FEDERAL COURT OF AUSTRALIA

Martinaj v Minister for Immigration and Border Protection [2016] FCA 868

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| Appeal from: | *Martinaj v Minister for Immigration and Border Protection* [2016] FCCA 217 |
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| File number: |  |
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| Judge: | **KENNY J** |
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| Date of judgment: | 2 August 2016 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court – appellant, an Albanian citizen, applied for a partner visa under the family violence provisions of the *Migration Regulations 1994* (Cth) – Migration Review Tribunal not satisfied appellant suffered family violence and referred claims to independent expert for assessment – whether independent expert failed to consider correct test for relevant family violence |
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| Legislation: | *Migration Act 1958* (Cth)  *Migrations Regulations 1994* (Cth) |
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| Cases cited: | *Coulton and Others v Holcombe and Others* [1986] HCA 33; 162 CLR 1  *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2015] FCAFC 7; 227 FCR 95  *IYER v Minister for Immigration and Multicultural Affairs* [2001] FCA 929; 192 ALR 71  *Martinaj v Minister for Immigration and Border Protection* [2016] FCCA 217  *Metwally v University of Wollongong [No 2]* [1985] HCA 28; 60 ALR 68  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259  *MZYPO v Minister for Immigration and Citizenship* [2013] FCAFC 1  *O’Brien and Others v Komesaroff* [1982] HCA 33; 150 CLR 310  *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476  *Water Board v Moustakas* [1988] HCA 12; 180 CLR 491 |
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| Date of hearing: | 1 August 2016 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 40 |
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| Counsel for the Appellant: | A Aleksov |
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| Solicitor for the Appellant: | Erskine Rodan & Associates |
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| Counsel for the First Respondent: | L Brown |
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| Solicitor for the First Respondent: | DLA Piper Australia |
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| The Second Respondent submits to any order of the Court, save as to costs. |  |

ORDERS

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|  | | VID 308 of 2016 |
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| BETWEEN: | MARK MARTINAJ  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | KENNY J |
| DATE OF ORDER: | 2 August 2016 |

THE COURT ORDERS THAT:

1. Leave be granted to amend the notice of appeal in the terms set out in the proposed amended notice of appeal filed on 26 July 2016.
2. The appeal be dismissed.
3. Unless a party notifies in writing the Court by 4:00pm on Wednesday 3 August 2016, indicating opposition to this order as to costs, the appellant pay the first respondent's costs of the appeal, such costs to be taxed in default of agreement.

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

REASONS FOR JUDGMENT

KENNY J:

# introduction

1. This is an appeal from a judgment of the Federal Circuit Court of Australia (**Federal Circuit Court**) dismissing an application for judicial review of a decision of the Migration Review Tribunal (as it was then) (**Tribunal**): see *Martinaj v Minister for Immigration and Border Protection* [2016] FCCA 217. The decision of the Tribunal affirmed the decision of a delegate of the first respondent (**Minister**) to refuse to grant the appellant a Partner (Temporary) (Class UK) visa (**partner** **visa**) on the basis that the appellant was no longer in a partner relationship with his sponsor and family violence by his sponsor was not established. The appellant also sought leave to amend his notice of appeal to rely on a ground not advanced before the Federal Circuit Court.
2. Both the appellant and the first respondent filed written submissions, and counsel for both parties made further detailed submissions at the hearing. The second respondent filed a submitting appearance, save as to costs.
3. For the following reasons I would grant the appellant leave to amend his notice of appeal in the terms he sought and dismiss the appeal.
4. The appellant is a citizen of Albania, but resided in Greece from around 2000 until he arrived in Australia on 30 October 2009 as the holder of a student visa. The appellant met his visa sponsor in Greece in July 2009 when his sponsor was on holidays there. The appellant and his sponsor commenced a de facto relationship on his arrival in Australia and the appellant applied for the partner visa on 2 November 2010. On 28 March 2011, however, his sponsor informed the first respondent's Department that the relationship between her and the appellant had ended.
5. The appellant claimed that his sponsor’s conduct towards him constituted "relevant family violence", meeting the requirements of cl 820.221 of Sch 2 to the *Migrations Regulations 1994* (Cth) (**Regulations**). In July 2011 he provided the Department with his own statutory declaration in support of his visa application, along with statutory declarations from a psychologist and a medical practitioner. In accordance with r 1.23 of the Regulations, the Minister's delegate referred the appellant’s claims of relevant family violence to an independent expert for assessment. This independent expert furnished a report dated 8 February 2012, which expressed the opinion that the appellant had not suffered relevant family violence. Under the Regulations, the Minister was bound to accept this opinion (r 1.23(10)). Accordingly, the delegate refused to grant the partner visa sought by the appellant.
6. On 6 June 2012 the appellant applied to the Tribunal for merits review of the delegate’s decision. Upon review, the Tribunal sought a further opinion from a different independent expert, and this independent expert also expressed the view that the appellant had not suffered relevant family violence: see [23] below. In accordance with r 1.23, the Tribunal relied on the opinion of this independent expert and, on 6 June 2014, the Tribunal affirmed the decision under review.
7. On 10 July 2014, the appellant applied to the Federal Circuit Court for judicial review of the Tribunal’s decision. In that Court the appellant challenged the decision of the Tribunal on the basis that, amongst other things, the opinion of the independent expert was affected by procedural unfairness and bias. The primary judge dismissed the application by a judgment delivered on 16 March 2016. The appellant does not now seek to impugn those findings. Rather, he seeks to appeal against this judgment on a ground not argued in the Federal Circuit Court.
8. On 13 April 2016, the appellant filed a notice of appeal from the judgment of the primary judge that was seven days out of time, as well as an application for an extension of time in which to appeal. By consent, on 10 May 2016, the Court extended the time for filing a notice of appeal to 13 April 2016.
9. The appellant now seeks leave to rely on an amended notice of appeal. The only ground the appellant now seeks to rely on is as follows:

The Federal Circuit Court erred in not finding that the decision of the Tribunal was affected by jurisdictional error in that the Tribunal relied on a purported opinion of an Independent Expert that was not a valid opinion of an Independent Expert within the meaning of r 1.23 of the *Migration Regulations 1994* (Cth), and that the Tribunal thereby failed to complete the statutory task required of it upon the review.

