FEDERAL COURT OF AUSTRALIA

Al-Dmour v Minister for Immigration and Border Protection [2018] FCA 429

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| Appeal from: | Application for leave to appeal: *Al-Dmour v Minister for Immigration & Anor* [2017] FCCA 1755 |
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| File number: | NSD 1335 of 2017 |
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| Judge: | **WIGNEY J** |
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| Date of judgment: | 13 March 2018 |
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| Catchwords: | **PRACTICE AND PROCEDURE –** application for leave to appeal interlocutory judgment of Federal Circuit Court – whether leave to appeal should be granted – whether decision of primary judge attended by sufficient doubt to warrant it being reconsidered by an appellate court  **MIGRATION –** judicial review – Partner (Class UK) visa – where application for judicial review dismissed by primary judge as raising no arguable case for relief – failure to consider claim – failure to engage in “active intellectual process” – failure to make an obvious enquiry, the existence of which could be easily ascertained |
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| Legislation: | *Federal Circuit Court Rules 2001* (Cth), r 44.12  *Federal Court of Australia Act 1976* (Cth), s 24  *Migration Act 1958* (Cth), ss 476, 476A  *Migration Regulations 1994* (Cth), cl 820.211 of Schedule 2, criteria 3001, 3003 and 3004 of Schedule 3 |
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| Cases cited: | *AAM15 v Minister for Immigration and Border Protection* [2015] FCA 804  *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397  *Htun v Minister for Immigration and Multicultural Affairs* (2001) 233 FCR 136  *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429  *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 |
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| Date of hearing: | 13 March 2018 |
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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: | Catchwords |
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| Number of paragraphs: | 37 |
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| Counsel for the Applicant: | The Applicant appeared in person with the assistance of an interpreter |
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| Solicitor for the First Respondent: | Ms SA Given of HWL Ebsworth Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent made a submitting appearance, save as to costs |

ORDERS

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|  | | NSD 1335 of 2017 |
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| BETWEEN: | MOHAMMAD MAJED NAYF AL-DMOUR  Mr Al-Dmour | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | WIGNEY J |
| DATE OF ORDER: | 13 march 2018 |

THE COURT ORDERS THAT:

1. The applicant’s application for leave to appeal, filed 8 August 2017, be dismissed.
2. The applicant pay the first respondent’s 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. In October 2013, Mr Mohammed Majed Nayf **Al-Dmour**, a citizen of Jordan, applied for a Partner (Temporary) (Class UK) visa. That application was refused by a **delegate** of the **Minister** for Immigration and Border Protection. Mr Al-Dmour applied to the Administrative Appeals **Tribunal** for review of that decision. That review application was unsuccessful. The Tribunal affirmed the decision to refuse to grant Mr Al-Dmour the temporary partner visa. Undeterred, Mr Al-Dmour challenged the Tribunal’s decision in judicial review proceedings commenced in the Federal **Circuit Court** of Australia. The primary judge in the Circuit Court summarily dismissed that application on the basis that Mr Al-Dmour had failed to advance an arguable case of jurisdictional error on the part of the Tribunal.
2. In this application, Mr Al-Dmour seeks leave to appeal from the primary judge’s dismissal of his review application.

# background

1. Mr Al-Dmour first arrived in Australia on 9 December 2010 as the holder of a subclass 573 student visa. That substantive visa ceased on 29 September 2012. Since that time, Mr Al-Dmour has not held a substantive visa. Shortly before his student visa ceased, Mr Al-Dmour lodged an application for a protection visa. That application was also unsuccessful, as was his subsequent review application in the Tribunal in respect of that adverse decision. On 9 October 2013, just under a month after the Tribunal handed down its decision and reasons in respect of that application, Mr Al-Dmour applied for a temporary partner visa on the basis of his relationship with an Australian citizen, Ms Britney **Henman**. Mr Al-Dmour and Ms Henman were married on 3 October 2013.
2. A visa applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the *Migration* ***Regulations*** *1994* (Cth). Relevantly to the present matter, a visa applicant must satisfy Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl 820.211(2)(d) of Schedule 2 to the *Regulations.* In order to satisfy criterion 3001, the visa application must have been lodged within 28 days of the relevant day. The ‘**relevant day**’ is defined in criterion 3001(2), as follows:

**3001**

1. For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
   1. if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa – 1 September 1994; or
   2. if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa – the day when the applicant last became an illegal entrant; or
   3. if the applicant:
      1. ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
      2. entered Australia unlawfully on or after 1 September 1994;

whichever is the later of:

* + 1. the last day when the applicant held a substantive or criminal justice visa; or
    2. the day when the applicant last entered Australia unlawfully; or
  1. if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister’s decision not to revoke the cancellation – the later of:
     1. the day when that last substantive visa ceased to be in effect; and
     2. the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal’s decision.

