Federal Court of Australia

EQU19 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1182

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **RAPER J** |
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| Date of judgment: | 5 October 2023 |
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| Catchwords: | **MIGRATION** – appeal from decision of the Federal Circuit and Family Court of Australia (Division 2) affirming a decision of the Administrative Appeals **Tribunal** to affirm a decision of a delegate not to grant a protection visa – whether the Tribunal made a finding that was illogical, irrational or not based on evidence – whether the Tribunal incorrectly applied s 423A of the *Migration Act 1958* (Cth) –appeal dismissed |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 13(1)  *Migration Act 1958* (Cth) ss 5AAA, 5J(1), 65, 423A, 423A(1), 423A(2), 430, 430(1)(c), 501  *Migration Amendment (Protection and Other Measures) Act 2015* (Cth)  Explanatory Memorandum of the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) |
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| Cases cited: | *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593  *ASJ22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 476  *Commissioner of Taxation v Addy* [2020] FCAFC 135; 280 FCR 46  *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3; 289 FCR 21  *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594  *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; 168 ALR 407  *SZUHJ v Minister for Immigration and Border Protection* [2018] FCA 331  *XFKR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 167; 280 FCR 535  *XRZG v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 783 |
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| Solicitor for the First Respondent: | Mills Oakley |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs. |

ORDERS

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|  | | NSD 712 of 2022 |
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| BETWEEN: | EQU19  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | RAPER J |
| DATE OF ORDER: | 5 October 2023 |

THE COURT ORDERS THAT:

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

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

REASONS FOR JUDGMENT

# RAPER J:

1. This is an appeal from a decision of the Federal Circuit and Family Court of Australia (Division 2) (**FCFCOA**), in which the primary judge dismissed the appellant’s judicial review application of a decision of the second respondent, the Administrative Appeals **Tribunal** (**T**): *EQU19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FedCFamC2G 609 (**J**). The Tribunal affirmed a decision of the **delegate** of the first respondent, the **Minister**, made on 18 July 2019, refusing to grant the appellant a Protection visa (subclass XA-866) (**protection visa**) pursuant to s 65 of the *Migration* ***Act*** *1958* (Cth).
2. This appeal concerns whether the primary judge erred in not finding that:
3. the Tribunal’s finding as to the level of the appellant’s devotedness to his Christian faith (leading to him not being able to satisfy the refugee and complementary protection visa criteria) was illogical, irrational or based on no evidence (**the devotedness finding**); and
4. the Tribunal failed to comply with s 423A of the Act in respect of the appellant’s claim to be at risk of harm based upon his political opinion, in particular his criticism of King Abdullah II (**political opinion claim**) and the evidence in respect of that claim.
5. For the following reasons, I dismiss this appeal.

## Background

1. The appellant’s immigration history is lengthy, and is helpfully summarised by the primary judge at J[2]–[13], and is briefly re-stated as follows.
2. The appellant is a citizen of Jordan who first arrived in Australia on 17 July 1997 on a Temporary Partner visa. He was granted a Permanent Partner visa on 8 November 1999. Following a trip to Jordan, the appellant was granted a Resident Return visa on 4 February 2003. Following criminal convictions, on 9 January 2017 the Minister cancelled the appellant’s Resident Return visa under s 501 of the Act.
3. The appellant applied for a protection visa on 7 June 2019. The appellant’s claims for protection are summarised as follows (see T[6]):
4. The appellant is an Orthodox Christian who claims to fear harm from the Jordanian officials and the Muslim community in Jordan as a result of his faith.
5. He claims that the family of an ex-partner will seek revenge on him on “honour grounds”.
6. He fears that he will be targeted in a long-standing “tribal feud”.
7. He will not be able to subsist if returned to Jordan due to his mental and physical health conditions, lack of family support and prolonged absence from Jordan.
8. He claims that he opposes the current government in Jordan, and that his ex-partner’s family will use his political opinion as leverage against him.
9. On 18 July 2019, the delegate refused the appellant’s protection visa application: A decision which was upheld by the Tribunal. However, the Tribunal’s decision was ultimately quashed, by consent, by this Court on 16 April 2021 (on appeal from the then Federal Circuit Court of Australia), and a writ of mandamus issued directing the Tribunal to determine the appellant’s application according to law.
10. On 20 September 2021, the Tribunal again affirmed the delegate’s decision to refuse to grant the protection visa. It is this decision of the Tribunal is the subject of this appeal.

## The Tribunal’s decision

### Christian faith – Devotedness

1. Relevant to the first appeal ground, the Tribunal considered the appellant’s claim that he feared harm from the Jordanian authorities and Muslim community in Jordan on the basis of his Christian faith: at T[6]. The Tribunal considered the extent of his religious observance first in Jordan (prior to his arrival in Australia) and then in Australia.
2. The appellant claimed that he was a devout Christian whose religious conviction put him at a higher risk of harm than other Orthodox Christians and/or other members of his family and community: at T[29]. The Tribunal accepted that the appellant was a Christian: at T[28]. However, in the context of considering the appellant’s religious practice in Jordan, the Tribunal rejected the appellant’s claim that he was more devout than his family members and his local Orthodox community (at T[30]–[32]):

30. The applicant claims that he was devout in his religious practice while growing up. He always attended church; and he used to sit and talk with the priest.

* He told the current Tribunal that when he was young, he used to receive religious materials from Germany, by correspondence. He could not remember any details (such as the organisation) but said that it was similar to the Bible study course that he had completed in prison in Australia. The Tribunal found the applicant’s evidence vague and unsubstantiated. It also formed the impression that he was blurring his experiences growing up in Jordan with his more recent contacts with religious groups (in prison and in immigration detention).
* He also told the first Tribunal that he had been planning to become a priest in Jordan. Asked about this at the recent hearing, he thought that there may have been an interpretation error. He had meant to say that he would like to become a priest in the future (i.e. not that he had been preparing to do so in Jordan).

