FEDERAL COURT OF AUSTRALIA

ACF16 v Minister for Immigration and Border Protection
[2016] FCA 982

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| Appeal from: | *ACF16 v Minister for Immigration & Anor* [2016] FCCA 1019  |
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| File number: |  |
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| Judge: | **WIGNEY J** |
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| Date of judgment: | 17 August 2016 |
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| Legislation: | *Migration Act 1958* (Cth), ss 36, 36(2)(a), 36(2)(aa), 425(1)  |
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| Cases cited: | *AAO15 v Minister for Immigration and Border Protection* [2015] FCA 1291 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576*Minister for Immigration and Citizenship v SZIAI* (2009) 111 ALD 15*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 *Randhawa v Minister for Local Government and Ethnic Affairs* (1994) 52 FCR 437*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 *SZOOR v Minister for Immigration & Citizenship* (2012) 202 FCR 1*SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451 |
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| Date of hearing: | 17 August 2016 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | No Catchwords |
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| Number of paragraphs: | 44 |
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| Counsel for the Appellant: | The appellant appeared in person with the assistance of an interpreter |
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| Counsel for the First Respondent: | Mr D McLaren of Minter Ellison |
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| Counsel for the Second Respondent: | The second respondent filed a submitting appearance, save as to costs. |

ORDERS

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|  | NSD 709 of 2016 |
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| BETWEEN: | ACF16Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNAL Second Respondent |

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| JUDGE: | WIGNEY J |
| DATE OF ORDER: | 17 AUGUST 2016 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant is to pay costs as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from transcript)

WIGNEY J:

1. This is an appeal from an unsuccessful application for judicial review of a migration decision in the Federal Circuit Court of Australia. The appellant is a Sri Lankan national who travelled to Australia on a visitor visa in May 2012. A couple of weeks after arriving he applied for a protection visa, claiming that he feared that he would be harmed if he returned to Sri Lanka. As will be seen, his main, if not only, fears of harm were said to emanate from the fact that he, or his business, was the victim of extortion in Sri Lanka. His protection visa application was unsuccessful, as was his review application before the Administrative Appeals Tribunal. His unsuccessful judicial review challenge to the Tribunal’s decision in the Circuit Court is the subject of this appeal.
2. The appeal raises essentially two questions. The first is whether the Tribunal failed to comply with its statutory requirement to give the appellant a fair hearing having regard to the way it dealt with certain documents relied on by him in support of his application. The second is whether the Tribunal’s decision was irrational or illogical. The primary judge answered both of those questions in the negative and rejected the appellant’s contention that the Tribunal had failed to properly exercise its jurisdiction.
3. For the reasons that follow, the primary judge’s conclusion that the Tribunal had not relevantly erred was correct.

# The appellant’s protection visa claims

1. The criteria for the grant of a protection visa are well known. At the time the appellant applied for a protection visa s 36(2)(a) of the *Migration Act 1958* (Cth) provided that a criterion for a protection visa is that the appellant is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugee Convention. In simple terms, Australia has protection obligations under the Refugee Convention in respect of a person who is outside their country of origin and who is unable or unwilling to avail themselves of the protection of that country, or to return there, on account of them having a well-founded fear of persecution based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.
2. Section 36(2)(aa) of the Act provided an alternative criterion known generally as the complementary protection criterion. A person meets the complementary protection criterion if the Minister is satisfied that Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the
non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.
3. The remaining subsections of s 36 and Subdivision AL of Part 2 Division 3 of the Act contain additional provisions relating to protection visas. Other parts of the Act, such as Part 1, include provisions that define or explain various expressions used in s 36(2)(a) and (aa), such as significant harm and persecution.
4. The appellant’s protection visa application contained fairly wide ranging claims concerning events that had occurred in the appellant’s life in Sri Lanka. He proffered those claims in support of his contention that he would be persecuted or suffer harm if returned to Sri Lanka. For reasons that will become apparent, it is unnecessary to rehearse those claims in any detail in these reasons.
5. In March 2013, a delegate of the first respondent, the Minister for Immigration and Border Protection, refused to grant the appellant a protection visa. The only point of relevance to note for the purposes of the appeal is that the delegate expressed doubts about the credibility of some of the appellant’s claims and, more significantly, found that various documents relied on by the appellant were not genuine. As will be seen, the appellant’s claim concerning an unfair hearing hinges on the way that the Tribunal dealt with some documents.