1. On 23 September 2014, the Minister’s delegate wrote to Mr Al-Dmour inviting him to provide any information or submissions he wished to make with respect to whether there were compelling reasons for the Minister not applying criterion 3001. He was also invited to provide further evidence of his relationship with Ms Henman. On 23 October 2014, Mr Al-Dmour responded to that invitation through a migration agent.
2. In short summary, Mr Al-Dmour advanced five submissions. The first was that he was the victim of poor advice from a migration agent who advised him not to renew his student visa, but to apply for a protection visa. The second submission was that his wife was depressed at the prospect of him being required to go overseas to lodge his visa application. The third was that he had never been a non-citizen because he had been on a bridging visa after the expiry of his student visa. The fourth was that his wife was working and it was unreasonable for her to have to leave her job in order to join him overseas while he applied for a visa. The fifth was that the security situation in Jordan was extremely volatile and his wife was worried about his safety.
3. The response also enclosed a copy of a letter from a psychologist concerning Ms Henman. In short summary, the report stated that Ms Henman had been feeling anxious and depressed since learning that her husband might have to depart from Australia, particularly as he was her only source of emotional and financial support.
4. On 15 December 2015, the delegate again wrote to Mr Al-Dmour and invited him to comment on adverse information which the Minister’s Department had received to the effect that he and Ms Henman were not in a genuine relationship. Mr Al-Dmour responded to that invitation by letter dated 4 January 2016. In that letter, Mr Al-Dmour stated that his relationship with Ms Henman had broken down in October 2015 and that Ms Henman had commenced a relationship with another woman.
5. On 22 January 2016, the delegate refused to grant the visa to Mr Al-Dmour. The delegate was not satisfied that Mr Al-Dmour’s circumstances justified a waiver of the Schedule 3 criteria. The delegate found, therefore, that Mr Al-Dmour did not satisfy subclause 820.211(2)(d) of Schedule 2 to the Regulations.
6. On 10 February 2016, Mr Al-Dmour lodged an application for review of the delegate’s decision with the Tribunal.

# tribunal’s review and decision

1. On 28 November 2016, the Tribunal wrote to Mr Al-Dmour and invited him to give evidence and present arguments at a hearing. The Tribunal also requested Mr Al-Dmour to provide it with any information he wished to rely on to justify a waiver of the Schedule 3 criteria. Mr Al-Dmour did not provide any information to the Tribunal, even when reminded to do so shortly before the initial hearing date. He requested, and was granted, a short adjournment of the hearing.
2. On 25 January 2017, Mr Al-Dmour appeared before the Tribunal with the assistance of his migration agent. He was invited again to give evidence and present arguments in support of the waiver of the requirements of Schedule 3. In its **Reasons**, the Tribunal summarised the evidence given by Mr Al-Dmour in the following terms (Reasons at [24]):

With no information provided since the time of application, the applicant was asked at the hearing if he wished to give oral evidence about any matters that may be compelling for waiving the criteria. He told the Tribunal that he is no longer in a relationship with his wife and has not been since October 2015, that he was genuine and she wasn’t and she left him because she turned from being in a normal relationship with him to being a lesbian. The applicant told the Tribunal that it is not his fault that the relationship failed and he tried his best with her. He said he has not spoken to her for a long time.

1. The Tribunal concluded that Mr Al-Dmour had not provided any compelling reasons for not applying the Schedule 3 criteria. It reasoned as follows (Reasons at [25]):

Two people claiming to be in a married relationship with each other need to have a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing and they must live together or not separately and apart on a permanent basis. The applicant, on his own oral evidence at the hearing, confirmed that his wife left the marriage to have a lesbian relationship, the relationship is therefore not continuing and has not been since October 2015 and they now live apart on a permanent basis, although it is noted that he hoped in the early stages of the separation that this would only be temporary.

1. Having found that there were no compelling reasons for waiving the Schedule 3 criteria, the Tribunal found that Mr Al-Dmour did not meet cl 820.211(2)(d)(ii) of Schedule 2 to the *Regulations* and affirmed the decision under review.

