FEDERAL COURT OF AUSTRALIA

SZTJL v Minister for Immigration and Border Protection [2015] FCA 836

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| Citation: | SZTJL v Minister for Immigration and Border Protection [2015] FCA 836 |
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| Appeal from: | SZTJL v Minister for Immigration & Anor [2015] FCCA 689 |
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| Parties: | **SZTJL v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL** |
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| File number: | NSD 238 of 2015 |
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| Judge: | **PERRAM J** |
|  |  |
| Date of judgment: | 13 August 2015 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court – whether jurisdictional error demonstrated in Refugee Review Tribunal’s reasons – whether Tribunal properly dealt with complementary protection claims – whether Tribunal’s findings as to appellant’s credibility irrational |
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| Legislation: | *Migration Act 1958* (Cth) s 36(2)(aa) |
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| Date of hearing: | 5 August 2015 |
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| Place: | Sydney |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 38 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the First Respondent: | Ms R Graycar |
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| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
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| Solicitor for the Second Respondent: | The Second Respondent filed a submitting appearance |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 238 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | SZTJL  Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  REFUGEE REVIEW TRIBUNAL  Second Respondent |

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| JUDGE: | PERRAM J |
| DATE OF ORDER: | 13 AUGUST 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the first respondent.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 238 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | SZTJL  Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  REFUGEE REVIEW TRIBUNAL  Second Respondent |

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| JUDGE: | PERRAM J |
| DATE: | 13 AUGUST 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

## 1. Introduction

1. The appellant is a citizen of Bangladesh. He is currently 36 years old. He arrived on 25 October 2011 travelling on a temporary business visa. On 1 December 2011 he applied for a protection visa. That application was refused on 15 June 2012. He then sought a review of that decision before the Refugee Review Tribunal (‘the Tribunal’) on 19 July 2012. On 27 June 2013 the Tribunal invited the appellant to a hearing which it conducted on 19 August 2013. On 16 September 2013 it rejected his claims and affirmed the decision of the delegate.
2. The appellant then applied to the Federal Circuit Court for judicial review of the Tribunal’s decision. That application was dismissed. It is the appeal from that decision which is now before this Court.

## 2. Background

1. The appellant was born in the village of Mohorali Matbar Kandi which is in the Shariatpur District in central Bangladesh. The gist of the appellant’s claims to protection lies in his alleged association with the Bangladesh National Party (‘BNP’) which he says began as long ago as 1996.
2. In the delegate’s decision there was some consideration given to the political situation in Bangladesh. It appears that it is not good. The delegate summarised it this way:

‘Despite these current and recommended future improvements, it is my assessment that available country information broadly supports a bleak outlook for law and order in Bangladesh; indicates widespread, systematic intra-party and inter-party political violence and portrays Bangladeshi law enforcement authorities as largely politicised, corrupt, under-resourced and generally ineffective.’

1. The two most significant political parties in Bangladesh are the BNP and the Bangladesh Awami League. The latter is presently in control of Bangladesh. The appellant claimed to have been involved in BNP activities since 1996 and that, as a consequence, he was a target for violence by members of the Awami League. The grim picture painted by the delegate made this a plausible claim if its other elements were made good.
2. The delegate was not disposed to accede to the appellant’s claims, however, because it did not accept that he had any significant political profile in Bangladesh and was thus of no interest to the Awami League. It felt this conclusion consistent with the fact that he had moved to Dhaka in 2011 without any apparent difficulty.
3. In the Tribunal’s review proceeding, the Tribunal took a much more detailed look at the various claims which the appellant had made about his political role in Bangladesh and his relationship with, or concerns about, the Awami League. It examined six aspects of those claims and concluded that his account was untruthful. Having rejected that account it then concluded that he did not have a well-founded fear of persecution for a Convention reason. It then expressly considered his claims to complementary protection arising from Australia’s non-refoulement obligations. Since it did not accept the basic facts of his case it concluded that this claim was not made good either.
4. Very shortly, the Tribunal’s six reasons for rejecting the appellant as a credible witness were:
5. ***Paid work with the BNP****.*
6. The Tribunal thought that the appellant’s accounts of whether he did paid work for the BNP between 1996 and 2011 were inconsistent in various ways.
7. ***Involvement in BNP activities between 1996 and 2009***.
8. The Tribunal examined aspects of his accounts of what he had done with the BNP and concluded that these were inconsistent. For example, he told the Tribunal that he ran messages and stuck up posters, yet in the Departmental interview he had said that he worked with the poor.
9. ***Difficulties faced as a result of involvement with BNP***.
10. I will return to this topic in a little more detail below, as it appears to me that the way in which the Tribunal proceeded may not be altogether free of difficulty. However, in short compass there were three points:

