Federal Court of Australia

DAB16 v Minister for Home Affairs (No 2) [2021] FCA 120

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| Appeal from: | *DAB16 v Minister for Immigration & Anor* [2018] FCCA 3957 |
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| File number: | WAD 614 of 2018 |
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| Judgment of: | **CHARLESWORTH J** |
|  |  |
| Date of judgment: | 23 February 2021 |
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| Catchwords: | **MIGRATION** – costs orders under s 486F of the *Migration Act 1958* (Cth) – where previous finding that migration litigation had no reasonable prospect of success – whether contravention of s 486E of the *Migration Act 1958* (Cth) by a legal practitioner – whether legal practitioner encouraged migration litigation – whether practitioner gave “proper consideration” to the prospect of success of an appeal – consideration of matters relevant to the exercise of the Court’s discretion to award costs – where delay between judgment on substantive issues and determination of costs application –whether previous costs order can and should be varied or set aside |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth)*Migration Act 1958* (Cth) ss 5H, 5J, 36, 473DC, 473DD, 474, 476, 476A, 486E, 486F, 486H, 486I, 486J, 486K*Migration Litigation Reform Act 2005* (Cth)*Federal Court Rules 2011* (Cth) rr 4.12, 39.05  |
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| Cases cited: | *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306*DAB16 v Minister for Home Affairs* [2019] FCA 2114*DAB16 v Minister for Immigration & Anor* [2018] FCCA 3957*FJV18 v Minister for Home Affairs & Anor* [2020] FCCA 1032; 351 FLR 315*Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2019] FCA 1458*SZFDZ v Minister for Immigration and Multicultural Affairs* (2006) 155 FCR 482*SZTMH v Minister for Immigration and Border Protection* (2015) 230 FCR 550  |
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| Division: | General Division |
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| Registry: | Western Australia |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 102 |
|  |  |
| Date of hearing: | 18 February 2020, 22 September 2020, 29 October 2020  |
|  |  |
| Counsel for the Appellant: | The Appellant did not appear (18 February 2020)Ms H Veale (22 September 2020, 29 October 2020) |
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| Solicitor for the Appellant: | Dentons Australia Ltd |
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| Counsel for the First Respondent: | Mr D O’Leary |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | The Second Respondent filed a Submitting Notice |

ORDERS

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|  | WAD 614 of 2018 |
|   |
| BETWEEN: | DAB16Appellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| order made by: | CHARLESWORTH J |
| DATE OF ORDER: | 23 FEBRUARY 2021 |

THE COURT ORDERS THAT:

1. Pursuant to r 39.05(a) and r 39.05(c) of the *Federal Court Rules 2011* (Cth), the orders in paragraphs 4, 5 and 7 of the orders made on 18 February 2020 are set aside.
2. Pursuant to s 486F(1)(a) of the *Migration Act 1958* (Cth) Mr Haidari Smart is to pay the Minister’s costs of the appeal, fixed in the sum of $7,000.00.
3. Pursuant to s 486F(1)(c)(ii) of the *Migration Act 1958* (Cth) Mr Haidari Smart is to pay to the appellant the sum of $5,000.00, by way of repayment of the legal fees paid by the appellant of and incidental to the appeal.

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

REASONS FOR JUDGMENT

CHARLESWORTH J

1. This appeal falls within the definition of “migration litigation” for the purposes of s 486K of the *Migration* ***Act*** *1958* (Cth). An order dismissing the appeal was made on 11 December 2019. Oral reasons were delivered on that day. Written reasons were subsequently published as *DAB16 v Minister for Home Affairs* [2019] FCA 2114 (First Reasons). The Court made a finding that the appeal had no reasonable prospect of success:  First Reasons, [46]. That finding gives rise to an obligation to consider whether an order for costs under Pt 8B of the Act should be made. These reasons relate to that issue.

# THE LITIGATION

1. The appellant is a citizen of Pakistan. He is a Shia Muslim of Hazara ethnicity and is a non-citizen for the purposes of the Act. On 2 September 2015, the appellant applied for a protection visa. In support of his application, the appellant claimed (relevantly) that he satisfied the criteria in s 36(2)(a) and s 36(2)(aa) of the Act (respectively, the Refugee Criterion and the Complementary Protection Criterion).
2. The Refugee Criterion will be fulfilled if the Minister is satisfied that the non-citizen is a refugee. The word “refugee” is defined in s 5H to mean a person who is outside of his or her country of nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of the receiving country and there is a real chance that the person would be persecuted on the grounds of (relevantly) race or religion if returned there:  s 5H(1)(a) and (b), 5J(1)(a) and (b). The real chance of persecution must relate to all areas of the receiving country:  s 5J(1)(c).
3. The Complementary Protection Criterion will be fulfilled if the Minister has substantial grounds for believing that, as a consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that he or she would suffer significant harm. Section 36(2B) provides that there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that (relevantly):

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm;

1. A delegate of the then-named Minister for Immigration and Border Protection refused to grant the appellant a visa, including on the basis that the appellant could relocate to Lahore in the province of Punjab.
2. The delegate’s decision was referred for review by the Immigration Assessment Authority under Pt 7AA of the Act. The Authority affirmed the delegate’s decision. The Authority was satisfied that the appellant faced a real chance of serious harm from anti-Shia militia in his home province in Pakistan by reason of his ethnicity and religion. The Authority then turned to consider the appellant’s submission that he would not be safe as a Hazara Shia anywhere in Pakistan.
3. In the course of doing so the Authority referred to country information contained in a report prepared by the Department of Foreign Affairs and Trade (DFAT Report). The Authority said:

29. According to the most recent DFAT thematic report, Sunnis and Shias are generally more integrated in Lahore and that the level of generalised and sectarian violence is lower in Punjab than other parts of Pakistan. No Shia deaths from sectarian violence were reported in Lahore during 2015. The latest DFAT reports state too under the Pakistan Constitution, Pakistani citizens are free to live anywhere in the country. I am satisfied the applicant could travel to and reside in Lahore.