31. The Tribunal asked about the religious practice of other family members (including those remaining in Jordan, and those who travelled between the USA and Jordan). He replied that he is not familiar with their (current) religious practice, as he has lost contact with most family members. He also commented that they are ‘non-religious’, as they do not pray or go to church. In his post-hearing submission, he wrote that he had fallen out with his one remaining brother in Jordan, as their views on religious practice differed.

32. Overall, the Tribunal found the applicant’s evidence about his religious practice in Jordan, particularly the strength of his religious conviction, lacking in detail and consistency. **There is no context or supporting evidence for his claim that he was more devout than all his family members, or the local Orthodox community.** The Tribunal considers these claims to be exaggerated and unreliable. It is particularly concerned that he was drawing less on personal experience growing up as a Christian in Jordan, than on recent contacts in Australia (such as his participation in Bible studies via correspondence).

(Emphasis added.)

1. The Tribunal then considered the evidence regarding the appellant’s religious practice in Australia, and observed at T[38]:

The Tribunal finds that the applicant practices as a nominal Orthodox Christian, in Jordan and (when the opportunity arises) in Australia. It does not accept that he has adopted the beliefs or practices of Protestant groups he has met in recent years, or that he has a genuine commitment to proselytising in the future, in Australia or Jordan.

1. In the context of considering the appellant’s fears, of adverse experience as a Christian, if he were returned to Jordan, the Tribunal referred to questions it had asked of the appellant about his family’s experiences, noting that some relatives remain in Jordan. The Tribunal referred to the appellant’s claim again that he sought to distinguish his religious practice and experiences from his family, and contended that he is not close to his family nor is he aware of their circumstances: at T[42].
2. With respect to the appellant’s claimed past faith-based mistreatment in Jordan, the Tribunal found that the appellant may have faced some instances of discrimination, but it did not accept that his freedom to practice his faith was restricted, nor did it accept that he had faced discrimination, bullying, harassment or other mistreatment that amount to serious harm: at T[44].
3. Later in its reasons, the Tribunal assessed the appellant’s claims against the refugee criterion, for the purposes of s 5J(1) of the Act, and in particular regarding his Christian faith: at T[93]–[105]. The Tribunal reiterated its finding that the appellant was not “more devout or outspoken than other members of his family and community”: at T[98]. Given the relevance of this finding to the appeal, the whole paragraph is extracted as follows:

The Tribunal accepts that the applicant is an Orthodox Christian and would wish to continue practising his faith if he returns to Jordan. **However, for the reasons stated above, it does not accept that he is more devout or outspoken than other members of his family and community.** It also does not accept that he always had a keen interest in church activities; that he has an outgoing, assertive personality that drives him to discuss his faith with others; or that his more recent contacts with Protestant or evangelical churches motivate him to preach actively.

(Emphasis added.)

1. The Tribunal also considered the appellant’s claim that as a Christian in a Muslim-majority country, the appellant would face discrimination. After considering country information concerning Christian experience in Jordan (at T[100]–[104]), the Tribunal concluded as follows (at T[105]):

The Tribunal accepts that the applicant has some general concerns about returning to a Muslim-majority country, particularly in light of reports of growing assertiveness within some Muslim groups. However, it finds there is no real chance of him being subject to persecutory harm as a result of hate speech or debate. The Tribunal finds on the basis of the available country information, and also having regard to the applicant’s and his family’s experiences in Jordan, that he will be free to practice as an Orthodox Christian. It finds that he will return to his local area, and at least initially mix with family and members of the Christian community. It accepts that he may face some degree of discrimination as a Christian, in the sense that employers and others tend to favour members of their own faith community, family and neighbourhoods over others. While the applicant may face instances of discrimination, the Tribunal finds there is no real chance of this reaching the level of serious harm (for instance, impairing his ability to subsist).

### Political opinion claim

1. Relevant to the second appeal ground, the appellant raised a new claim, at the Tribunal hearing, that he feared harm on the basis of his political opinion. The appellant argued that he has posted comments online in opposition to King Abdullah II and his administration, and he feared that those comments would be used by his ex-fiancée’s brother as retribution. The appellant submitted that he had not previously raised this claim as “he felt he did not have the opportunity to do so at the hearing before the first Tribunal”: at T[86].
2. In support of this claim, the appellant provided, after the Tribunal hearing, over 55 pages of screenshots from Facebook pages, with one page translated from Arabic to English in which the appellant ‘liked’ comments by other people who were critical of King Abdullah II and his administration. The appellant also added comments disparaging the King to these posts. The Facebook activity occurred from February 2021, but mostly between May–June 2021: at T[87].
3. The Tribunal expressed significant concerns regarding the appellant’s oral submissions and his material, noting that the Facebook comments appeared to only be made recently: at T[88]. Further, the Tribunal found that the failure by the appellant to raise this claim earlier undermined his credibility: at T[89]. Whilst the Tribunal accepted that the appellant may have some concern about Jordanian politics (at T[90]), the Tribunal found that the appellant had been in Australia for over 20 years and during that time had not demonstrated a real interest in or engagement with Jordanian political issues. The Tribunal did not accept that the appellant had a political opinion that would motivate him to engage in political debates or activities. The Tribunal also did not accept that the Jordanian authorities viewed the appellant as a person of political influence or had any adverse interest in him, nor was there anything that his ex-fiancée’s brother (or anyone else) could use against him as leverage in the future: at T[90].
4. When the Tribunal applied its findings in relation to the appellant’s political opinion claim against the refugee criterion, the Tribunal reiterated its findings outlined above: at T[130]–[131].