* the appellant appeared to have been charged after he had left Bangladesh with offences which were capable of being seen as politically motivated but he had not ever raised these with the delegate or the Tribunal;
* in his written application he had said he had been attacked twice in May 2011 but in his departmental interview he had indicated that he had been attacked on other occasions prior to that. Before the Tribunal he said his difficulties had commenced in May 2011. The Tribunal regarded this as inconsistent and adversely affecting his credit; and
* the Tribunal thought that a medical certificate provided by the appellant to prove that he had been hospitalised after the attacks in May 2011 might have been forged.

1. ***Hiding in Bangladesh***.
2. The appellant claimed to have been hiding at his aunt’s in Dhaka. He had not, however, placed her address on a visa application he had made. The Tribunal thought it strange, and going against his credit, that he did not place the aunt’s address on the visa application.
3. ***Knowledge of BNP Leadership.***
4. The Tribunal was unimpressed by the appellant’s inability to say when a particular office holder in the BNP ceased to be an office holder. The appellant’s response was that the person had ceased to be an office holder after the appellant had left Bangladesh.
5. It was also unimpressed by a letter he provided with his visa application which suggested he had been the vice president of the youth wing of the BNP Janjira (or Zanjira) Police Station Branch. The Tribunal had sought independent corroboration of this letter through DFAT which was forthcoming but elements of which it did not accept. I return to the significance of this below.
6. ***BNP Australia*.**
7. The Tribunal was incredulous about the appellant’s evidence of when he had joined the BNP in Australia. When quizzed at the hearing on 19 August 2013, the appellant thought he had joined in July 2012. But correspondence showed that he must have joined before May 2012.
8. Overall, the Tribunal used all of these conclusions to come to the view at para [53] of its reasons for decision that the appellant was not a credible, truthful or reliable witness.

## 3. The Proceedings in the Federal Circuit Court

1. The appellant sought judicial review of this decision on 10 October 2013. The appellant pursued three formal grounds of review, a further two in his submissions at the hearing and one which was put orally before the Court. Only one of those is now pursued in this Court. This ground was that the Tribunal did not give separate reasons for dismissing his claim for a protection visa on the basis of any complementary protection, i.e., non-refoulement, obligations. The remaining grounds were dismissed by the Federal Circuit Court in terms which seem to me to be unremarkable.

## 4. The Appeal in this Court

1. As a matter of formality the grounds pursued in this Court were:

‘Ground One:

1. This Ground should be accepted for the reasons below:

1.1. My claim of ‘Fear of Persecution’ is based on the experience I have encountered in the past. I solemnly believe my return to Bangladesh will endanger my life.

1.2 I have been successful to established with Second Respondent that I am a BNP activist. Tribunal has failed to consider my situation and the current situation in Bangladesh. It is essential and part of Department’s policy to take consideration into circumstances that will affect me upon returning to Bangladesh.

1.3 I belong to Bangladesh Nationalist Party and my association and affiliation with this ‘Political party’ is substantiated by my acts and active participation. I have knowledge, activity and political believe in BNP. This political party has acknowledged my involvement by writing letters in support of my claim.

1.4 My reasons for joining and participating in BNP are stipulated in my Statements that I have provided before the delegate of the Minister for Immigration and Border Protection and Member of the Refugee Review Tribunal. In both instances the

1.5 Accordingly my active participation with BNP constitutes ‘reasonable fear of persecution’ and falls under the ambit of the Convention or the Act on the evidence and information before the Tribunal.

Ground Two:

The Tribunal has erred in making assertion under Section 36(2)(aa) of the Migration Act. The Refugee Review Tribunal has failed to provide reasons for its decision pursuant to section 36(2)(aa) of the *Migration Act.*

In dealing with my claims under section 36(2)(aa) of the *Migration Act 1958* (Cth), the RRT explicitly failed to provide separate reasons to its consideration under section 36(2)(a) of the Act.’