30. On the basis of the evidence before me, I am not satisfied the applicant has a well-founded fear of persecution from [anti-Shia groups] or from the Pakistan authorities for any of the reasons in s 5J(1)(a), now or in the reasonably foreseeable future if he relocated to live in Lahore.

1. On the basis of the same country information, the Authority concluded that it would be reasonable for the appellant to relocate to Lahore within the meaning of s 36(2B)(a) of the Act and so affirmed the delegate’s decision in respect of the Complementary Protection Criterion. The Authority said:

41. I accept the applicant will face some difficulty relocating to Lahore as he must find suitable employment and accommodation. As noted above the evidence before me is the applicant is engaged and his fiancée is working at a doctor clinic in their home town. I consider it reasonable that the applicant would desire his fiancée to relocate to Lahore with him so they may continue their relationship. I note his fiancée must have some qualifications work at a doctor clinic, I note too the applicant and his fiancée are still both relatively young and they have no children. I note as well the applicant has a primary school level of education, but that he has many years of experience selling clothes. While I note Punjabi is the main language of Lahore, the applicant declared as well as Hazaragi, he speaks Urdu, the national language of Pakistan, so he will still be able to communicate in Lahore to find work and accommodation. I note as well the applicant has shown himself to have the wherewithal to adapt to life in Australia. Finally, I note the applicant told the delegate he had spent some, albeit it limited time, in Lahore while attempting to depart Pakistan in 2012.

42. I am mindful of the country information discussed above regarding the general security situation in Lahore and the applicant’s acknowledgement at the TPV interview that Lahore is generally safe, because it is the home city of the Prime Minister of Pakistan. I accept the applicant will be identifiable as a Hazara Shia because of his physical features, but the country information quoted above that there is a population of Hazaras in Lahore does not support his claim no Hazaras live in that city. Having regard to that country information and the personal circumstances of the applicant and his fiancée, I am satisfied it is reasonable for the applicant to relocate to Lahore for the purpose of s.36(2B).

1. The Authority’s decision was a privative clause decision within the meaning of s 474 of the Act. It was not amenable to review under the *Administrative Decisions (Judicial Review) Act 1976* (Cth) (ADJR Act) in this or any other court.
2. Section 476(1) of the Act conferred upon the Federal Circuit Court of Australia (FCCA) the same jurisdiction in relation to the decision as the High Court has under s 75(v) of the Constitution. This Court has appellate jurisdiction in respect of a judgment of the FCCA, but otherwise has no original jurisdiction to judicially review the Authority’s decision:  Act, s 476A.
3. On 13 October 2016, the appellant commenced an application for judicial review of the Authority’s decision in the FCCA. He was legally represented in those proceedings, as he was on this appeal, in each case by the same solicitor, Mr Smart.
4. The grounds for judicial review at first instance were based in part on an argument that the Authority acted upon “critical facts which did not exist”. At the hearing, the appellant sought to introduce evidence that had not been put before the Authority so as to make good that ground. The evidence was intended to show that the country information contained in the DFAT Report was factually incorrect, particularly in relation to whether there existed a community of persons of Hazara ethnicity living in Lahore. The lengthy submissions and grounds bearing on that topic are typified in the following passages extracted from the written submissions at first instance:

1.17. Further, in the same paragraph the Second Respondent did not take into account or give appropriate weight to the evidence of the Applicant that there were some Hazaras in Karachi but none in Lahore. There was no evidence before the Second Respondent that there was a large community of Hazara living in Lahore. The main source which the Second Respondent relied on was misinterpreted DFAT report. The Second Respondent failed to give proper reference to the DFAT report so that the Applicant could specifically refer to the Second Respondent’s error in this application. In any case, as stated in Ground 2 of this application, the DFAT Report was erroneous and misleading. The Second Respondent misled itself by mainly following the erroneous DFAT report. The DFAT report was probably structured on the incorrect Pakistani news, and governmental, non-governmental reports.

…

1.21. The Second Respondent has also fundamentally erred in failing to consider that the Applicant is not just Shia but Hazara as well. The Second Respondent’s saying that ‘no Shia death from sectarian violence were reported in Lahore’ is a self-serving error. The Second Respondent erred in applying the circumstances of general local born Shia Punjabis’ situation to the Applicant. No Shia death in 2015 does not mean that the Applicant will not face attack in Lahore because there is no Hazaras, in the situation as the Applicant’s, living in Lahore and there was no contrary evidence before the Second Respondent. If there was Hazaras in living in Lahore in the same situation as the Applicant there would have been reports of killing of Hazaras. Another to explain is, for instance, a White Caucasian Christian faces a different high level of threat in Lahore Pakistan than the Local born Punjabi ethnicity Christians whose colour, a way of life and language are the same as other locals. It would be illogical to apply local Punjabis Christians’ circumstance on a White Caucasian Christian. Just because there have not been death reports of white Caucasian deaths in Lahore does not mean that a white person is safe in Lahore but the simple reason is that there is no common white Caucasian live there.

…

1.24. The Second Respondent erred also in the uncritical adaptation of following the DFAT report that there was a Hazara community in Lahore. The ground reality suggests that there is no Hazara community in Lahore. Please note that the particulars of these errors are given in Ground 2, explaining, why the DFAT report is incorrect. The Second Respondent’s basing its decision on incorrect information amounted to a jurisdictional error.

…

2.1. This ground is all about an incorrect DFAT report. The Respondent has based its decision on that Report and the critical facts derived from the Report are the foundation of the decision. Therefore, the facts in the report must exist before the Report could be relied on. If the facts mentioned in the Report do not exist, the decision is judicially reviewable because of jurisdictional error.  …

…

2.7. We submit the interpretation that there is a Hazara community in Lahore is thus fatally flawed. That there is any ‘community’ at all is itself open to question. According to the UK Home Office ‘Estimates of the number of Hazara living outside of Quetta ... vary widely’. In March 2014 ‘Dawn’ stated 80,000 people had migrated out of Quetta to Islamabad Rawalpindi, Lahore and Karachi. But, in April 2014 the vice chairperson of HRCP indicated this number was only 30,000. By contrast, the PAK Institute For Peace Studies quoted by the UK Home Office put the figure of Hazara population in Lahore as only ‘a few families’ in a population of over 7 million. Noting it is difficult to trace the distribution of Hazara population in Pakistan.