## The primary judge’s reasons

1. By way of amended originating application dated 27 January 2022, the appellant sought judicial review of the Tribunal’s decision on four grounds: at J[30]–[31]. Two of those grounds are essentially repeated on appeal (the “impugned finding” below is described as the devotedness finding on appeal) and were as follows:

…

2. The Tribunal erred jurisdictionally in its assessment of the refugee and complementary protection criteria by making a finding that was illogical, irrational, based on no evidence or not open on the evidence, namely, that at the time of decision the Applicant was no more devout or outspoken than other members of his family (**impugned finding**).

3. The Tribunal erred jurisdictionally in its assessment of the refugee and complementary protection criteria by failing to apply, or failing to correctly apply, s 423A of the Act in relation to the Applicant’s claim to fear harm based on his political opinion, in particular his criticism of King Abdullah II (**political opinion claim**), and the evidence in respect of that claim.

…

### The devotedness finding

1. The primary judge reasoned that the devotedness finding was open given the Tribunal’s reasons had to be read in context and with “a beneficial construction” (at J[72]); that the question of the appellant’s relative religious devotion to his family was raised by the appellant himself, and was not an “arbitrary measure set by the Tribunal”; and the Tribunal concluded that the appellant had not been able to give a particularly detailed account of his family’s religious practice: at J[73]–[74].
2. The primary judge noted the use of the present tense by the Tribunal, at T[98], when assessing the appellant’s refugee claims arising from his religious status, namely that “it did not accept that he is more devout or outspoken than other members of his family and community”, and observed the following:

79 The use of the present tense (in contradistinction to [32]) indicates that the Tribunal understood that it was making its assessment (as required) at the time of decision and was therefore not proceeding on any misunderstanding of the evidence given about the practices of the applicant or his family in Jordan in the 1990s.

80 The Tribunal was concerned with an assessment of what the applicant may do on return to Jordan in terms of his religious practices and what impact this would have in terms of the refugee and complimentary protection criteria. The reference in [98] to the anterior factual finding regarding past activity in Jordan does not alter that position. Contrary to the applicant’s claim that the Tribunal merely assumed the applicant was more devoted than other family members, this was not accepted based on his own, scant evidence. That rejection was not, in and of itself, illogical given that the applicant could not provide further detail in that regard when questioned at the hearing.

81 It also does not begin to impinge on any issues which can sometimes be considered in cases where a claimed basis for seeking protection is religion, namely whether the Tribunal is impermissibly acting as an arbiter of doctrine: see *WALT v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCAFC 2 at [28]-[30] per Mansfield, Jacobson and Siopis JJ, citing *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 at [16] per Gray J.

82 In this regard I find that there was nothing illogical, nor irrational in the Tribunal’s findings relating to the applicant’s Christian faith.

### Political opinion claim

1. The primary judge rejected the appellant’s submission that his new claim arose following questions from the Tribunal, but rather found that the appellant introduced this new claim when straying away from the subject of the questions of the Tribunal which the Tribunal stopped: at J[93]–[96].
2. The primary judge also found that the appellant was given an opportunity to explain why his new claim had not been raised before later in the hearing, and that the Tribunal explored with the appellant and his legal representative the opportunities he had to raise the claim: at J[97]–[98].
3. It is worthwhile to extract J[95]–[97] of the primary judge’s reasons, which include the relevant parts of the Tribunal’s reasons, given their relevance to the second basis of appeal concerning the political opinion claim:

95 While stopping the applicant in relation to the new claim at that juncture, the member did revisit the point towards the end of the hearing. In this regard (and by reference to a review of the transcripts in the SCB), the Tribunal’s reasons for decision accurately summarise the evolution of the claim to place in its proper context the Tribunal’s adverse credibility finding. It is useful to reproduce its reasoning at [86] and [88]-[90] (omitting its description at [87] of the applicant’s post-hearing evidence consisting of Facebook screenshots):

[86] At the most recent hearing, the applicant stated that one of his fears is that [S’s brother] will use the political material that he has posted online against him. He said that he has posted comments opposed to King Abdullah II and his administration. In response to questions, he said that he has a political opinion opposed to the government, mainly based on its treatment of the Christian minority. He said that he had not raised it previously because he felt he did not have the opportunity to do so at the hearing before the first Tribunal. He did not explain why he had also not raised it with the Department, or in the detailed pre-hearing submission to the current Tribunal.

…

[88] The Tribunal has significant concerns about the applicant’s oral evidence and the material received post-hearing. His comments on Facebook appear to be only recent, and for the most part only ‘likes’ or ‘shares’ of others’ postings. Before the resumed hearing, the applicant had presented no claims or evidence of having a political opinion opposed to the government. The applicant claims that the most immediate threat from this material is that [S’s brother] could use it against him on his return, due to their conflict. However, it is difficult to believe that the applicant continues to post such material without at least ‘blocking’ the individual who appears intent on using it against him.

[89] Finally, the applicant’s failure to mention this claim earlier undermines its credibility. The post-hearing submission of 26 July 2021 notes that he only mentioned his political views in the context of describing the way his ex-partner’s brother could pursue him, expanding on them in response to the Tribunal’s questions. In effect, it invites the Tribunal to place weight on it as a spontaneous and genuine statement, rather than view it as a recent, contrived claim. The Tribunal takes into account that the applicant mentioned politics during an unfocussed narrative, but considers his subsequent efforts to elevate this to a political opinion and to present it as a new protection claim to be opportunistic, and not a reflection of any genuine fear.

[90] The Tribunal accepts as plausible that the applicant has some concerns about Jordan’s politics, including the monarchy and the administration, and the economic situation there. However, he has spent over two decades in Australia, and has demonstrated no real interest or engagement in Jordanian political issues during that period. The Tribunal does not accept that he has a political opinion that motivates him engage in political debate or activities. To the extent that he may have followed some political dissidents online, and indicated his support, this activity appears to be relatively recent and limited in scope. There is nothing to suggest that the applicant has any social media profile, or that his comments on Facebook have attracted any scrutiny or adverse comment. The Tribunal does not accept that the Jordanian authorities view him as a person of any political influence; or that they have any adverse interest in him; or that there is anything that his ex-partner’s brother or anyone could use against him as leverage in the future.