[Errors per original]

1. The first ground does not really constitute the kind of ground which this Court can entertain. It is concerned with substantive arguments which are, subject to legal error of a jurisdictional kind, the province of the Tribunal rather than this Court.
2. On the other hand, ground 2 can certainly be raised. The Federal Circuit Court, it is true, did not accept the argument. But I think it was correct to do so. The Tribunal’s reasoning on complementary protection was that since it did not believe he was involved in BNP politics at all, it did not think there were, in terms of s 36(2)(aa) of the *Migration Act 1958* (‘the Act’), substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Bangladesh, there was a real risk that he would suffer significant harm.
3. It is not correct to say, therefore, that the Tribunal did not deal with this matter separately. It did so albeit it used the same factual substratum. There is nothing wrong with doing that and, indeed, it would be quite odd if the Tribunal were required to find all the facts a second time. I do not accept, therefore, that any error is demonstrated in the Tribunal’s treatment of the issue of complementary protection.

## 5. Other Matters

1. At the hearing of the appeal I raised some concerns I had about two aspects of the Tribunal’s reasoning in relation to its conclusion that the appellant was an untruthful witness.

### (i) Paragraph [35]

1. I will shortly set out para [35] of the Tribunal’s reasons which deal with the appellant’s position in relation to a violent incident in which he may have been involved. However, before doing so I propose to set out my understanding of the documents which were before the Tribunal on the issue. All of the documents were translations of other documents. There were four of them. Although they all relate to incidents well before May 2012 and although they bear other dates in 2011, each of these four documents bears a date at the top of its first page of 20 May 2012 (or in one case 15 May 2012). It is not clear to me what that date is although it may be a print-off date.
2. The four documents are:
3. a letter dated 15 July 2011 from Mr Tazel Madbar to the Officer in Charge of the Zanjira Police Station. It appears to be a complaint that the appellant, in the company of others, took part in a violent procession at 5.45 pm on 15 July 2011. It alleges that they attacked Mr Madbar’s cousin with dangerous weapons on the head;
4. a document entitled ‘First Information Report’ prepared by a sub-inspector called Mr Alam. This recorded the names of Mr Madbar and his cousin and the date of the incident as being 15 July 2011 at 5.45 pm;
5. a print out of judicial orders. This appears to record various mention dates. The first date given is 7 July 2011 which makes no sense since the incident is alleged to have occurred on 15 July 2011; and
6. a charge sheet apparently dated 15 February 2012 and suggesting an offence date of 16 July 2011.
7. There are certainly temporal irregularities with these documents. Further, there are aspects of their style which are certainly curious to an Australian lawyer. On the other hand, it is is important to keep in mind the different legal cultures at play in different systems.
8. However, my concern is not with whether the Tribunal should have, or should not have, accepted the genuineness of these documents. My concern is that its reasoning about them is a little difficult to follow. The reasoning appeared at para [35] and was in these terms:

‘35. Despite submitting a Bangladesh First Information Report in his name (and others) dated 25 May 2012, regarding an incident on 16 July 2011 of anti-government procession for killing, burning and breaking of government and private assets and relating letter where the applicant with others attacked a person on the head with the motive of murder, summary of Court Orders from 7 July 2011 to 15 February 2012 against the applicant and Charge Sheet dated 20 February 2012 and letter dated 15 July 2011 and 20 May 2012 of a witness to the incident the applicant did not indicate at the hearing before me nor at the Department interview that he feared return as a result of this charge or incident. As raised with him under the process outlined in s.424AA this is despite being asked at the Department interview at the end whether there is any other reason he fears return or whether there is any other information he wants to tell the interviewer about or to consider. Further at the hearing before me, he never referred to any case against him despite being asked whether there was anything else he wanted to tell me about what happened in Bangladesh or whether he had anything else to say or add to his claims. In response when my concern as to his lack of evidence as to this charge was raised by me at the hearing, he indicated that after he came to Australia the police went to his house and advised there was a case against him. He said he did not know whether it was a fabrication or true and the police have not returned. I do not accept the applicant’s response and expect that if the applicant was charged with murder (falsely), because of his BNP activities at the instruction of Awami League activists, due to its seriousness he would raise it at the Department interview and/or the hearing before me when given the opportunity to advise of any other concerns or evidence he would like to be considered. As he did not I do not accept the applicant has been a witness of truth in this regard and this adds to my finding the applicant is not credible. In making these findings I have considered the submitted FIR, Charge sheet and associated documents of the incident and the weight placed on these documents below.’