# The tribunal proceedings and decision

1. The appellant applied to the Tribunal for a review of the delegate’s adverse decision.
2. Section 425(1) of the Act required the Tribunal to invite the appellant to appear before it to give evidence and present arguments relating to the issues arising in relation to the delegate’s decision, being the decision under review. In due course the appellant was invited to attend, and did attend, a hearing before the Tribunal at which he gave evidence and presented arguments.
3. The appellant, it appears, gave the Tribunal a fairly detailed account of his life in Sri Lanka from 2007 until his departure in May 2012. That account is detailed in the Tribunal’s reasons. It is unnecessary to repeat it. As events transpired, the appellant’s case that he feared that he would suffer harm if he returned to Sri Lanka turned out to focus almost exclusively on the claim that he was the victim of extortion in Sri Lanka. He feared harm at the hands of the extortionists.
4. In simple terms, the appellant’s evidence was that he operated a business with three other partners in the northern part of Sri Lanka. Two of those partners did not have any real involvement in the running of the business. As a result of the success of the business, the appellant was approached by supporters of the Sri Lankan army or a paramilitary group who demanded that he pay them a sum of money. They said that payment was necessary to allow the business to operate. If he did not pay he would be abducted or arrested. The appellant said that he could not afford to pay the full amount of the money, so he negotiated to pay by instalments. After paying the first instalment, the appellant left Sri Lanka.
5. After the appellant left Sri Lanka to come to Australia in May 2012, the same men approached the appellant’s parents, who still lived in Sri Lanka, in an apparent attempt to find the appellant. They also approached and threatened his business partner. On the appellant’s account, this was because the appellant had not paid them all of the money they had demanded from him. The appellant’s evidence was that he feared being harmed by the extortionists should he return to Sri Lanka because he had not paid the balance of the funds.
6. The appellant relied on a letter that purported to be from an assistant priest of a Catholic church in Jaffna. The letter stated that the appellant “belongs to our Church” and that “[a]s he [the appellant] has involved in doing business over here, it is rather difficult for him to return to his country [*sic*]”.
7. It would appear from the Tribunal’s reasons that the Tribunal questioned the appellant at some length concerning the extortion claim, his reasons for travelling to Australia, his intentions when he initially arrived in Australia and why they changed, and his discussions with his business partner and members of his family concerning the extortion demands. Unfortunately for the appellant, this questioning, or more specifically the appellant’s responses to it, ultimately led the Tribunal to disbelieve the appellant. The Tribunal found that the appellant’s claims concerning the extortion were false.
8. Given the appellant’s claim that the Tribunal’s findings were irrational or illogical, it is necessary to extract at least some of the Tribunal’s reasons for why it disbelieved the appellant. The Tribunal’s reasons include the following assessment of the appellant’s evidence (at [28] to [31]):

The applicant claims protection on the ground that men who had demanded money from him when he was in Sri Lanka will harm him because the applicant has not paid any further amount to them or the full amount they originally wanted from him. He claims that although this problem had arisen when he was in Sri Lanka and although he had the opportunity to find safety from that problem by coming to Australia, he never intended to remain here. He claims he intended to go back to Sri Lanka and placate the people he fears by hoping they would accept lesser sums of money over a longer period of time.

What changed his mind was simply exhortations from his sister and parents that he was in a dangerous situation and should not return. The Tribunal has difficulty accepting that evidence because the applicant himself would have well-known of the dangers he was in and the Tribunal does not believe that, if he truly thought he could avoid those dangers by paying smaller amounts of money, he would just suddenly change his mind at the behest of his parents and sister. The Tribunal’s scepticism about that claim is enhanced by the applicant’s unconvincing evidence that these important exhortations of his parents and sister arose not from the fact that men had demanded money from the applicant, but, from the fact, that he had paid money to them.

The Tribunal could not see why the fact that payment had been made would cause his parents and sister to give him these warnings, but, not the fact that a demand for payment had even been made in the first place. Further, the applicant’s evidence about what he told his parents and sister was also unconvincing. The Tribunal could not see why the applicant would tell his family a demand for money had been made but not tell them that he had paid money because he did not want to worry them. If anything, telling family that a demand had been made but not telling them that he had paid money would only make them worry given the applicant said that if he had not made any payment he could have been abducted. He said his sister and parents were aware of the way people like this operated. The Tribunal also does not believe that, after telling his family a demand had been made for him to pay money, he was somehow able to avoid telling them payment had been made.