# the circuit court proceedings and judgment

1. Mr Al-Dmour applied to the Circuit Court for judicial review of the Tribunal’s decision. His application advanced the following three grounds (as drafted):
2. The Tribunal made jurisdictional error.
3. I did not get a fair hearing at the Tribunal.
4. The Tribunal identified wrong issue.
5. He relied on an affidavit, filed along with his application, which simply stated (as drafted):
6. I did not get a fair hearing at the Tribunal.
7. I did not end up the relationship and my relationship with my partner was genuine.
8. Perhaps not surprisingly, given the somewhat unhelpful and uninformative terms of Mr Al-Dmour’s application and affidavit, the primary judge set the matter down for hearing pursuant to r 44.12 of the *Federal* ***Circuit Court Rules*** *2001* (Cth). At such a hearing, known as a “show cause” hearing, the Circuit Court can dismiss the application if it is not satisfied that the application has raised an arguable case for the relief claimed. Rule 44.12(2) makes it clear that such a dismissal is interlocutory in nature.
9. The primary judge invited Mr Al-Dmour to make submissions in relation to his review application. In his **Judgment**, the primary judge recorded Mr Al-Dmour’s response to that invitation in the following terms (Judgment at [18]):

I invited oral submissions from Mr Al-Dmour this afternoon. He considers the circumstances to be both unfortunate and unfair because he has done nothing wrong. His former partner terminated the relationship which has resulted in an adverse outcome for him on his visa application. He and the sponsor are now divorced. Mr Al-Dmour maintains a sense of grievance because, in his view, having entered the relationship in good faith, he should not have been deprived of the visa he sought because of circumstances beyond his control and in which he was not to blame. That may be so from a moral perspective, but on the basis of any legal analysis, there is no arguable case of jurisdictional error by the Tribunal.

1. It is tolerably clear from that summary of Mr Al-Dmour’s oral submissions that he did not add in any material way to the broad and general assertions of error in his application and affidavit. He did not identify any error that could arguably constitute a jurisdictional error. He did not identify the basis of his assertion that he did not get a fair hearing. He did not point to the “wrong issue” which he suggested that the Tribunal had identified. It is, in those circumstances, unsurprising that the primary judge found that Mr Al-Dmour had not raised an arguable case for relief.
2. The primary judge reasoned (at Judgment [19]) that the Tribunal had complied with its “procedural code” and that there was no unfairness in the process followed by the Tribunal. The Tribunal, his Honour found, was “confronted with the technical requirements for the visa” and, in the absence of any compelling circumstances to depart from those requirements, was bound to reach the conclusion it did. The primary judge noted (at Judgment [21]) that the Tribunal had requested evidence with respect to the requirements of Schedule 3 and that Mr Al-Dmour had been afforded an opportunity at the hearing to provide oral evidence about any compelling reasons for waiving the Schedule 3 criteria. His Honour said (at Judgment [23]) that it was a matter for Mr Al-Dmour to “make his case to the Tribunal” and that there was nothing to suggest that Mr Al-Dmour was given anything other than a fair hearing.
3. The primary judge concluded that Mr Al-Dmour was unable to advance an arguable case of jurisdictional error by the Tribunal and accordingly dismissed the application pursuant to r 44.12(1)(a) of the Circuit Court Rules.

# application for leave to appeal – grounds and submissions

1. Mr Al-Dmour sought leave to appeal from the judgment of the Circuit Court. Leave to appeal was required because the dismissal of Mr Al-Dmour’s case pursuant to r 44.12 of the Circuit Court Rules was an interlocutory decision. Section 24(1A) of the *Federal Court of Australia Act 1976* (Cth) provides that an appeal shall not be brought from an interlocutory judgment unless the Court or a judge gives leave.
2. In considering whether leave to appeal should be granted, the first limb of the relevant test involves a consideration of whether the decision is attended with sufficient doubt to warrant it being reconsidered by an appellate court: *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-400. It is convenient, then, to first consider whether Mr Al-Dmour has demonstrated that the decision of the primary judge is attended with sufficient doubt to warrant the grant of leave. The starting point is the draft grounds of appeal.
3. The draft notice of appeal contained the following two grounds (as drafted):
4. The primary judge erred by holding that the Respondents did not make jurisdictional error by failing to exercise jurisdiction.
5. The Primary judge failed to find the Tribunal erred in its decision because the Tribunal failed to engage in active intellectual process and consider the documents and evidence submitted to the DIBP.

