "any document submitted in support of the [applicant's] case".

99 An applicant's answer to a question asked of him or her or one of his or her witnesses in the course of cross-examination cannot rationally be conceived of as information presented orally in support of the applicant's case. According to ordinary acceptation, such an answer is information elicited orally at the instance of the Minister with the aim of derogating from the applicant's case and thereby or otherwise supporting the Minister's case.

100 Of course, the Minister's cross-examination of an applicant or one of the witnesses called by an applicant could result in answers supportive of the applicant's case or which derogate from the Minister's case, just as may have occurred here. But it does not follow that the provision should be read as applying to answers of that variety. As the Full Court observed in *Jagroop*[60], in many cases it would be impossible or impractical for an applicant to foresee evidence which might emerge in the course of cross-examination of the applicant or one of the applicant's witnesses, and so impossible or impractical for the applicant to give notice of it in advance. It is not to be inferred that the provision

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57 (2014) 225 FCR 482.

58 *Jagroop* (2014) 225 FCR 482 at 500 [84] per Dowsett, Murphy and White JJ.

59 (2014) 225 FCR 482 at 502 [94].

60 (2014) 225 FCR 482 at 499-500 [82]-[83].

was intended to require something which may prove to be impossible or impracticable[61].

101 The conclusion that s 500(6H) does not apply to answers given in cross-examination of an applicant or of an applicant's witness is also supported by the context in which the provision appears. Read in context, the expression "information presented orally in support of the person's case" in s 500(6H) will be seen to be aimed at achieving the same result in relation to oral evidence as the expression "document submitted in support of the person's case" in s 500(6J) is designed to achieve in relation to written evidence. The natural and ordinary meaning of "document submitted in support of the person's case" in s 500(6J) is of documentary evidence tendered by an applicant. It would be a most unusual use of language for it to extend to a document which counsel for the Minister might tender in the course of cross-examination of an applicant or one of the applicant's witnesses. If that were so, it would entitle the Minister to rely on parts of the document favourable to the Minister's case while excluding any part of the document which supported the applicant's case.

102 Furthermore, because, as the Full Court observed in *Jagroop*[62], proceedings before the AAT are to some extent as much inquisitorial as they are adversarial, the AAT is entitled[63] and, depending on the circumstances, may be bound to inform itself on any matter as it thinks appropriate, subject to the requirements of procedural fairness[64]. Hence, circumstances may not

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61 *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 350 per Gibbs J; [1975] HCA 28; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 per Mason and Wilson JJ; [1981] HCA 26; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 509 [48] per French CJ, Hayne, Crennan and Kiefel JJ; [2013] HCA 35; see generally Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 79-81 [2.38]-[2.39].

62 (2014) 225 FCR 482 at 501 [92].

63 AAT Act, s 33(1)(c).

64 *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424-425 per Brennan J; [1992] HCA 47; and, in relation to the comparable functions of the Refugee Review Tribunal, see *Abebe v The Commonwealth* (1999) 197 CLR 510 at 576 [187] per Gummow and Hayne JJ; [1999] HCA 14; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909 at 1918-1919 [57] per Gummow and Heydon JJ; 201 ALR 437 at 450; [2003] HCA 60; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 98 [24] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; [2005] HCA 72; *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [18], 1129 [25] per French CJ,

(Footnote continues on next page)

infrequently arise where it is necessary for an applicant to respond by way of oral submission to a matter raised by the AAT of its own motion. It should not be supposed that s 500(6H) was intended to prevent that occurring. Leastways, before a provision could be construed as having that effect, it would need to provide in very clear terms that the AAT may not have regard to any oral evidence or other material favourable to an applicant's case or which derogates from the Minister's case, regardless of whether it is adduced in chief or in cross-examination or in response to issues raised by the AAT, unless notice of that evidence or material has been given not less than two business days before the hearing[65].

103 That leaves the possible exception identified in *Jagroop* of a case like the present. In effect, the Full Court in *Jagroop* attempted to rationalise the decision of the Full Court in this case as a possible exception to the view that s 500(6H) is limited to evidence or other material adduced in chief. The possible exception so identified was evidence favourable to an applicant's case adduced in the course of cross-examination of an applicant or an applicant's witness which raises facts which the applicant could reasonably have anticipated[66].