Finally, the Tribunal also finds unconvincing and not credible the seemingly uninterested and nonchalant response of the applicant’s own business partner to the fact that the applicant was being approached by men for payment of a large amount of money because of the success of that very same business they were operating. The Tribunal does not believe that the applicant’s business partner would not have had a far stronger reaction to that situation whether or not it was only the applicant who was being approached and regardless of X’s other employment commitments. The Tribunal has explored all of these concerns with the applicant and finds his responses about them unsatisfactory and unconvincing. The Tribunal therefore finds that the applicant has been untruthful about being approached for money by people in Sri Lanka and about his intentions when he came to Australia in May 2012.

1. The Tribunal did not consider that the letter from the priest assisted in corroborating the appellant’s version of events. It said the following about the letter (at [34]):

To the department, the applicant submitted a letter from a Catholic priest in Jaffna who said the applicant attended his church and who broadly claimed that it was difficult for the applicant to return to Sri Lanka because he had been involved in business. This broad assertion does not overcome the concerns the Tribunal holds about the credibility of the applicant’s claims that men demanded money from him in Sri Lanka. Accordingly, the Tribunal does not give weight to the assertion made by the priest in his letter.

1. The appellant confirmed to the Tribunal that he did not fear harm in Sri Lanka from anyone other than the men who had demanded money from him. The Tribunal rejected the appellant’s evidence about those demands. The end result was that the Tribunal was not satisfied that the appellant met either the Refugee Convention criterion or the complementary protection criterion for a protection visa.

# The circuit court proceedings and judgment

1. The appellant sought judicial review of the Tribunal’s decision in the Circuit Court pursuant to s 476 of the Act. He sought an order quashing the Tribunal’s decision.
2. In the Circuit Court the appellant relied on two grounds of challenge to the Tribunal’s decision.
3. The first ground was that the Tribunal denied the appellant procedural fairness or breached s 425 of the Act. The particulars to that ground indicated that the alleged denial of procedural fairness arose from the way that the Tribunal dealt with the letter from the priest that the appellant had relied on in support of his claim. The essential complaint was that the Tribunal failed to give the appellant an opportunity to be heard in relation to the Tribunal’s conclusion that the letter was “broad based” and did not support the appellant’s case. In its submissions before the primary judge, the appellant contended that the nature of the findings made by the delegate engaged the principles enunciated in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.
4. It was held in *SZBEL* that, in the absence of steps taken by the Tribunal to notify an applicant to the contrary, the applicant was entitled to assume that the issues considered dispositive by the delegate were the issues which arose in relation to the decision under review. If the Tribunal should be inclined to reach its decision by reference to an issue other than those considered dispositive by the delegate, a failure to notify the applicant would be a denial of procedural fairness and a breach of s 425 of the Act.
5. The primary judge rejected the appellant’s first ground and held that there was no denial of procedural fairness. His Honour found that the Tribunal had made it clear to the appellant at the commencement of the hearing that the credibility of his evidence was in issue. It was pointed out to the appellant that it was the Tribunal’s task to decide whether or not the appellant was telling the truth. In that respect, the primary judge held that the case was distinguishable from *SZBEL*. The primary judge also held that the weight to be given to the letter from the priest was a matter for the Tribunal.
6. The second ground in the Circuit Court was that the Tribunal’s findings concerning payment of the money in [30] and [31] of its reasons were irrational or illogical. That appeared to be a reference to the Tribunal’s reasoning concerning the fact that the appellant’s business partner was, on the appellant’s account, somewhat nonchalant or disinterested about the fact that demands had been made to the appellant to pay large sums of money. It may also have been a reference to the appellant’s evidence concerning the reaction of members of his family to his revelations about the extortion demands and payments. The Tribunal’s reasoning and findings in those paragraphs fed into the Tribunal’s ultimate finding that the appellant’s evidence concerning the alleged extortion lacked credibility and was false.
7. The primary judge (at [18]) rejected the appellant’s contention that the Tribunal’s reasoning was illogical or irrational. His Honour held that the credibility findings in [30] and [31] were open on the evidence that was before the Tribunal.