1. There are some odd features of this paragraph. The first sentence seems to suggest that it was the appellant who had submitted the First Information Report and presumably before the Departmental interview. The argument seems to be that the appellant, in the ordinary course, would have mentioned in the course of the Departmental interview or to the Tribunal the claim which appears to flow from this material and that the fact that he did not reflected poorly on his credit. The appellant’s response when confronted with that proposition was that he was informed of this after he arrived in Australia and was not sure whether it was a fabrication.
2. That raises an obvious question as to why he would have provided the material to the Department in the first place. It is all rather confusing. Ultimately, the Tribunal’s view was that the documents were false. It is unclear why the appellant would have submitted fake documents and then not placed reliance upon them. Ultimately, whilst I would have been inclined myself simply to have put this material aside as neither advancing nor detracting from the appellant’s case, I am not prepared to say that it was beyond the realm of the rational to have concluded, as the Tribunal did, that the appellant was lying in the account he gave. It might have been useful for the Tribunal to have articulated what the lie was but inferentially it seems to be that he submitted fake documents and then, for whatever reason, chose not to rely upon them whilst making up the story that it had happened after he left Bangladesh. I am not prepared to conclude this was irrational on the Tribunal’s part.

### (ii) Paragraph [46]

1. The second issue which concerned me was the Tribunal’s reasoning at para [46]. This deals with, inter alia, the topic of whether the appellant had been, as he claimed, the vice president of the Jatiotabadi Jubo Dal, Janjira Police Station Branch. To get to the bottom of this issue, the Tribunal wrote to the Department of Foreign Affairs and Trade (‘DFAT’). The memo was dated 9 April 2013 and was as follows:

‘Background

The applicant claims to be Vice President of the BNP Jatiotabadi Jubo Dal, Zanjira Police Station Branch and to have been beaten by Awami league members and to have had false charges laid against him.

He has submitted a number of letters to support his claims. The attached letter should accompany the request for information from DFAT.

Questions.

1. Please ask DFAT to contact the Offices of the BNP Jatiotabadi Jubo Dal, Zanjira Police Station Branch, independently of any telephone numbers shown on the letter, and ask them whether the letter is genuine and whether the applicant is or was Vice president.’
2. It will be seen that the question was explicit in its desire to ensure that DFAT’s communication with the BNP should be quite independent of the appellant himself. On 21 June 2013, DFAT responded as follows:

‘On 13 May post emailed the reference letter to Biddut Khan, President of Jubodal, Zanjira Police Station Branch, Shariatpur. Upon receiving the letter, on 15 May Khan informed post that he was not the appropriate person to verify the letter and referred post to Abdul Jobbar Khan, Convenor of Jubodal from the applicant’s village.

On 15 May post contacted Abdul Jobbar Khan on his mobile number and sent him a copy of the reference letter by courier the same day. Between 19-21 May, Jobbar informed post that he did not receive the reference letter by courier and offered to provide an alternative way of contact. After delays receiving contact details for the next two weeks, on 5 June post received an email address (XXXX@yahoo.com) from Jobbar and emailed him a copy of the reference letter for verification.

On 18 June, Jobbar confirmed with post over the telephone that he received the reference letter by email. He also confirmed knowing [the appellant] as the Vice President of Jatiyotabadi Jubo Dal, Zanjira Police Station Branch. According to Jobbar, one of the signatories of the letter Mollah Md. Nasir Uddin is the President of Jubodal, Zanjira Branch and his signature on the reference letter is true. Abdul Jobbar could not comment on the second signatory Md. Lobir Bepari.

During the conversation, Jobbar mentioned that he had several cases against him in court and he is currently in hiding to avoid arrest. He also apologised for the delays post faced in transmitting the letter to Jobbar. According to Jobbar, Shariatpur is not a very developed town and with his regular movements (to avoid arrest) providing an alternative contact point was difficult.’