104 The existence of that exception should not be recognised. Upon its proper construction, s 500(6H) is limited to oral evidence adduced in chief in support of an applicant's case. For the reasons already explained, it cannot sensibly be construed as extending to oral evidence adduced in cross-examination of the applicant or of an applicant's witness favourable to the applicant's case, or which derogates from the Minister's case, or to an answer given or submission advanced in response to a matter raised by the AAT of its own motion. Though, as the Full Court discerned in *Jagroop*, it might not be quite as unreasonable if the reach of the provision beyond evidence adduced in chief were restricted to evidence adduced in cross-examination on matters of which an applicant had notice, the form of the provision is inapt to accommodate that construction. It would require reading in a large number of words which are not there[67].

Gummow, Hayne, Crennan, Kiefel and Bell JJ; 259 ALR 429 at 434, 436; [2009] HCA 39; and see generally Bedford and Creyke, *Inquisitorial Processes in Australian Tribunals*, (2006) at 28.

65 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 585 [51] per Gummow and Hayne JJ; [2006] HCA 50.

66 *Jagroop* (2014) 225 FCR 482 at 502 [96].

67 *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersey; *Taylor v The Owners – Strata Plan No 11564* (2014) 88 ALJR 473 at 483 [38] per French CJ, Crennan and Bell JJ; 306 ALR 547 at 557; [2014] HCA 9.

First day of hearing

105 There remains the second question of whether s 500(6H) requires notice to be given at least two business days before the first day of the hearing of an application for review or whether, upon its proper construction, it allows for the possibility of an adjournment of the hearing to afford an applicant additional time to give notice. Strictly speaking, the answer to the first question is sufficient to dispose of the appeal. But the second question was raised below and fully argued before this Court on the alternative basis that, if s 500(6H) were held to preclude the AAT from receiving the evidence elicited from Ms Fatai regarding the two other children, the appellant should have been granted an adjournment of the hearing in order to give the Minister the requisite notice of the evidence and thus rely upon it. In those circumstances, it is appropriate that the question be dealt with.

106 The starting point is that s 500(6H) does not in terms refer to the first day of the hearing of an application for review. Rather, it refers to a time "at least 2 business days before the Tribunal holds *a* hearing (other than a directions hearing) in relation to the decision under review" (emphasis added).

107 Among other significant things about that form of words are: the reference to *a* hearing as opposed to *the* hearing; the parenthetical exception of a directions hearing; and the words "in relation to the decision under review".

108 If the intention were to require notice to be given "at least two business days before the first day of the hearing of an application for review", one might think that those words would have been chosen. In contrast, the selection of the indefinite article *a* in preference to the definite article *the* suggests that the drafter anticipated the possibility of more than one hearing in relation to an application for review. That impression is fortified by the reference to "*the* hearing of the proceeding" in s 33(2)(a) and (b) of the AAT Act (emphasis added), which distinguishes between the first day of *the* hearing of the proceeding and subsequent days for the purposes of the AAT making directions.

109 The parenthetical exclusion of a *directions hearing* adds support to the conclusion that s 500(6H) envisages the possibility of more than one hearing. It suggests that it was foreseen that "a hearing ... in relation to the decision under review" is a sufficiently broad conception to include an interlocutory hearing in relation to the decision under review and hence that it was considered necessary to exclude directions hearings from the range of interlocutory hearings to which the provision would otherwise have attached. To some extent, that implies that the object of the provision was to require that notice be given at least two business days before the day of hearing of the matter the subject of notice.

110 The choice of the expression "in relation to the decision under review" in contrast to, say, "of the application for review" is also consistent with a

legislative recognition of the possibility of more than one hearing with respect to an application for review and thus suggests that the requirement to give notice should be taken as one to give notice at least two business days before the particular hearing at which the "information [is] presented orally in support of the person's case", as opposed to at least two business days before the first day of hearings in relation to the application for review.

111 In *Goldie*, Gray J concluded that the purpose of s 500(6J) and (6H) is to give the Minister an opportunity to answer the case put by an applicant for review without need of an adjournment of the hearing; more precisely, to prevent an applicant for review from being able to change the nature of his or her case, thus catching the Minister by surprise and forcing the AAT into granting one or more adjournments to enable the Minister to meet the new case put[68]. His Honour added that if that were not sufficiently apparent from the terms of the legislation, it was clear from the Second Reading Speech in relation to the Bill by which the provisions were introduced[69].