…

2.13. It is now for the Respondents to show that the sources relied on in compiling the DFAT Report are correct. The Second Respondent failed to properly take into account the evidence of the Applicant, failed to correctly assess available information and failed to independently assess the same. Had this been done, the result would have been that there was no credible and reliable evidence that the Applicant could safely relocate to Lahore or any other part of Pakistan. The same was required under s 36(2)(a) and (aa) of the Act. The Second Respondent relied on the DFAT report probably because of the Ministerial direction. However, the same ministerial direction allows a decision maker, to take other information into account as well. The Second Respondent clearly rejected the evidence of the Applicant in favour of a misinterpreted and unreliably sourced DFAT Report which resulted in a decision with a jurisdictional error because it was based on critical facts which did not exist. Section 36 2(a) and (aa) required a fair assessment of the claim which could not be possible because the decision makers relied on a Report which was based on incorrect information or facts. To any standard that is a jurisdictional error.

1. Mr Smart submitted that it was for the FCCA to enquire into the factual question of whether there existed a community of persons of Hazara ethnicity living in Lahore. He also submitted that the onus was on the Minister to demonstrate that the country information contained in the DFAT Report was correct.
2. The primary judge rejected the grounds for judicial review. The judge concluded that the Authority had taken into account evidence the appellant had given in relation to the security situation in Lahore (including as to whether there was a Hazara community residing there):  *DAB16 v Minister for Immigration & Anor* [2018] FCCA 3957 (FCCA Reasons), [27] – [28]. His Honour said that the weight to be ascribed to that evidence was a matter for the Authority:  FCCA Reasons, [29], [31]. The primary judge concluded that it was open to the Authority to rely upon the DFAT Report, that it provided an evidentiary foundation for its findings and that, accordingly, there was no jurisdictional error:  FCCA Reasons, [31], [42]. The primary judge rejected the contention that the Minister bore any onus in relation to factual questions about Hazaras living in Lahore:  FCCA Reasons, [40]. His Honour said that the new evidence relied upon by the appellant did not demonstrate that the DFAT Report was incorrect in any event:  FCCA Reasons, [34].
3. The task of this Court was to identify whether the primary judge committed appealable error in rejecting the grounds for judicial review.
4. As identified at [18] – [20] of the First Reasons, the following three issues arose on the appeal (each of which was determined adversely to the appellant):

18 The first issue is whether the ‘veracity’ of the DFAT Thematic Report was relevant to the performance of the task of the primary judge on the application for judicial review of the Authority’s decision and if so, what factual findings ought to have been made in that regard.

19 The second is whether the primary judge erred in failing to determine that the first respondent bore an evidentiary burden in connection with any critical fact upon which the application for judicial review might turn.

20 The third is whether the primary judge erred in failing to find that the Authority had failed to have regard to the appellant’s Shia religion and Hazara ethnicity when concluding that it was reasonable for him to relocate to another part of Pakistan.

1. It is necessary to have regard to the whole of the First Reasons to understand why this appeal was found to have “no reasonable prospects of success” within the meaning of that phrase in Pt 8B of the Act. Consideration of the question of costs does not provide an occasion to revisit or restate the conclusions previously drawn in relation to the merits of the appeal. The Court proceeds from the premise that its earlier conclusion is correct. Nothing in these reasons should be understood as altering the reasons previously given for the purposes of adjudicating the substantive rights and liabilities of the parties to the appeal.

# LEGISLATION

1. Part 8B of the Act commences with s 486E. It imposes an obligation in the following terms:

**486E Obligation where there is no reasonable prospect of success**

(1) A person must not encourage another person (the ***litigant***) to commence or continue migration litigation in a court if:

(a) the migration litigation has no reasonable prospect of success; and

(b) either:

(i) the person does not give proper consideration to the prospects of success of the migration litigation; or

(ii) a purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve.

(2) For the purposes of this section, migration litigation need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(3) This section applies despite any obligation that the person may have to act in accordance with the instructions or wishes of the litigant.

1. Section 486F confers powers to make certain orders against a person who acts in contravention of s 486E. It provides:

**486F Cost orders**

(1) If a person acts in contravention of section 486E, the court in which the migration litigation is commenced or continued may make one or more of the following orders:

(a) an order that the person pay a party to the migration litigation (other than the litigant), the costs incurred by that party because of the commencement or continuation of the migration litigation;

(b) an order that the person repay to the litigant any costs already paid by the litigant to another party to the migration litigation, because of the commencement or continuation of the migration litigation;

(c) where the person is a lawyer who has acted for the litigant in the migration litigation:

(i) an order that costs incurred by the litigant in the commencement or continuation of the migration litigation, are not payable to the lawyer;

(ii) an order that the lawyer repay the litigant costs already paid by the litigant to the lawyer in relation to the commencement or continuation of the migration litigation.

(2) If the court, at the time of giving judgment on the substantive issues in the migration litigation, finds that the migration litigation had no reasonable prospect of success, the court must consider whether an order under this section should be made.

(3) An order under this section may be made:

(a) on the motion of the court; or

(b) on the application of a party to the migration litigation.

(4) The motion or application must be considered at the time the question of costs in the migration litigation is decided.

(5) A person is not entitled to demand or recover from the litigant any part of an amount which the person is directed to pay under an order made under this section.