Particulars

* 1. In the submission to the DIBP by the applicant’s psychologist, noted that the applicant’s wife expressed her concerns about the applicant’s safety and well-being if he returned to live in the Middle East, especially due to the current volatile political situation in the Middle East. The Tribunal failed to consider whether considering compelling reasons.
  2. The Tribunal failed to consider and assess and ask relevant questions regarding the psychologist report.
  3. The applicant’s representative in his submission dated 23 October 2014 noted that the security situation in the Middle East is extremely volatile and Jordan has joined the coalition forced in fighting ISIS. The Tribunal failed to consider the above claim and failed to engage with that.

1. Mr Al-Dmour filed written submissions on 30 October 2017. In those written submissions, Mr Al-Dmour repeated his claim that the Tribunal failed to engage in an “active intellectual process” with the documents and evidence submitted to the Tribunal and to the Department. He submitted, relying on the decision in ***Htun*** *v Minister for Immigration and Multicultural Affairs* (2001) 233 FCR 136, that the Tribunal was required to consider his claims, whether they were expressly advanced by him or were addressed in the decision under review. He contended that the Tribunal had not considered two “claims” that were referred to in his submission to the delegate. Those two claims were: first, the psychologist’s report that recorded that his wife had concerns for his safety and wellbeing should he return to the Middle East due to the volatile political situation there; and second, his migration agent’s statement that the security situation in the Middle East was extremely volatile as Jordan had joined the coalition forces in its fight against ISIS.
2. Mr Al-Dmour also asserted, relying on *Minister for Immigration and Citizenship v* ***SZIAI***(2009) 259 ALR 429, ***Prasad*** *v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, as well as several other authorities, that a failure to make an obvious inquiry about a critical fact, the existence of which could be easily ascertained, could give rise to a jurisdictional error in the nature of a constructive failure to exercise jurisdiction. While he did not say so in terms, it would appear that the “critical fact” that the Tribunal was required to inquire into was the security situation in the Middle East which had been referred to in the psychologist report and his agent’s submission.
3. Mr Al-Dmour made oral submissions in support of his application for leave to appeal. Those submissions, however, did not address the grounds set out in his application for leave, nor did they address the reasons of the primary judge or the errors that he contended that the primary judge made. They were essentially directed to the reasons that his marriage broke down.