112 Even if that be so, however, it cannot be allowed to detract from the meaning of the provisions which emerges from their terms[70]. According to the plain and ordinary meaning of s 500(6H), there can be more than one hearing in relation to an application for review. That is consistent with the notice requirement being a requirement to give notice not less than two days before the particular hearing at which the subject material in support of the applicant's case is presented in chief. So to construe the provision may not accord to the Minister all of the advantages which Gray J conceived to be the purpose of the provision but it is logical and it is consistent with what was stated in the Second Reading Speech to be the objective[71]. So long as notice be given not less than two business days before the particular hearing at which the material the subject of notice is presented in chief, the Minister will not be taken by surprise or, for that reason, need to seek an adjournment.

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68 (2001) 111 FCR 378 at 390 [25].

69 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 December 1998 at 1232. See also Australia, Senate, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998, Explanatory Memorandum at 3.

70 *Re Coleman; Ex parte Billing* (1986) 61 ALJR 37 at 39 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; 68 ALR 416 at 420; [1986] HCA 74; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41.

71 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 December 1998 at 1232.

113 Finally, there remains the question of whether, when a hearing is adjourned from day to day, the second and any subsequent day of the hearing should be regarded as part of the hearing which began on the first day or as a separate hearing for the purposes of the provision.

114 Ordinarily, one would speak of each day of a hearing as part of the one hearing. So, as has been observed, if s 500(6H) had been drafted in terms akin to s 33(2)(a) and (b) of the AAT Act as requiring notice not less than two business days before *the* hearing of the application for review, there would be little reason to doubt that the requirement was to give notice not less than two business days before the first day of the hearing regardless of whether the hearing might be adjourned at the end of the first day and then continue for several days thereafter.

115 But, as has been seen, in the case of s 500(6H) the use of the expression "a hearing ... in relation to the decision under review" contemplates the possibility of more than one hearing and thereby leaves open as a possible construction that each day's hearing may be regarded as a separate hearing for the purposes of giving notice. Since that construction would have the least impact on the ability of the AAT to deal with an application for review in the manner which it conceives to be best calculated to achieve a just disposition of the application, and would also be consistent with the perceived object of the provision of ensuring that the Minister is not taken by surprise, that construction should be preferred.

116 So to conclude is not to overlook the 84-day time limit imposed by s 500(6L)(c). As counsel for the appellant submitted, there is no necessary inconsistency between that time limit and the possibility that, after a hearing has been adjourned, an applicant might give notice at least two business days before the day on which the hearing is to resume of material in support of the applicant's case which the applicant proposes to adduce in chief at the resumed hearing. The 84-day time limit is immutable and so may prove a powerful consideration in the AAT's determination whether to adjourn a hearing to enable an applicant to give notice of new or additional material which he or she seeks to adduce in chief in support of his or her case. But, properly understood, it goes no further than that.

Consequences of failing to take into account the subject evidence

117 It follows from what has been said that the AAT's refusal to take into account Ms Fatai's evidence concerning the two other children was to exclude a relevant material consideration. The AAT was empowered by s 33(1)(c) of the AAT Act to "inform itself on any matter in such manner as it thinks appropriate". To the extent the AAT considered that the evidence elicited from Ms Fatai was insufficient to make a determination as to the best interests of the two children, s 500(6H), properly construed, presented no barrier to the AAT taking the necessary steps to ascertain sufficient information for it to form a view.

118 Counsel for the Minister contended that it was apparent from the following passage from the AAT's reasons earlier set out[72] that, because of the paucity of evidence, any failure by the AAT to take account of the evidence made no difference:

> "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."

119 That submission should be rejected. Read in isolation, the passage of the reasons relied upon is equivocal. Read in context, it appears that what the AAT intended to convey was that, despite the limited written evidence about the children that was before the AAT, in the absence of Ms Fatai's oral evidence concerning the children the AAT was unable to determine whether or not visa cancellation would be in their best interests. So, far from demonstrating that Ms Fatai's evidence could not have made a difference to the AAT's decision, the cited passage read in context implies that her evidence, had it not been excluded, could well have proved critical or, at the least, could have made a difference.

Conclusion

120 For these reasons, I agree with the orders proposed in the joint judgment.

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72 The full passage is excerpted at [90] of these reasons.