1. The power to make an order under s 486F does not limit any other power the Court may otherwise have to make costs orders against a person who is not a party to proceedings:  Act, s 486J.
2. Section 486I(1) of the Act provides that a lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing the migration litigation has a reasonable prospect of success.
3. Part 8B of the Act was inserted by the *Migration Litigation Reform Act 2005* (Cth). The Explanatory Memorandum accompanying the amendments confirms that the amendments were intended to apply to lawyers and migration agents. So much is made plain by the text of s 486F(1)(c).
4. As Moore J said in ***SZFDZ*** *v Minister for Immigration and Multicultural Affairs* (2006) 155 FCR 482 the regime under Pt 8B was introduced against a background where in this Court and in the then-named Federal Magistrates Court there had been “an unrelenting stream of applications” challenging decisions made under the Act. His Honour said:

26 …  Those applications are often brought by litigants in person who, in many cases, have been given assistance by others. History reveals that many of those applications are unmeritorious and are doomed to fail. That is not to say, of course, that there are not also applications which reveal decision-making either arguably or actually infected by reviewable error. There are. Mostly, the applications relate to decisions made under the Act concerning applications for protection visas. Legal error resulting in the refusal of a protection visa, in circumstances where such a visa should or might be granted, could have profound consequences for the individual applicant.

27 However, Parliament appears to have taken the approach that, in relation to proceedings concerning decisions under the Act, proper consideration must be given by people assisting litigants about the prospects of success before proceedings are commenced. If that does not happen, the person providing assistance is at risk of being ordered to pay the costs of other parties to the litigation.  …

1. Moore J went on to order costs against a “well intentioned” lawyer in circumstances where there was nothing to suggest that the client had any real appreciation as to whether the litigation might succeed.
2. In *SZTMH v Minister for Immigration and Border Protection* (2015) 230 FCR 550, Rangiah J said (at [55]):

While Parliament intended to discourage persons from encouraging others to make and continue unmeritorious applications in migration cases, it is evident from Pt 8B that Parliament was also concerned to balance competing aspects of the public interest. It is in the public interest that ‘lawyers should not be deterred from pursuing their clients’ interests by fear of incurring a personal liability to their clients’ opponents’:  *Ridehalgh v Horsefield* [1994] Ch 205 at 226. If costs are too readily awarded against lawyers and other persons, even more litigants (many of whom have little or no English and no familiarity with our legal system) will have to represent themselves in migration litigation, increasing the burden on the courts and potentially decreasing the quality of justice that is delivered. Parliament balanced these competing considerations by building some protections for lawyers and other persons into Pt 8B.

1. His Honour regarded the conditions in s 486E(1)(b) as affording that protection, such that a legal practitioner will not be personally held liable for costs unless either one of the alternatives specified therein is fulfilled.

# EARLIER ORDERS

1. Before proceeding further it is necessary to address an argument advanced by Mr Smart to the effect that an order as to costs already made by the Court cannot be disturbed. To understand and resolve the argument it is necessary to set out the events that have occurred since the Court delivered judgment on the substantive appeal and published the First Reasons.
2. Upon the delivery of judgment, the Court ordered that the issue identified under s 486F of the Act be set down for hearing at a date to be fixed. The Minister on that day also made an application for an order that the appellant pay the Minister’s cost of and incidental to the appeal. That application was adjourned, also to a date to be fixed.
3. At the request of Mr Smart, the costs issues were originally set down for hearing on 18 December 2019. In advance of that hearing, Mr Smart filed an affidavit in support of his position that there should be no orders made under s 486F of the Act. Mr Smart also filed written submissions, as did Counsel for the Minister. At that hearing, Mr Smart asserted that he was presented with ethical difficulties because he was at that time providing the appellant with advice and assistance in relation to an application for special leave to appeal from the judgment. Mr Smart told the Court that a copy of the First Reasons had not been provided to the appellant.
4. In his affidavit, Mr Smart had asserted that he had worked “75 per cent pro bono”. The Court informed Mr Smart that he should make it plain precisely what he meant by that.
5. The appellant was not in attendance at the hearing.
6. The Court formed the view that the appellant should be afforded an opportunity to pursue an application for special leave to appeal from the judgment and that his appeal rights should be exhausted before this Court proceeded to hear the costs issues.
7. Against that background, further consideration of the costs issues was deferred pending a foreshadowed application for special leave. The Court further ordered that if no application for special leave was filed within the time prescribed by the High Court of Australia, the appellant was to notify this Court no later than seven days following the expiration of that period. No application for special leave was filed.
8. The matter next came before the Court on 18 February 2020. On that day, the Court made orders for further material to be filed. A referral certificate was also issued for the appellant for the purpose of the costs issues arising under Pt 8B of the Act. Orders were made in the following terms:

4. On or before 13 April 2020 the appellant is, if so advised, to file and serve:

(a) an affidavit confirming whether an order pursuant to s 486F(1)(c)(i) of the *Migration Act 1958* (Cth) is opposed;

(b) any application for an order pursuant to s 486F(1)(c)(ii) of the *Migration Act 1958* (Cth);

(c) any affidavit material and written submissions upon which the appellant may rely in support of any application made under paragraph 4(b).

5. In the event that no application is filed in accordance with the order in paragraph 4(b):

(a) the appellant is to pay the Minister’s costs of the appeal, fixed in the amount of $7,000;

(b) subject to the order in paragraph 6, the question arising under s 486F(1)(c)(i) of the *Migration Act 1958* (Cth) is to be reserved as and from 14 April 2020.

6. The appellant has liberty to apply to make oral submissions in relation to any issue arising under s 486F of the *Migration Act 1958* (Cth), such liberty to be exercised on or before 13 April 2020 by email confirmation to associate.charlesworthj@fedcourt.gov.au.