# The appeal

1. The appellant was not legally represented in relation to his appeal. His notice of appeal raised two grounds of appeal. To a large extent they mirrored the grounds of review in the Court below, though the particulars of the procedural fairness ground differed slightly. The two grounds of appeal were in the following terms.

**Ground 1**

1. His Honour erred (*ACF16 v Minister for Immigration and Border Protection*) erred [*sic*] in failing to find that the Tribunal has not been procedurally unfair and committed jurisdictional error when it failed to deal with the priests letter and enquire about the business documents by failing to comply with its obligations under s 425 of the Act.

**Particulars**

(a) The Tribunal has been procedurally unfair and failed to enquire about the business documents to the Appellant.

(b) The Tribunal has been procedurally unfair and failed to deal with the priest’s letter given by the Appellant.

(c) The Tribunal failed to identify these matters and deal with it.

**Ground 2**

1. His Honour should have found that the Tribunal committed jurisdictional error by being irrational/illogical.

**Particulars**

(i) The Appellants [*sic*] repeats ground in the amended application in FCCA.

(ii) The Tribunal committed jurisdictional error.

1. The appellant did not file any written submissions.
2. The appellant appeared unrepresented at the hearing of the appeal. He made brief oral submissions. Those submissions could loosely be characterised as being directed to his first appeal ground. He did not make any submissions concerning illogicality or irrationality.
3. In his oral submissions, the appellant repeated his contention that the Tribunal did not consider the letter from the priest and other business documents that he had submitted, or attempted to submit, to the Tribunal. He said that the business documents, which included bank statements, a certificate of registration, a company letterhead and a distributorship agreement, clearly showed that he operated a business in Sri Lanka. The appellant also submitted that the Tribunal failed to question him in depth about various issues concerning the alleged extortion. He said that the paramilitary officers who were behind the extortion were still operating in Sri Lanka.

## Ground 1 – denial of procedural fairness

1. There is no merit in the appellant’s contentions concerning denial of procedural fairness. The primary judge was correct to reject this aspect of the appellant’s case.
2. In relation to the priest’s letter, the appellant’s reliance on *SZBEL* was curious. This was not a case where the Minister’s delegate had accepted a particular claim or an item of evidence tendered by an applicant, but the Tribunal then rejected that claim or evidence without putting the applicant on notice that it might do so. Indeed, the opposite was the case. The delegate had not accepted that the priest’s letter was genuine. In those circumstances, the appellant must have been aware that there was an issue concerning the priest’s letter.
3. The Tribunal, on the other hand, did not appear to doubt the authenticity of the priest’s letter. It simply did not give it any weight as corroborating evidence because the statement in the letter was in such broad terms. The weight to be given to any particular piece of evidence is entirely a matter for the Tribunal. It was open to the Tribunal to take the view it did about the cogency of the letter as corroborating evidence. Procedural fairness did not require the Tribunal to put the appellant on notice that it might give little or no weight to the letter. In any event, a fair reading of the Tribunal’s reasons reveals that the Tribunal put the appellant on notice that the credibility of all his evidence concerning the extortion claim was in issue. That would include the letter. The Tribunal’s adverse findings, including in relation to the weight to be given to the letter as corroborating evidence, was “obviously…open on the known material”: *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 G-B.
4. The appellant’s contention that the Tribunal failed to deal with the priest’s letter has no merit. The Tribunal did deal with the priest’s letter. It simply gave it no weight for the reasons it gave. It was open to the Tribunal to give the priest’s letter no weight.
5. The appellant’s contention that the Tribunal failed to enquire about the business documents that he had submitted also does not assist him. This was not an argument or contention that was pursued in the Circuit Court. There is little doubt that the appellant did provide some business documents to the Tribunal. Those documents tended to prove that the appellant did operate a business in Sri Lanka. The difficulty for the appellant, however, is that the fact that he conducted a business in Sri Lanka was not in issue. The Tribunal did not doubt that the appellant conducted a business in Sri Lanka. It accepted his evidence in that regard. In those circumstances it was unnecessary for the Tribunal to conduct any further enquiries concerning the documents. There was certainly no duty upon it to do so: cf. *Minister for Immigration and Citizenship v SZIAI* (2009) 111 ALD 15.
6. Finally, the appellant’s general assertion that the Tribunal did not question him in depth, or otherwise did not properly consider his case, has no merit and is rejected. A fair reading of the Tribunal’s reasons reveals that the Tribunal questioned the appellant at length about his claims and evidence. Unfortunately for the appellant, that very questioning led the Tribunal to find that the appellant’s evidence concerning the extortion was false.