96 In relation to the nature and circumstances in which the new claim was raised, I reject the characterisation that it came about in response to questions from the Tribunal. While it is the case that the Tribunal revisited the issue and allowed the applicant to raise it (having curtailed the applicant’s first attempt to raise it because it had while the Tribunal was exploring another aspect of the applicant’s longstanding protection claims) it can hardly be construed as having emanated from the Tribunal itself.

97 Next, what is summarised at [86] of the Tribunal’s reasons reflects the fact the applicant was given the opportunity to explain why the new claim had not been raised previously, at SCB 74.17-74.21 (anonymisation and emphasis added):

MEMBER: Okay. Mr [EQU19], you’ve been before to the Department over some time ago and you’ve had a lengthy hearing – you had a detailed hearing with the previous tribunal. You haven’t raised any concerns about [S’s brother] drawing on those political statements so far. In fact, you’ve not mentioned it, I don’t think, until now. **What’s the reason for that**?

INTERPRETER: The Member did not want to listen to me. Did not want to listen what I was saying.

MEMBER: I’m sorry, which member are you referring to?

INTERPRETER: The old one, the one before.

(Emphasis in original.)

1. Whilst accepting that the Tribunal did not explicitly refer to s 423A in its reasons, the primary judge found that it was “tolerably clear”, when reading T[86] and T[89], that the Tribunal had considered the appellant’s explanation as to why the claim had not been raised earlier, and implicitly found that the explanation was not reasonable, at J[99]:

It is not in dispute that the Tribunal does not make express reference to s 423A of the Act. However, it is tolerably clear that paragraphs [86] and [89] read in combination constituted a consideration of the applicant’s reason for not having raised the claim prior ([86]) and an implicit finding the explanation was not reasonable ([89]). The first sentence of [89] (emphasis added):

Finally, the applicant’s failure to mention this claim earlier undermines **its** credibility.

reflects the language of the statute which requires that if the Tribunal is not satisfied the explanation for the late claim is reasonable it must draw an inference which is unfavourable “*to the credibility* ***of the claim***” (emphasis added).

1. With respect to the appropriate construction of s 423A, and whether it was properly applied by the Tribunal, the primary judge made the following remarks (at J[100]–[103]):

100 Unlike sections such as s 424AA, s 423A does not impose on the Tribunal a method by which it is to obtain the explanation, nor prescribe any preconditions to its operation (see for example s 424AA(1)(b)). Accordingly, while brief, nothing about the manner in which the Tribunal discussed the new claim or adduced the explanation about its late provision from the applicant at the hearing gives rise to a jurisdictional error. The explanation having been proffered, it was found to undermine the credibility of the claim. It is open to infer, and I do, that having reflected the language of s 423A(2) the Tribunal was implicitly finding that the explanation was not reasonable.

101 However, the Tribunal did not dismiss the claim out of hand by virtue of the credibility finding. Rather, it went on to consider the claim to fear harm because of his political opinions which had caused him to engage in online political activity. The Tribunal was not satisfied that the evidence later proffered by the applicant supported the claim that Jordanian authorities saw the applicant as being a person of political influence.

102 These findings were made by the Tribunal separate to the issue about the claims being a recent addition. Accordingly, even if I am wrong and the Tribunal failed to apply (or properly apply) s 423A the result of this is, firstly, that all that would result is a neutral position in that the claim would arise for consideration absent a mandatory adverse credibility finding attaching to the claim itself. The claim would then fall for consideration afresh. However in a case such as this, where the Tribunal had also rejected the claim on a separate and independent basis, even if there was an unravelling of the s 423A finding it could not have resulted in a different decision being reached (on a substantive basis in relation to the claim).

103 Accordingly, the allegation that the Tribunal failed to apply or properly apply s 423A of the Act is not made out and it is therefore unnecessary to proceed the (admittedly interesting) statutory interpretation question contended for.

## The present appeal

1. The appellant advances two grounds of appeal. Ground 1 is analogous to the second ground of judicial review advanced before the primary judge, and ground 2 is analogous to the third ground of judicial review before the primary judge.
2. The two grounds of appeal (particulars omitted) are as follows:
3. The primary judge should have found that the Tribunal’s conclusion that that the appellant was no more devout in his Christian faith than other members of his family who had remained in Lebanon (or visited there) and who were apparently not suffering the harms of which the appellant claimed to be at risk was illogical, irrational or based on no evidence. That error was material so as to amount to jurisdictional error.
4. The primary judge should have found that the Tribunal failed to comply with s 423A of the Act in respect of the appellant’s claim to be at risk of harm based upon his political opinion, in particular his criticism of King Abdullah II and the evidence in respect of that claim. That failure was material.

## Consideration

### Ground 1: The devotedness finding

1. For the followings reasons, ground 1 must fail.
2. The appellant submitted that the Tribunal’s conclusion that he did not satisfy the refugee or complimentary protection criteria was based, in part, on its finding that the appellant was no more devout in his Christian faith than other members of his family in Lebanon, and who were not suffering the harms which the appellant claimed to be at risk of suffering if he were not granted a protection visa. The appellant contended that the primary judge should have found this devotedness finding to be illogical, irrational or based on no evidence, and was material, thereby amounting to jurisdictional error. I do not accept this submission.
3. The characterisation of a decision (or a state of satisfaction) as legally unreasonable because of illogicality or irrationality is not easily made: see *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3; 289 FCR 21 at [33]–[35], which is extracted as follows:

33. The characterisation of a decision (or a state of satisfaction) as legally unreasonable because of illogicality or irrationality is not easily made: *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; 357 ALR 408; 163 ALD 1; [2018] HCA 30 at [11], [52], and [135]; *Minister for Home Affairs v DUA16* (2020) 385 ALR 212; [2020] HCA 46 at [26]; *SZMDS* at [130]–[135]; *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496; [2016] FCAFC 146 at [60]; and *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 395 ALR 57; [2021] FCAFC 195 at [142].