1. As can be seen, orders [4(a)] and [4(b)] refer to the two types of orders that might be made under s 486F(1)(c) of the Act concerning the appellant’s liability to Mr Smart in relation to his own cost of the appeal. They are distinct from the question of whether Mr Smart (as opposed to the appellant) should be ordered to pay the Minister’s costs.
2. As at 13 April 2020, no application had been filed on behalf of the appellant in accordance with the order in [4(b)]. As at that date, Mr Smart had not filed a notice of ceasing to act, such that the appellants’ address for service as it appeared on the Court record remained that of Mr Smart. Mr Smart had nonetheless informally provided the Court with the appellant’s personal email address.
3. The order in [5] was expressed in self-executing terms so far as it affected the issues under s 486F(1)(b) concerning the Minister’s costs. The effect of the self-executing order was to require the appellant to pay the Minister’s costs. Also as at 13 April 2020, the Court’s judgment on the question arising under s 486F(1)(c)(i) was reserved.
4. On 2 October 2020, the appellant lodged an application for orders setting aside the orders made on 18 February 2020 so as to enable him to apply for orders pursuant to s 486F to the effect that Mr Smart pay the costs incurred by the Minister on the appeal and that he repay an amount paid by the appellant to him in relation to the appeal. The reasons for the delay in making that application are considered elsewhere in these reasons.
5. Mr Smart submits that order [5] made on 18 February 2020 cannot be varied or set aside because it is an order that finally determines the rights as between the parties in the proceedings and so cannot be properly characterised as interlocutory. I reject that submission.
6. Rule  39.05 of the *Federal Court Rules 2011* (Cth) relevantly provides that the Court may vary or set aside a judgment or order after it has been entered if it was made in the absence of a party (r 39.05(a)) or it is interlocutory (r 39.05(c)). The power to make a costs order is ancillary to the power to adjudicate the substantive controversy between the appellant and the Minister. Orders made in the exercise of the power are plainly interlocutory in nature:  *Celand v Skycity Adelaide Pty Ltd* (2017) 256FCR 306 at [67]; *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2019] FCA 1458 at [23]. I am satisfied that the earlier costs order is one that may be set aside in the exercise of the discretion conferred under r 39.05(c) of the Rules.
7. If I am wrong in that conclusion, I would in any event conclude that the orders were made in the absence of the appellant in the relevant sense and so may be set aside under r 39.05(a). The interests of the appellant and Mr Smart clearly do not coincide on the question of costs, nor have they coincided since the publication of the First Reasons on 11 December 2019. Mr Smart attended at the hearing on 18 February 2020 not to advance the appellant’s interests but to advance and protect his own. Mr Smart was of course entitled to appear in his personal capacity to respond to the issue raised on the Court’s motion. But it cannot be said that he could (or did in fact) appear as the appellant’s advocate and agent on the costs question arising under s 486F(1)(b) of the Act. Mr Smart himself appropriately acknowledged that it would not be appropriate to proceed in the appellant’s absence and he had earlier correctly expressed concern that he had a conflict of interest in continuing to act generally. He had earlier told the Court that the appellant had been advised that independent legal representation would be arranged for him.
8. In all of the circumstances, I am satisfied that the circumstance that the appellant was not present at the hearings on 18 December 2019 and 18 February 2020 is sufficient of itself not only to enliven the power to set aside the order in [5(b)] but to justify doing so in the Court’s discretion so that questions arising under s 486F of the Act may be fully considered and the appellant heard in respect of them.
9. The effect of setting the order aside is to permit consideration of applications that have subsequently been made on the appellant’s behalf by an independent barrister who accepted the referral (hereafter referred to as the appellant’s Counsel).
10. I have not overlooked the requirements of s 486F(3) and (4) of the Act, which require that the motion or application relating to costs be considered at the time that the question of costs in the migration litigation is decided. Mr Smart did not rely on those provisions as an obstacle to the Court now proceeding to decide the issue arising under s 486F(1)(b) of the Act on the Court’s own motion or the issues arising under s 486F(1)(c) of the Act on the application of the appellant. The questions arising under s 486F(1)(c) are yet to be decided. In my view, s 486F(4) must be construed having regard to the rules of the Court conferring powers to set aside orders as to costs, particularly those made in the absence of a party. The effect of setting aside the order that the appellant pay the Minister’s costs is that the issues under s 486F(1)(b) remain to be considered and decided.
11. I am otherwise satisfied that Mr Smart, the appellant and the Minister have been afforded a fair opportunity to be heard, including at a further hearing conducted on 29 October 2020 in which Mr Smart was again heard in relation to all relevant issues. Argument on the issues arising under s 486F(1)(c)(i) was reopened, notwithstanding the earlier reservation of judgment on that question.

# CONTRAVENTION

1. The Court may only make an order if Mr Smart has acted in contravention of s 486E.
2. A contravention of s 486E has three elements. Expressed in light of the circumstances of the present case, they are as follows.
3. First, Mr Smart must be shown to have encouraged the appellant to commence or continue the appeal.
4. Second, the appeal must be shown to have no reasonable prospect of success:  Act, s 486E(1)(a). As expressed in s 486E(2), the requirement that the litigation have no reasonable prospect of success does not require a conclusion to be drawn that the proceedings are hopeless or bound to fail.
5. The third element encompasses two alternatives. It must either be shown that Mr Smart did not give proper consideration to the prospect of success of the ligation, *or* that a purpose in commencing or continuing the litigation is unrelated to the objectives which the Court process is desired to achieve:  Act, s 486E(1)(b)(i) and (ii) respectively.
6. In oral submissions, the appellant’s Counsel pointed to circumstances that were said to fulfil the requirement in s 486E(1)(b)(ii). I do not consider the evidence to be sufficient to proceed on that basis. For the purposes of identifying a relevant contravention of s 486E, the Court will focus its inquiry on whether Mr Smart gave proper consideration to the prospect of success of the litigation within the meaning of s 486E(1)(b)(i).

## No reasonable prospect of success

1. Mr Smart submitted that this element is not fulfilled because the arguments advanced on the appellant’s behalf were not only arguable but were meritorious and ought to have been upheld.
2. That submission should be rejected.
3. As has been said, the Court’s earlier finding that the appeal had no prospect of success is the event that gives rise to the Court’s obligation to consider making an order under s 486F of the Act. As a matter of construction, consideration of the issues arising under s 486F must proceed from the starting point that the finding has already been made (as to which see s 486F(2)).
4. Mr Smart devoted a substantial part of the costs hearing repeating the submissions that had been made at the hearing of the appeal. The submissions were to the effect that the primary judge and this Court on the appeal could and should receive evidence that was not put before the Authority so as to demonstrate that the information contained in the DFAT Report was factually incorrect. The submissions included assertions of fact from the bar table, such as the following assertions in relation to the DFAT Report:

… there is another reason, your Honour, that I’m quite certain this report is incorrect about being – this ..... incorrect in saying that there is a Hazara community, because that is giving from the bar table. I, your Honour, served in the army – Pakistan army. I have – I know that area quite well, so I was in the army in that area and I have – I have lived with Lahoris, with people, I know them. I have been to Lahore, I have seen the Lahore. There is no Hazara community in Lahore because they can’t survive there. Hazaras can’t survive in Lahore.