## Ground 2 – irrational or illogical reasoning

1. The second ground of appeal has even less merit than the first. The primary judge was correct to reject the appellant’s contention that the Tribunal’s reasoning in [30] and [31] was in any sense irrational or illogical.
2. It is unnecessary to deal at length with the relevant principles in relation to irrationality or illogicality as a ground for judicial review of administrative decisions. The significant point to note is that, as was made clear by Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 647-648 [130]-[131], not every lapse of logic in the decision-making process will result in jurisdictional error. If particular findings or reasoning on the way to the decision-maker’s ultimate conclusion and decision are challenged on the basis of illogicality or irrationality, jurisdictional error will not be made out unless it is shown that the findings could not have been made, or the reasoning could not have been employed, by a reasonable or rational decision-maker. At 648 [131] their Honours said:

What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

1. Crennan and Bell JJ found that the impugned finding or reasoning by the Tribunal was not illogical or irrational because on the probative evidence before the Tribunal a logical or rational decision-maker could have come to the same conclusion. Heydon J, who was the other member of the majority in *SZMDS*, also found that the Tribunal’s reasoning was not illogical because it was a matter about which reasonable minds might differ: the “difference was one of degree, impression and empirical judgment” (at 632 [78]).
2. For a decision to be vitiated for jurisdictional error based on illogical or irrational findings of fact or reasoning, generally “extreme” illogicality or irrationality must be shown, “measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions”: *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at 137 [148]. A decision cannot be said by a reviewing court to be illogical, irrational or unreasonable simply because one conclusion has been preferred to another possible conclusion: *SZOOR v Minister for Immigration & Citizenship* (2012) 202 FCR 1 (at 22-23 [84] per McKerracher J, Reeves J agreeing at 27 [113]).
3. Caution must also be exercised where the reasoning or finding that is challenged as being irrational or illogical relates to issues of credit: *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451 at 455 [14]-[15]. That is because assertions of illogicality and irrationality can all too readily be used to conceal what is in truth simply an attack on the merits of the Tribunal’s findings and decision. The deployment of illogicality or irrationality to achieve merits review should not be sanctioned: *SZMDS* at 636 [96] (Crennan and Bell JJ).
4. Considered in light of those principles, there is no basis for concluding that the reasoning or findings in [30] and [31] of the Tribunal’s reasons involved illogicality or irrationality. While a different decision maker may not have attached the same significance to some of the issues relating to the appellant’s evidence concerning the reactions of his business partner and family to his revelations concerning the extortion demands and payments, that is not to the point. It could not be said that no reasonable or rational decision maker could have employed the same reasoning, or made the same findings. Reasonable minds could no doubt differ about those matters. There was certainly no extreme illogicality or irrationality involved.
5. The same conclusion applies to other parts of the Tribunal’s reasons, and indeed to the Tribunal’s decision and reasons considered as a whole. There is no basis for concluding irrationality or illogicality on the part of the Tribunal.
6. It should also be noted that the process whereby the Tribunal questioned the appellant and tested and analysed his responses was in no sense unreasonable. The Tribunal was not required to uncritically accept any or all of the appellant’s claims or evidence: *Randhawa v Minister for Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451E (per Beaumont J). The Tribunal had a duty to test the appellant’s claims and evidence and to make an assessment of the plausibility and credibility of his account: *AAO15 v Minister for Immigration and Border Protection* [2015] FCA 1291 at [48]. The end result of that process was a finding that the evidence lacked credibility and the appellant was not to be believed. That finding was open to the Tribunal and, to that extent, was therefore not open to challenge.

# Conclusion and disposition

1. The appellant has failed to demonstrate any appealable error on the part of the Circuit Court. His appeal is dismissed with costs.

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| I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney. |

Associate:

Dated: 17 August 2016