34. The task in assessing illogicality is not an exercise in logical dialectic. “Not every lapse of logic will give rise to jurisdictional error. A Court should be slow, although not unwilling, to interfere in an appropriate case”: *SZMDS* at [130]. It is the ascertainment, through understanding the approach of the decision-maker and characterising the reasoning process, of whether the decision (or state of satisfaction) is so lacking a rational or logical foundation that the decision (or relevant state of satisfaction) was one that no rational or logical decision-maker could reach, such that it was not a decision (or state of satisfaction) contemplated by the provision in question. Some lack of logic present in reasoning may only explain why a mistake of fact had been made which can be seen to be an error made within jurisdiction. As the Chief Justice said in *Stretton* at [11], the evaluation of whether a decision was made within lawful boundaries is not definitional, but one of characterisation and whether the decision was sufficiently lacking in rational foundation, having regard to the terms, scope and purpose of the statutory source of power, that it cannot be said to be within the range of possible lawful outcomes.

35. Ultimately, the question is whether the satisfaction of the relevant state of affairs or matter was irrational, illogical or not based on findings or inferences of fact supported by logical grounds: *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12; 78 ALD 224; [2004] HCA 32 at [38]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59; 73 ALD 1; [2003] HCA 30 at [52] and [173], such that it cannot be said to be possible for the conclusion to be made or the satisfaction reached logically or rationally on the available material. It will then satisfy the characterisation of unjust, arbitrary or capricious.

1. The relevant principles set a high bar for an applicant in judicial review proceedings who claims illogicality or irrationality in the Minister’s decision: see *XRZG v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 783 at [13]–[15] (per Kennett J).
2. I do not accept that the primary judge erred in not finding that the Tribunal had made such an error. To the extent that the primary judge’s reasons are impugned, in part, by her Honour commencing her consideration of this ground by noting that the Tribunal’s findings must be “read in context and with a beneficial construction” (at J[72]), I do not accept that her Honour is deploying a presumption of correctness to the Tribunal’s decision. Rather, her Honour, in a short hand way is referring to an earlier paragraph in her judgment, at J[62], citing *XFKR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 167; 280 FCR 535 at [27], and the holding that reasons must be read “beneficially” namely as a whole adopting a commonsense and realistic approach.
3. I do not accept that it was illogical for the Tribunal to reach a conclusion, at the time of the decision, that the appellant was no more devout than his family members or his community: at T[98]. The appellant accepts that there is nothing inherently erroneous in the Tribunal deploying a comparator group. However, the appellant contends that the comparator group did not share the same characteristics. This was so because, according to the appellant, he had become “more devout and outspoken about his faith”, since being in Australia, particularly from 2016, specifically:
4. from about 2011, the appellant was known to a local pastor and used to attend church on a regular basis;
5. in mid-2014, whilst in custody, the appellant attended and participated in chapel services;
6. between April and July 2016, the appellant undertook and completed a bible course, for which he was commended on his “hard work and thoughtfulness”;
7. in late 2016, whilst in custody at a different correctional facility, the appellant attended chapel services twice-weekly and confided in the chaplain;
8. throughout 2016 the appellant was communicating by letter to a religious mentor overseas;
9. throughout 2017, the appellant continued a bible course whilst in custody and frequently attended and participated in weekly chapel services; and
10. in late 2017 whilst in immigration detention, the appellant attended Sunday and Thursday morning services.
11. According to the appellant, the Tribunal did not have any recent information about the appellant’s family’s religious devotedness. Given the same, on the appellant’s submission, the finding that he held no greater relative devotedness was irrational in the context of a “future, forward-looking assessment of risk”. It was this finding, according to the appellant, coupled with country information, that led the Tribunal to conclude that the appellant would be “free to practice as an Orthodox Christian”: at T[105]. The appellant contended that the Tribunal did more than simply use a comparison to negate his claim, but in fact it used the comparison positively in assessing the refugee criterion at T[105].
12. However, contrary to the appellant’s contention, the Tribunal rejected not only the lack of relative devotedness but also critically the appellant’s claimed level of devotedness and its increase over time. The Tribunal rejected the strength of the appellant’s religiosity in Jordan as “lacking in detail and consistency”: at T[32]. As to the appellant’s religious practice in Australia, the Tribunal had “significant concerns about his claims to have always been devout, and to have a strong commitment to spreading the Gospel” (at T[37]) and stated:

Overall, the Tribunal found his evidence vague, changeable and unsubstantiated, in particular in what his religious practice in Jordan actually entailed; how it differed from that of his family and community; and what motivated him to now identify with evangelical Protestant groups. The Tribunal considers that the applicant tailored his evidence to match the profile of those Christians in Jordan – in particular, unregistered evangelical groups – who may be at greater risk of mistreatment.

1. It is clear that the devotedness finding was based on the totality of the evidence, including the unsatisfactory nature of the appellant’s own evidence. Therefore, even if, as the appellant contended, the evidence demonstrated that his siblings in Jordan were not particularly religious this does not demonstrate illogicality in the Tribunal’s reasons nor does it provide a basis for the no evidence claim. The Tribunal rejected the appellant’s claimed level of devotedness, its increase over time and the claim that his devotedness was higher than his family (by reason of the lack of evidence regarding the same and the Tribunal’s rejection of the appellant’s own evidence in this regard).
2. In addition, the Tribunal found that the historical country information indicated that the government was “overwhelmingly tolerant of the Christian minority” and did not accept the appellant’s claims of past faith-based adverse experience: at T[39]–[44].
3. Accordingly, there was nothing illogical, irrational or based on no evidence, in the Tribunal making the devotedness finding. It cannot be accepted that the Tribunal deployed a form of reasoning that no reasonable decision-maker could have adopted. The appellant’s claim is essentially to disagree with the reasoning.
4. Accordingly, the ground should be dismissed.