1. Mr Smart did not grapple with the circumstance that the Court has earlier rejected the same arguments on the bases disclosed in the First Reasons. Critically, the Court rejected the submission that the DFAT Report did not disclose the sources of the information contained in it:  First Reasons, [29]. The Court held that the arguments advanced for the appellant had erroneously equated the concept of jurisdictional error with the grounds that might be argued upon review of a decision under the ADJR Act and associated authorities, which had no application in the present legal context:  First Reasons, [32].
2. Mr Smart made no submissions concerning the limits of a court’s powers on judicial review as they relate to findings of fact. Mr Smart’s submissions assumed (incorrectly) that proof that the DFAT Report was factually incorrect would and could support a finding that the Authority had committed jurisdictional error by preferring the evidence contained in it to the evidence of the appellant. Mr Smart persisted with the submission that the grounds agitated before the primary judge were not an attempt to engage in merits review of a factual finding.
3. In seeking to rely on new evidence that was not before the Authority, Mr Smart made no reference to the circumstance that the Authority itself is limited in its own powers to receive new information (being information that was not before the Minister’s delegate):  Act, s 473DC, s 473DD.
4. Even if the Act contemplated that the Court should reconsider its earlier finding that the appeal had no prospect of success (which is doubtful), in this case there is no basis to depart from the finding, nor to depart from any of the reasoning upon which the finding was based.
5. I find this element of the contravention to be satisfied.

## Encouragement

1. The appellant is an unsuccessful asylum seeker. He does not speak English.
2. There is little direct evidence before the Court as to what was said by Mr Smart to the appellant prior to the commencement of the appeal. It was open to Mr Smart to adduce evidence of the advice provided to the appellant and the instructions he received, including advice and instructions in respect of which the appellant might otherwise be entitled to claim legal professional privilege:  Act, s 486H(1). The evidence adduced by Mr Smart did not include any such advice. The appellant’s Counsel did not adduce evidence directly on the topic.
3. From the bar table, Mr Smart asserted that the appellant was “well aware that these kinds of cases are not 100 per cent successful”. The assertion is unsupported by evidence of any advice in fact given. Even if advice had been given in such generalised terms, it would not have provided the appellant with a meaningful assessment as to whether the appeal had a reasonable prospect of success.
4. It should go without saying that the obligation of a lawyer in migration litigation, as in any litigation, is to provide the litigant with advice in relation to the prospects of the litigation succeeding. It is only on receipt of such advice that the litigant is able to make an informed decision as to whether or not to commence or continue the litigation. And it is only after receiving that advice that the litigant may make a proper assessment of the risk that an adverse costs order may be made and so measure the risks and benefits. Moreover, in the absence of advice to the contrary, a litigant may have a reasonable basis to believe that the case formulated on his or her behalf is properly founded in the law and has some prospect of success. A reasonable basis for that belief would exist not only because the legal practitioner holds him or herself out as competent to properly formulate a case, but also because of the commercial context in which the retainer with the legal practitioner is entered into. The context is one in which the legal practitioner charges the litigant fees for his or her services that constitute a significant expense for the client. The lawyer’s conduct in formulating the grounds, filing the notice of appeal and certifying the grounds as having reasonable prospects of success, whilst asserting an entitlement to charge fees for legal services for doing those things are together sufficient to support an inference that a legal practitioner has “encouraged” the client to commence and continue the litigation in the requisite sense. Of course it is open to the lawyer to adduce evidence to rebut the inference that otherwise arises. However, in the absence of advice and instructions, it is reasonable to infer that the carriage of a case is wholly entrusted to the legal practitioner on the client’s reasonable assumption that the litigation has some prospect of success. There could otherwise be no apparent utility in the lawyer-client relationship. In the absence of advice (and express instructions to commence and continue the proceedings based upon that advice) it becomes more difficult for a lawyer to point to the agency relationship between lawyer and client as a basis for opposing an order that the lawyer be made personally liable for the opposing party’s costs.
5. It would matter not that the litigant wishes to commence litigation for the purposes of prolonging his or her stay in Australia and so may be desperate to advance any grounds of review or appeal, no matter how unmeritorious. Section 486F(3) makes it plain that the prohibition against encouragement applies notwithstanding the instructions or wishes of the litigant. There is no evidence in the present case that the appellant engaged Mr Smart or commenced the litigation for any such ulterior purpose. The appellant may be presumed to have a genuine and pressing need to have his immigration status favourably resolved in accordance with the law.
6. An inference of encouragement in the present case may also be based on Mr Smart’s unshakeable subjective belief that the Authority’s reliance on the DFAT Report constituted jurisdictional error. Pursuance of that topic was described by Mr Smart in the course of oral submissions as a “passion”. In light of that belief, it may be fairly inferred that the weaknesses in Mr Smart’s arguments were not apparent to him and, as a consequence, it is very unlikely that the weaknesses were made known to the appellant in the form of correct and measured advice concerning the prospect of success of the litigation.
7. I am reinforced in that view by the circumstance that Mr Smart pressed an identical ground relating to a DFAT Report in ***FJV18*** *v Minister for Home Affairs & Anor* [2020] FCCA 1032; 351 FLR 315. The hearing of that matter occurred after the date that the First Reasons were published. Although *FJV18* succeeded on other grounds, the ground in relation to the factual correctness of the DFAT Report was found to be unmeritorious:  *FJV18* at [36] – [37]. The primary judge in that case deprived the successful applicant of his costs in respect of that ground. The circumstance that the ground was pressed in *FJV18* after Mr Smart had received the reasons of the primary judge in relation to this matter (and the First Reasons published by this Court) further reinforces my view that Mr Smart is unable or unwilling to appreciate the weakness of the argument and has remained so throughout the litigation commenced in this Court on the appellant’s behalf.
8. That circumstances tells strongly against an inference that the appellant was properly cautioned about the risks inherent in the present proceedings. As I have said, in the absence of that caution, and in all of the circumstances discussed above, the solicitor’s conduct in taking all critical steps in the appeal on the appellant’s behalf is sufficient to show that Mr Smart encouraged the appellant to commence and continue the appeal.
9. Before concluding on this topic, I will give reasons for ruling on the admissibility of a document upon which the appellant sought to rely.
10. The appellant’s Counsel sought to draw an inference from an email sent to the appellant from Mr Smart on 18 December 2019 (marked MFI-A2) by which, Counsel submitted, Mr Smart had encouraged the appellant to apply for special leave to appeal from the judgment delivered on 11 December 2019 to the High Court of Australia. Mr Smart objected to the admissibility of the email on the basis that it came into existence after the First Reasons were published and so was not relevant to whether he encouraged the migration litigation in this Court. I do not consider the content of the email to be relevant to the matters arising for determination under s 486F of the Act, not so much because of its timing but because of its content. The email does little more than to attach a copy of the First Reasons, inform the appellant of the time period in which an application for special leave may be made and (appropriately) inform the appellant that he should obtain alternative legal representation in relation to special leave because the issue under s 486F of the Act had arisen, so rendering it inappropriate for Mr Smart to continue to act. I uphold the objection to the admissibility of the email and have not taken it into account.