# Is the judgment attended by sufficient doubt to warrant leave to appeal?

1. The first difficulty faced by Mr Al-Dmour in establishing that the judgment of the primary judge is attended by sufficient doubt to warrant reconsideration by the Full Court is that the substantive grounds and submissions he now relies on were not raised at all in the Circuit Court. The grounds referred to in Mr Al-Dmour’s application for leave to appeal were not included in his application and affidavit in the Circuit Court. Nor did he raise any of the arguments he now wishes to advance when invited to make submissions in the Circuit Court.
2. It is, in some circumstances, appropriate to grant an applicant or appellant leave to raise new arguments on appeal, particularly if the respondent is not in any way prejudiced by the fact that the arguments were not relied on in the Court below. That said, the Court should not routinely or automatically grant leave to an applicant or appellant to raise arguments not raised in the Circuit Court in leave to appeal applications or appeals from judgments concerning applications under s 476 of the *Migration* ***Act*** *1958* (Cth). That would effectively turn this Court into a *de facto* first instance trial court, a situation that s 476A of the Act was plainly designed to prevent: *AAM15 v Minister for Immigration and Border Protection* [2015] FCA 804 at [14]. Mr Al-Dmour has given no explanation or reason for why he should be granted leave to raise the grounds in his application for leave to appeal for the first time in this Court.
3. The second, and perhaps more fundamental, difficulty for Mr Al-Dmour is that the new grounds have no merit in any event. As for the contention that the Tribunal did not consider his claims, it cannot be concluded, in the particular circumstances of this case, that Mr Al-Dmour made or relied on either of the two claims he now relies on when he presented his case to the Tribunal. Nor could it be said that those claims were relevantly raised by the decision under review, or were able to be divined from the material that was otherwise before the Tribunal for the purposes of the review application. The Tribunal requested Mr Al-Dmour, both in writing before the hearing and orally at the hearing, to provide information and arguments in support of his contention that the criteria in Schedule 3 should be waived. He did not, either before or at the hearing, advise the Tribunal that he relied on the submissions and material that had previously been supplied to the delegate, or that he was concerned about the security situation in the Middle East if he was required to return to Jordan.
4. It should be emphasised in this context that the submission to the delegate that Mr Al-Dmour now seeks to rely on had been provided well over two years prior to the hearing in the Tribunal. It also raised issues that plainly had no ongoing relevance or significance by the time of the Tribunal hearing. Indeed, the main thrust of the psychologist’s report was that Mr Al-Dmour’s then wife was anxious and depressed that Mr Al-Dmour was required to return to Jordan to apply for his visa because he was her only source of emotional and financial support. There was only a glancing reference to the volatility of the region to which Mr Al-Dmour may have to return. The source of that observation appeared to be the psychologist himself, not Ms Henman and certainly not Mr Al-Dmour. By the time of the Tribunal hearing, Mr Al-Dmour had long been separated from Ms Henman. It could scarcely be said that he was relying on a claim based on the fact that two years previously, his former wife had been depressed and anxious about losing him as a breadwinner. By the time of the Tribunal hearing, it was highly unlikely that Ms Henman would have been concerned about losing the emotional and financial support of Mr Al-Dmour should he be required to return to Jordan. That is because Mr Al-Dmour and Ms Henman had already separated.
5. Much the same can be said about Mr Al-Dmour’s migration agent’s statement concerning the security situation in the Middle East. Even putting to one side the vagueness and generality of that statement, the ultimate point that was made by the agent to the delegate was that Mr Al-Dmour’s then wife would be extremely worried about her husband’s safety if he was required to return to the Middle East to apply for the visa. By the time of the Tribunal’s hearing, that could not possibly be said to be a claim advanced by Mr Al-Dmour in support of his case that the criteria in Schedule 3 should be waived. There was no claim that Mr Al-Dmour himself was concerned about his safety, or that there was any objective basis for believing that Mr Al-Dmour would in fact be in danger, or might come to harm, if he returned to Jordan.
6. Mr Al-Dmour’s contention that the Tribunal was under a duty to investigate the issues or facts raised in the psychologist report must also be rejected for essentially the same reasons. Both the psychologist’s report and the agent’s submission concerned the mental state of Ms Henman. The main concern was that she was depressed and anxious about the possibility of Mr Al-Dmour being required to return to the Middle East for a period of time because he was her only source of emotional and financial support. The situation had so obviously changed by the time of the Tribunal hearing that it was under no obligation to further investigate anything in relation to that issue. There was certainly no obvious inquiry that should have been made about a critical fact, the existence of which could be easily ascertained.
7. The facts and circumstances of Mr Al-Dmour’s case are far removed from *Htun*, *SZIAI*, *Prasad* and the other cases relied on by him in support of his application for leave to appeal. There is little doubt that the Tribunal may be found to have constructively failed to exercise its jurisdiction if it failed to consider and address a claim that can reasonably be said to have been raised in the material that was before the Tribunal, or if it failed to make an obvious inquiry about a critical fact, the existence of which could be easily ascertained. The problem for Mr Al-Dmour is that it could not be said that the matters upon which he now seeks to rely were either properly raised, or in the materials before the Tribunal. They were raised in a submission made, not to the Tribunal, but to the Minister’s delegate well over two years before the Tribunal hearing. During those two years, Mr Al-Dmour’s circumstances had changed considerably such that it could not fairly be said that the issues that had been raised in the submission were of any continuing relevance or significance.
8. It was a matter for Mr Al-Dmour to put his case to the Tribunal. He was clearly and unequivocally requested by the Tribunal to identify the information and arguments he wished to raise concerning the waiver of the relevant criteria. He made no mention of any of the issues or claims previously made to the delegate.
9. Putting those arguments to one side, the primary judge was otherwise plainly correct to conclude that Mr Al-Dmour had not raised any arguable case of jurisdictional error. The only argument that he raised before the Tribunal was that he was not responsible for his separation from his former wife. That was also the only substantive argument that was advanced before the primary judge. It did not give rise to any arguable case of jurisdictional error on the part of the Tribunal.

# Conclusion and disposition

1. The decision of the primary judge was not attended by sufficient doubt to warrant consideration by the Full Court. It follows that Mr Al-Dmour’s application for leave to appeal must be dismissed. Mr Al-Dmour has not provided any relevant reason why he, as the unsuccessful party, should not be required to pay the Minister’s costs. He should accordingly be ordered to pay those costs as agreed or assessed.

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| I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney. |

Associate:

Dated: 28 March 2018