### Ground 2: The political opinion claim

1. By his second ground of appeal, the appellant contends that the Tribunal’s conclusion that he did not satisfy the refugee and complementary protection criteria was based, in part, on its rejection of the appellant’s claim to be at risk of harm based on his political opinion. The appellant submits that the primary judge erred by not finding that the Tribunal failed to comply with s 423A of the Act in respect of that claim and the associated evidence, and this error was material.

#### Section 423A

1. Section 423A of the Act details how the Tribunal is to deal with new claims or evidence. The provision is extracted as follows:

**How Tribunal is to deal with new claims or evidence**

(1) This section applies if, in relation to an application for review of a Part 7-reviewable decision (the ***primary decision***), the applicant:

(a) raises a claim that was not raised before the primary decision was made; or

(b) presents evidence in the application that was not presented before the primary decision was made.

(2) In making a decision on the application, the Tribunal is to draw an inference unfavourable to the credibility of the claim or evidence if the Tribunal is satisfied that the applicant does not have a reasonable explanation why the claim was not raised, or the evidence was not presented, before the primary decision was made.

1. There has been limited judicial consideration of this section.
2. Section 423A was introduced by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth). In the Explanatory Memorandum of the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth), the purpose of s 423A was described as follows:

While the new section 5AAA places the responsibility to provide and substantiate claims on an asylum seeker, new section 423A is directed at encouraging asylum seekers to provide all claims and supporting evidence as soon as possible. The new section 423A requires the RRT to draw an inference unfavourable to the credibility of new claims or evidence provided to the RRT, where the applicant does not have a reasonable explanation to justify why the claims were not raised or the evidence was not presented before the primary decision was made on their protection visa application.

1. The effect of s 423A was then described as follows:

70. This item inserts new section 423A “How Tribunal is to deal with new claims or evidence” after section 423 of Division 4 of Part 7 of the Migration Act.

71. New subsection 423A(1) provides that this section applies if, in relation to an application for review of an RRT–reviewable decision (the ***primary decision***) in relation to a protection visa, the applicant:

* raises a claim that was not raised in the application before the primary decision was made; or
* presents evidence in the application that was not presented in the application before the primary decision was made.

72. New subsection 423A(2) provides that in making a decision on the review application, the Tribunal is to draw an inference unfavourable to the credibility of the claim or evidence if the Tribunal is satisfied that the applicant does not have a reasonable explanation why the claim was not raised, or the evidence was not presented, before the primary decision was made.

73. The effect of this amendment is that the RRT is to draw an unfavourable inference in respect of the credibility of an applicant’s claims or evidence, if the claims or evidence were not raised in the application before the primary decision was made and the applicant does not have a reasonable explanation for the delay. It is required that all relevant information is provided by the applicant to the Minister in their application, including any additional information that may be submitted to the Minister, prior to the primary decision being made. A claim may be raised, or evidence may be presented in the application by way of, but not limited to, details in the application form, at an interview, in a response to a request, or information volunteered by the applicant at any stage prior to the primary decision.

74. This amendment supports new section 5AAA (Non-citizen’s responsibility in relation to protection claims) inserted by item 1 of Schedule 1 to the Bill. The purpose is to ensure that protection visa applicants are forthcoming with all of their claims and evidence as soon as possible.

1. The appellant submits that s 423A codifies the preconditions that must be met before (and the circumstances in which) the Tribunal may draw an unfavourable inference as to the credibility of a claim or evidence. The appellant further submits that subs (2) imposes a condition precedent on the drawing of an adverse inference, namely, that the Tribunal must be *satisfied* that an applicant does not have a *reasonable explanation* as to why a claim was not raised, or evidence was not presented. To be “satisfied” of something, the appellant submits that the decision-maker must be positively convinced of that matter: *Commissioner of Taxation v Addy* [2020] FCAFC 135; 280 FCR 46 at [102] (per Derrington J).
2. The appellant contends that the mandatory language of s 423A’s heading (especially the words “is to”, rather than the permissive “may”) reinforces the view that the provision establishes an exhaustive code governing the way in which the Tribunal can draw adverse inferences, noting that a provision’s heading is a permissible aid to the provision’s interpretation: *Acts Interpretation Act 1901* (Cth) s 13(1).
3. Given, according to the appellant, s 423A codifies the procedural fairness requirements, he submits that the Tribunal must draw an unfavourable credibility inference to the claim itself and the evidence if and only if it is satisfied that there is no reasonable explanation as to why the claim or evidence was not raised or admitted before the primary decision maker. Therefore, what was required at T[74] was an identification of the claim and evidence and, separately, findings that the explanation for delay was not accepted in relation to each of them.
4. It is my view that there is no necessity to determine whether s 423A constitutes a complete code or not given the true contest, about which the parties join issue, is whether the Court can be satisfied (as the primary judge was) that the state of satisfaction was reached and that the reasons of the Tribunal properly reflect that in a manner that did not ground jurisdictional error. The requisite state of satisfaction, said to be required by both parties, was in fact achieved.
5. In any event, I do not accept the appellant’s description of the operation and bounds of s 423A. Section 423A cannot be read as codifying the circumstances in which the Tribunal may draw an unfavourable inference. Rather, as the Minister contended s 423A makes it mandatory where there is the late assertion of a claim or the provision of evidence for the Tribunal to draw an unfavourable inference regarding the applicant’s credibility in the absence of a reasonable explanation. This does not entail the obverse, namely that where there is a satisfactory explanation no credibility finding can be made in respect of the claims: see, e.g., *SZUHJ v Minister for Immigration and Border Protection* [2018] FCA 331 at [20]. There is no requirement in s 423A as to the process for drawing a negative inference to be conducted in a particular manner. The provision simply permits, and requires, the drawing of the inference upon a state of satisfaction. The section has a limited compass: The drawing of an inference in the context of the late assertion of a claim or the provision of new evidence. It does not limit or circumscribe credibility findings which may be made more generally about a visa applicant’s claim. Rather it deals with a temporal phenomenon – the late provision of a claim or new evidence which risks unreliability and invention or manufacture to support a claim. As referred to above, the section was inserted into the Act, together with s 5AAA, to provide an incentive for visa applicants to put before the Department and/or the Minister all of his or her claims at the earliest opportunity.
6. For the following reasons, it is my view that, as the primary judge found, despite the Tribunal making no express reference to the provision, it is clear from the manner in which the Tribunal conducted the hearing (its questioning of the appellant and allowing him to put on more evidence after the hearing regarding this new claim) and from its reasons, that the Tribunal did understand what was required under the section: It is mandatory for the Tribunal to draw an unfavourable inference regarding the applicant’s credibility in the absence of a reasonable explanation.
7. In the course of his oral evidence, the appellant raised the new political opinion claim, which focused on his criticism of King Abdullah II. He posted his critical views of the King on social media. After the raising of this new claim, the Tribunal asked the appellant direct questions as to why such claims and evidence had not been presented to the Department or to the Tribunal and gave the appellant an opportunity to put on post-hearing material in support of his claim, but noted that it had “real concern[s]” about this claim being raised so late in the visa application process. The appellant thereafter provided the Tribunal with a supplementary statement dealing with his new political opinion claim, which annexed screenshots of Facebook posts.
8. The gravamen of this ground is that the Tribunal drew an unfavourable inference as to the credibility of the claim and the appellant’s evidence (at T[89]) without *first* forming the requisite state of satisfaction required under s 423A(2) (i.e., that the appellant did not have a “reasonable explanation” for the delay in raising the claim).
9. For the following reasons, it may be properly inferred (as the primary judge did) that the Tribunal reached the requisite state of satisfaction.
10. It appears readily apparent from the exchanges between the appellant and the Tribunal (extracted at in the primary judge’s reasons at [25] above), that the Tribunal was identifying the risk that it may draw an adverse inference against the appellant. Indeed the Tribunal went on, after the exchange extracted by the primary judge to ask again:

MEMBER: So you’ve mentioned – when have you expressed your political opinions let’s say in the last 20 years, what evidence do you have of being – of expressing a political opinion in relation to Jordan?

INTERPRETER: The same situation. My opinion about the king, about the religion, about the country, it is there. I did not mention it because I’m afraid I might get killed either here or in Jordan.

MEMBER: What evidence do you have or what examples or evidence do you have to show me that you’ve been expressing your political opinions?

INTERPRETER: Because I have so many posts, I put them in the Facebook and [my ex-fiancée’s partner] was a friend – a friend of mine on Facebook, so he would have seen that.

MEMBER: Do you or Dr Donnelly have any material you wish to provide me in relation to that claim? I ask, Dr Donnelly, in the sense you may wish to suggest a way forward?

DR DONNELLY: Member, I think what the learned tribunal has proposed, I will be able to get some instructions in terms of getting material from the applicant posted on Facebook purportedly about his political opinion of the King Abdullah.

1. Indeed, the Tribunal member specifically alluded to s 423A in the exchange immediately thereafter:

MEMBER: [Appellant], there’s a provision of the Act whereby if you make a claim or if you give a claim or evidence, I can draw adverse credibility inferences if you haven’t presented it to the Department or the tribunal – to the Department previously. I want to register my real concern that after all of the discussions and all of the opportunities you’ve had to present claims about political opinion, that you have not done so until in the last quarter of an hour.

1. Whilst s 423A was not explicitly identified by the Tribunal, it is clear that the appellant and his legal representative understood the need to provide an explanation from the content of the post-hearing submission. This was apparent from the content of the appellant’s further supplementary statement filed after hearing. The appellant, under the heading “Reasons for the Delay” stated the following:

3. The Tribunal indicated that it might form the view that my delay in raising this additional claim could be held against me. With respect, the Tribunal would be very careful to adopt that position for the reasons that follow.

4. First, so that it is clear, I have always believed (at least subjectively) that my political opinion claim was intimately tied up with my religious claim. Effectively, my adverse political opinion of King Abdullah II and his administration is largely due to his treatment of Christians in Jordan.

5. Secondly, I did not realise earlier that my political opinion concerning King Abdullah II was an independent ground for claiming protection in Australia. It is to be kept ready in mind that I did not have the benefit of legal representation in the past and otherwise have a lack of knowledge concerning refugee laws in Australia.

6. Thirdly, context is important here. I did not raise my political opinion claim strategically to assist my case out of nowhere. I raised the political opinion claim strictly to answer a question put by the learned Tribunal. I was asked by the Tribunal on what basis do I fear harm from my ex-partner’s brother and his family in Jordan. In response, I answered, inter alia, that my ex-partner’s brother had seen my criticism of King Abdullah II and his administration through my public Facebook account. I was (and am) concerned that there was (and is) a possibility that my ex-partner’s brother will report me to the authorities in Jordan on account of my adverse political opinion concerning King Abdullah II.

7. My political opinion claim, as observed above, is inextricably linked to my Christianity claim. As indicated in my evidence before the Tribunal, I am outspoken and have a friendly extrovert character. I love to communicate the word of God and preach my Christianity. My criticism of King Abdullah II is tied up to my religious claim because my political opinion is that King Abdullah II and his administration do not truly care about Christians.

…

10. For the preceding reasons, it is respectfully contended that the Tribunal would not make an adverse credibility finding against me in the context of my political opinion claim. I maintain that my political opinion claim is closely tied with my religious claim, and there is not a large difference between the two. I have not created an entirely new claim to strengthen my protection visa application.