## No proper consideration

1. For the purposes of s 486E(1)(b)(i), the subjective views of the legal representative are not determinative in the consideration of whether proper consideration has been given to the prospect of success. In *SZFDZ*, Moore J said at [25]:

…  The word ‘proper’ invites consideration of whether, in the circumstances, there was a balanced and thoughtful assessment of the prospects of success, such assessment being directed to whether, objectively, the litigant had prospects of success.  …

1. Here, the relevant circumstances include the nature of the lawyer-client relationship and the circumstance that the legal representative holds himself out as competent in the area of migration law, as evidenced by his entering into the retainer.
2. In my view any consideration of the content of the requirement that a lawyer give proper consideration to the prospects of success of particular migration litigation must proceed from the reasonable expectation that the lawyer possesses a minimum degree of knowledge and competency in the migration area, particularly in circumstances where the lawyer holds himself or herself out as entitled to practice for fee or reward.
3. To be “proper”, the lawyer’s consideration must proceed from a proper understanding not only of the Act but of the general law in relation to judicial and appellate review.
4. More specifically in relation to this appeal, the requirement to give proper consideration required (at least) a correct understanding of the relevant limitations on the powers of the Authority, and of the primary judge on review, and of this Court on appeal. It required a correct understanding of the nature of the jurisdiction conferred on the FCCA under s 476 of the Act and an appreciation of the difference between judicial review and merits review. It required an appreciation that the broader grounds for review under the ADJR Act did not apply and therefore an appreciation that cases concerning the ambit of that Act had no direct application.
5. The requirement of proper consideration in the present case also required that the lawyer proceed from a fair and correct reading of the DFAT Report upon which the Authority relied, including the fact that it did contain (contrary to the submission that was advanced) a statement of sources upon which the country information was based. Also required was a correct understanding of the case law as it applied to the use of country information by an administrative tribunal in the performance of its merits review and fact finding functions. In the context of an appeal, proper consideration required that careful scrutiny be given to the submissions that had been made before the primary judge by the Minister and also to the reasons given by the primary judge for accepting those submissions. The practitioner was required to ask whether there was a reasonable prospect that this Court would detect appealable error of the kind alleged in the grounds of appeal.
6. The grounds of review argued before the primary judge did not turn on the resolution of any uncertainly in the case law, nor upon any point of statutory construction reasonably amenable to differing views.
7. Of particular concern is Mr Smart’s assumption that the primary judge (and this Court) could and should receive evidence that was not before the Authority so as to reach a different conclusion on a factual question to that reached by the Authority by a trial process in which the Minister bore an onus of proof. That aspect of the argument alone indicates that any consideration that was given to the merits by Mr Smart proceeded from a flawed understanding of fundamental legal principles. Any consideration founded on that flawed understanding could not be “proper consideration” for the purposes of s 486E of the Act.
8. There may be a category of case in which a legal practitioner makes an error of judgment or proceeds from an understandable misapprehension of legal principle or in ignorance of recently decided authority or recently made amendments to the Act. A finding that the lawyer has not given “proper consideration” in such cases may be more problematic. I do not consider this case to fall within that category.
9. Accordingly, I am satisfied that Mr Smart is a person who has acted in contravention of s 486E of the Act and is therefore a person against whom orders under s 486F of the Act may be made.

# DISCRETION

1. By his new Counsel, the appellant applies for orders in the following terms:

1. That order 4 of the orders made on 18 February 2020 be varied such that the time to file and serve the matters set out in orders 4(a) through to (c) be extended to 2 October 2020;

2. That order 6 of the orders made on 18 February2020 be varied such that the time to apply to make oral submissions in relation to any issue arising under s486F of the *Migration Act 1958* (Cth) be extended until 2 October 2020;

3. That pursuant to s486F(1)(a) of the *Migration Act 1958* (Cth), an order be made that Mr Haidari Smart pay the costs incurred by the Respondents on this appeal.

4. That pursuant to s486F(1)(c)(ii) of the *Migration Act 1958* (Cth), an order be made that Mr Haidari Smart repay to the applicant the costs paid in relation to this action.