1. The sequence painted by this report is:
2. DFAT contacted Mr Biddut Khan who was believed to be the President of Jubo Dal, Zanjira Police Station Branch;
3. Mr Khan informed DFAT that he was not the appropriate person to speak to. Rather, the appropriate person was Mr Abdul Jobbar Khan who was the convenor of the Jubo Dal in the appellant’s village; and
4. after several missteps, DFAT spoke with Mr Abdul Jobbar Khan and he confirmed that the appellant was the vice president of Jatiotabadi Jubo Dal, Zanjira Police Station Branch.
5. During the hearing before me some matters were clarified with the appellant with the assistance of the interpreter. These were:
6. Jatiotabadi means ‘National’ and is another way of referring to ‘the BNP’;
7. Jubo Dal means ‘Youth Wing’;
8. Shariatpur is a region and Zanjira Police Station is, in effect, a district within that region; and
9. the appellant’s village is Mohorali Matbor Kandi.
10. Armed (impermissibly perhaps) with that additional information it will be seen that only one branch of the BNP’s youth wing is involved. It appears strange that the President of that branch, when fielding an inquiry from DFAT as to who the vice president had been, would refer the matter to the convenor of the BNP in the appellant’s village. On the other hand, one has the situation that the efforts by the Tribunal to obtain independent verification of whether the appellant had been the vice president of the branch had resulted in confirmation that he was.
11. The Tribunal’s solution to this quandary was to disbelieve the statements made to DFAT by Mr Abdul Jobbar Khan. This it did at paras [47]-[49] as follows:

‘47. For the reasons that follow I place no weight on the evidence of Abdul Jobbar Khan to support the applicant’s claims and the letter of Mollah Md. Nasir Uddin that he was Vice President of the BNP Jatiotabadi Jubo Dal.

* Firstly as was suggested to the applicant and outlined in footnote 3 above independent information indicates that there is a high prevalence of document fraud in Bangladesh and that it is common for political party membership confirmation letters to be issued to facilitation [sic] verification procedures, even if the information is incorrect and that it is normal to provide incorrect information for a third party, because it is considered a duty to help “co-nationals/brothers” to immigration [sic] to a so-called “rich” country.
* Secondly Abdul Jobbar Khan indicated that Mollah Md Nasir Uddin is President of the Jatiotabadi Jubo Dal Janjira (Zanjira) branch, as did the applicant, when information provided by DFAT above and independently obtained indicates that Biddut Khan holds this role.
* The letter from Mollah Md Nasir Uddin indicates him as President, Shariatpur District BNP which does not conform with his title as provided by Abdul Jobbar Khan or the applicant.
* The applicant identified Abdul Jobbar Khan as President, BNP Shariatpur District Branch rather than as Convenor of Jatiotabadi Jubo Dal from the applicant’s village.

48. The applicant responded that Mollah Md Nasir Uddin is President of the BNP Janjira or Zanjira Branch, Jubo Dal.

49. Based on the information above and based on the applicant’s inconsistent evidence outlined above, I place no weight on the evidence provided by Abdul Jobbar Khan to DFAT as to the applicant’s involvement in the BNP Janjira Jatiotabadi Jubo Dal or in the letter provided by Mollah Md Nasir Uddin as to his involvement in BNP politics and his role.’

1. This is a little difficult to follow. However, when it is unpacked it is more coherent than it appears to be on first reading. Several additional items of information are needed in order to complete the picture. The first bullet point refers to ‘Footnote 3’. Footnote 3 is accurately summarised in the bullet point. Information provided by a Canadian source did suggest that it was normal in Bangladesh for third party verification enquiries to be responded to falsely because there is thought to be a duty to help ‘co-nationals/brothers’ to immigrate to rich countries. The significance of this is that it explains what is otherwise puzzling, which is the absence of a motive in Mr Abdul Jobbar Khan to lie to DFAT about the appellant.
2. Assessment of the second and third bullet points is hampered by the fact that DFAT appears to suggest that the letter in question bore more than one signature whereas the version in the appeal papers bore only one signature. During the hearing before me this problem was resolved when the untranslated version was produced which clearly had two signatures.
3. Once those matters are clarified, it seems to me that there is nothing remarkable about paras [46]-[49]. Having had the benefit of Ms Graycar’s submissions for the Minister and having thrashed the matter out during the hearing I am satisfied that neither para [35] nor para [46] of the Tribunal’s reasons disclose the difficulties which, on first examination, they seem to have. For completeness I requested the Minister’s solicitor to furnish me with a transcript of that part of the Tribunal’s hearing where this issue was put to the appellant. The solicitors did so and I have examined the extracted transcript. It shows that the matter was put to the appellant.

## 6. Conclusion

1. The appeal will be dismissed with costs.

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| I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 13 August 2015