1. The appellant submits that the Tribunal was required to actively engage with the question of whether the explanation for the delay is reasonable, and to reach a state of satisfaction on that question: see *ASJ22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 476 at [61]–[65]. It is my view that the Tribunal did do this. The Tribunal, at T[86], dealt directly with the appellant’s reason for delay, as claimed at hearing, that he had not had an opportunity to raise it at the first Tribunal hearing. In addition, the Tribunal refers to part of the appellant’s explanation, repeated in his post-hearing submission, that there is an overlap between his religious and political opinion claim: at T[86]. The Tribunal then considered the appellant’s post hearing evidence (at T[87]) and its limited scope, evincing only recent activity (at T[88]) and being of a limited nature (liking or sharing posts) in the context of the appellant’s claim. The Tribunal then considered whether, taking into account the appellant’s post-hearing submission, whether the new claim was “spontaneous and genuine” or “opportunistic, and not a reflection of any genuine fear”: at T[89].
2. In addition, the Tribunal expressly referred to and took into account the appellant’s explanation for the delay as contained in his post-hearing submission: at T[89]. The Tribunal’s reasoning is directed at the explanatory circumstances of the late claim and was addressing whether that explanation was reasonable. I accept the Minister’s contention that, once one is satisfied that the Tribunal actively engaged with the reasonableness of the appellant’s explanation, it is difficult to see what further requirements were placed on the Tribunal by s 423A.
3. As to whether there was a requirement under s 423A for the Minister to be *positively convinced* of the absence of a reasonable explanation, as submitted by the appellant, it is apparent from the Tribunal’s reasons that it was so convinced. However, I do not accept the appellant’s submission that the Tribunal merely rejected the explanation on the basis of recency. This is not what the Tribunal did. This is apparent from the fact that the Tribunal asked the appellant on more than one occasion during the hearing why he had not made this claim before, allowed him to put on evidence with respect to the claim and considered that evidence. It is also apparent from the Tribunal’s reasons: The Tribunal went onto assess the appellant’s claim and the underlying evidence: at T[87], [88], [90]. The Tribunal did not accept that the appellant had any real interest or engagement in politics, and it found his social media activities recent and limited.
4. Furthermore, notwithstanding the operation of s 430 of the Act, the Tribunal was not required to set out each aspect of evidence that constitutes a particular submission in order to demonstrate that the Tribunal did, in fact, engage with the required question: see *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593 at [46], *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; 168 ALR 407 at [64]–[65] and *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594 at [31]–[32] (per French CJ and Kiefel J) and [69]–[70] (per Gummow J).
5. In the appellant’s supplementary written submissions, he contended that the precondition in s 423A(1) is “purely temporal” in that it does not rely upon the evaluative question of whether a claim could have been raised, or whether evidence could have been provided, before the relevant time. Notwithstanding this point, the appellant submitted he relied upon the fact that the claim and the evidence could *not* have been presented before the relevant time, at least in a confined evidentiary sense.
6. I do not accept this submission. The appellant had not claimed before the Tribunal that his political opinion claim was based only on a *recent* political opinion and/or activity. There is nothing in the representations made to the Tribunal nor in the appellant’s post-hearing submissions which suggested that his claim was so limited such that there was a reasonable explanation for delay (i.e., no delay because the claim had only crystallised recently). That was not the claim before the Tribunal and hence not part of the Tribunal’s reasons for having concerns about the claim.
7. Further and critically, the Tribunal dealt with the appellant’s new claim and evidence at T[87]–[88], and it is clear that it did not find the evidence satisfactory. The Tribunal did not find it unsatisfactory by reason of its late provision simpliciter (that is, the Tribunal did *not* apply the adverse inference pursuant to s 423A). The third sentence at T[88] considers the appellant’s failure to raise the claim or any other evidence before the *resumed hearing* (thereby taking it outside the confines of s 423A). The Tribunal then dealt with the timing of the claim at T[89].
8. As a consequence, the Tribunal’s conclusions, at T[87] and T[88], would have remained undisturbed (despite any purported error if my reasons above are incorrect) and are such that there was no realistic possibility that the result could have been different. I do not accept the appellant’s contention that this draws an artificial distinction between the assessment of credibility and substance nor that the purported error at T[89], must have informed the surrounding reasoning, especially the reasoning at T[88] and [90]. Furthermore, the Tribunal’s findings at T[130]–[131] reinforce my view, and are extracted as follows:

130. The Tribunal accepts that the applicant follows developments in Jordan, including through social media, and has some broad concerns about country’s problems, including the king’s political manoeuvrings, the country’s economic problems and issues such as corruption. The cancellation of his return resident visa and his ongoing protection visa application may have piqued his interest in conditions in Jordan. However, the Tribunal does not accept that he has any genuine political conviction; or that he is motivated to engage in political debate or activities. The Tribunal finds that he has never been a person of adverse interest to the Jordanian authorities, for any reason. Although he has shared some social media content recently, and posted a few comments, the Tribunal finds that there is no real chance of the Jordanian authorities taking any adverse interest in him as a result of such recent activity.

131. The Tribunal finds that there is no real chance of the applicant engaging in any political activities if he returns to Jordan. Given his low level of political interest, it finds that he will also not be motivated to engage in such activity, but have to refrain from doing this in order to avoid persecution. There is also no real chance of the Jordanian authorities taking an adverse interest in the applicant on the basis of any political opinion, actual or imputed, now or in the reasonably foreseeable future.

(Footnotes omitted.)

1. For these reasons, ground 2 must fail.

## Conclusion

1. By reason of the foregoing, the appeal must be dismissed and the appellant pay the respondent’s costs.
2. Finally, I am very grateful to have received assistance from Ms De Ferrari SC and Dr Murphy, who appeared for the appellant on a pro bono basis.

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| I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Raper. |

Associate:

Dated: 5 October 2023