1. On the basis of an affidavit filed on behalf of the Minister I am satisfied that the costs payable to the Minister should be fixed in the sum of $7,000.00.
2. Mr Smart deposes that the appellant is a person under financial hardship and I accept that to be the case.
3. The initiating documents identify Mr Smart by name as the lawyer for the appellant. The name of a law firm is also provided on the initiating documents. Mr Smart personally certified the litigation as having reasonable prospect of success.
4. A copy of the costs agreement is in evidence (Exhibit-A1). It does not shed light on the legal structure of the firm. However it does state that Mr Smart was “responsible and in control of” the appellant’s case and was also the person to contact regarding the appellant’s legal costs. The agreement specifies a charge for Mr Smart’s work in the amount of $319.00 per hour.
5. Mr Smart has been afforded the opportunity to file affidavit evidence raising any factual issue as to why the costs orders should not be made. If there was a reason why an order for costs should not be made against Mr Smart personally (as opposed to the firm), it has not been made apparent on the affidavit evidence filed by him.
6. For the purposes of s 486F(1)(b)(ii) of the Act, I am satisfied that the appellant paid sums totalling at least $5,000.00 pursuant to the costs agreement. There is some discrepancy in the evidence as to the date on which the latest payment may have been made.
7. In an affidavit, Mr Smart said that “it was his intention ab initio was to act pro bono”. In another affidavit he stated that “we acted at least 75 per cent of the time on a pro bono basis”.
8. I am satisfied that as at the date of the publication of the First Reasons, it is possible that Mr Smart had not invoiced the appellant for all of the work that had been undertaken preparatory to the hearing. However, I consider the phrase “pro bono” when used by Mr Smart is more apt to mean that that there was some forbearance in respect of the charging for legal services to the appellant or the enforcement of invoices at least pending the determination of the appeal.
9. Mr Smart submitted that if orders for the repayment of his fee were to be made, there would be a windfall outcome for the appellant because the appellant had enjoyed the benefit of the legal services provided to him. I cannot accept that submission. The true situation is that if an order is not made, the appellant will be liable to pay the Minister’s costs in the amount of $7,000.00 in circumstances where he had (as I have found) been encouraged by Mr Smart to commence and continue the litigation and so become exposed to that costs liability. To the extent that Mr Smart in fact provided legal services to the appellant, that circumstance must be considered against his obligations to the appellant at general law and under the Act itself. The services provided to the appellant in this litigation have not advanced the appellant’s position in relation to his immigration status and from the outset there was no reasonable prospect that the litigation would have that result. In the circumstances, there is a strong basis for requiring that Mr Smart reimburse the appellant the full extent of the fees paid in connection with the appeal.
10. As to the liability to pay the Minister’s costs, it is apt to recall that orders for costs have a compensatory purpose. It is necessary to ask whether the conduct of the litigation that has caused the Minister to incur expenses is conduct for which the appellant should be held responsible. In the ordinary course, the responsibility for paying a successful party’s costs is that of the unsuccessful party, the unsuccessful party being bound by the actions of his or her lawyer and agent. However, where proceedings have been commenced and continued in contravention of s 486E of the Act, as has been mentioned earlier, the contravening lawyer should not be permitted to point to the agency relationship as a basis for resisting the responsibility for paying the Minster’s costs.
11. It remains to consider an aspect of prejudice asserted by Mr Smart as a basis for opposing the orders, arising from delay in the resolution of the costs issues since the First Reasons were published more than 12 months ago.

## Delay

1. Mr Smart submits that the delay is prejudicial to him because he is no longer associated with the firm named on the Court record. Mr Smart submitted that the delay has the consequence that he is unable to turn to the firm to indemnify him in relation to any amounts that may be payable by him should the orders now be made.
2. The delay to which Mr Smart refers has different explanations affecting different points in time.
3. The judgment was delivered shortly before Christmas 2019 and then deferred at Mr Smart’s request because of issues relating to the application for special leave. The matter came back before the Court in February 2020 at which time a certificate referring the appellant for legal assistance was made pursuant to r 4.12 of the Rules.
4. In March 2020 the staff of the South Australia District Registry commenced efforts to identify a suitable lawyer to accept the referral certificate. In March 2020 the appellant’s Counsel was contacted as part of these efforts. In July 2020, the appellant’s Counsel emailed my then Associate to advise that it was anticipated she would obtain instructions to seek more time to make a substantive application. Whilst Counsel had been provided with some of the relevant material, Counsel’s appointment in accordance with the referral certificate was not formally confirmed until 9 September 2020. Mr Smart accepted during oral submissions that the Court may proceed on the footing that Counsel was not provided with the appellant’s contact details until 9 September 2020. The present application was filed reasonably promptly thereafter on 2 October 2020.
5. The delay is not the fault of Mr Smart, nor is it the fault of the appellant personally. It is in large part the fault of the Court. In and of itself the delay in finalising the costs issues is regrettable. Its effects are to be appropriately weighed in the exercise of my discretion.
6. However I am not satisfied that Mr Smart has a proper evidentiary basis to demonstrate the particular prejudice he asserts. Firstly, there is no evidence as to when he left his previous firm, nor evidence of the nature and terms of his former legal relationship with the firm. It has not been demonstrated that the delay caused Mr Smart to take a step or refrain from taking any step that later provided to be disadvantageous to him. From around June or July 2020, Mr Smart could not reasonably have proceeded on an assumption that there would be no application affecting his interests, Counsel at that time having foreshadowed that she expected to receive instructions to make an application.
7. Whether Mr Smart has a right of indemnity against the firm is unnecessary to decide. It is sufficient to observe that there is no evidence to show that the delay in the resolution of the issues has caused Mr Smart to lose that right, assuming it to have existed at an earlier point in time.
8. Whilst it is relevant, I do not consider the delay to be such as to justify the Court refusing the appellant’s application or declining to act on its own motion to make orders under s 486F of the Act. Nor is it sufficient reason to decline to exercise the discretion under r 39.05 of the Rules to vary or set aside the previous orders.
9. In all of the circumstances, I am satisfied that orders to the effect sought by the appellant (and otherwise foreshadowed on the Court’s own motion) should be made.
10. Mr Smart has been afforded the opportunity to apply to be joined as a party, but has declined to make that application. The orders will be expressed to apply to Mr Smart as a non-party to the proceedings.

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| I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Charlesworth. |

Associate:

Dated: 23 February 2021