1. In the proposed amended notice of appeal, the appellant seeks orders that:
2. The appeal should be allowed, the orders of the FCC should be set aside, and the matter should be remitted to the Administrative Appeals Tribunal.
3. The applicant seeks his costs of the appeal (but he does not seek his costs of the proceeding before the FCC).
4. The Minister submits that the appellant should not be permitted to raise this new ground, because: (1) it depends on an argument that was not made before the primary judge; (2) there is no reason why the argument could not have been raised below since the appellant was represented by experienced counsel; (3) “[t]he public interest in the timely and effective disposal of litigation weighs heavily against the appellant being granted leave to raise his new ground at this stage of the litigation process” (citing *IYER v Minister for Immigration and Multicultural Affairs* [2001] FCA 929; 192 ALR 71 at [61]-[62]); and (4) there is insufficient merit in the proposed new ground.
5. The appellant acknowledged in his submissions that there was no explanation for why the proposed ground was not advanced before the Federal Circuit Court. The appellant submitted that the proposed ground had strong merit and there would be no relevant prejudice suffered by the respondents. The Minister acknowledged that there would be no prejudice to him if the proposed new ground were allowed. In oral submissions, the appellant’s counsel also mentioned that the failure to grant leave would affect any subsequent opportunity for appeal.
6. Parties are of course bound by the way a case is conducted: see, for example, *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2015] FCAFC 7; 227 FCR 95 at [161]-[162]. Thus, a point cannot be raised for the first time on appeal when it could possibly have been met by calling evidence at trial. This is not such a case; and, as reference to authorities such as *Metwally v University of Wollongong [No 2]* [1985] HCA 28; 60 ALR 68 at 71; *Water Board v Moustakas* [1988] HCA 12; 180 CLR 491 at 497; *Coulton and Others v Holcombe and Others* [1986] HCA 33; 162 CLR 1 at 7-8 and *O’Brien and Others v Komesaroff* [1982] HCA 33; 150 CLR 310 at 319 show, an appellate court has a discretion to permit an appellant to argue an issue on appeal that was not argued below where it considers that it is expedient and in the interests of justice to entertain the issue.
7. I have considered the competing considerations to which the parties referred. In this case, in allowing a new point to be argued, no injustice will be caused to another party. The issue that the appellant now seeks to raise is a narrow question of construction and the relevant law's application to entirely non-controversial facts. The arguments have in fact been made in support of, and in opposition to, the issue now sought to be raised. Notwithstanding my view about the ultimate merits of the proposed new ground, I would in this case grant leave to amend the notice of appeal to replace the original grounds of appeal with the one ground set out at [9] above: compare *MZYPO v Minister for Immigration and Citizenship* [2013] FCAFC 1 at [68].

# Statutory scheme

1. Pursuant to s 65 of the *Migration Act 1958* (Cth), where a valid visa application is made the Minister must grant the visa if satisfied that the relevant criteria are met. Part 820 of Sch 2 to the Regulations sets out criteria for a partner visa. Relevant to this case, cl 820.221 required that at the time of the visa decision, the applicant be the spouse or de facto partner of the sponsor, unless the relationship had ceased because the applicant suffered from relevant family violence committed by the sponsor. Clause 820.221(1) of the Regulations provides for criteria to be satisfied at the time of decision. It relevantly provides that in the case of an applicant under certain subclauses in cl 820.211, the applicant must either continue to meet the requirements of the relevant subclause, or meet the requirements of cl 820.221(2) or (3). Clause 820.221(3) relevantly provides that an applicant meets the requirements of that subclause if the applicant would continue to meet the requirements of the relevant subclause in 820.211 except that the relationship between the applicant and the sponsoring partner has ceased and the applicant has suffered family violence committed by the sponsoring partner.
2. Under r 1.23(10):

(10) If an application for a visa includes a non-judicially determined claim of family violence:

(a) the Minister must consider whether the alleged victim has suffered relevant family violence; and

(b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and

(c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:

(i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and

(ii) the Minister must take an independent expert’s opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.

1. It was common ground that the case fell within the term “non-judicially determined claim of family violence” under r 1.23(9). The expression “relevant family violence” was defined in r 1.21:

***relevant family violence*** means conduct, whether actual or threatened, towards:

(a) the alleged victim ...

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

1. The word "violence" includes a threat of violence: r 1.21.
2. The effect of the opinion of an independent expert was stated in r 1.23(13):

(13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

1. Regulation 1.23(14) provided:

(14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

# tribunal decision

1. The Tribunal relevantly found that the appellant and his sponsor were in a relationship that had ceased and that a non-judicially determined claim of family violence had been made: Tribunal reasons at [13] and [23]. The Tribunal, at [34], was not satisfied on the evidence before it that the appellant had suffered relevant family violence for the purposes of the r 1.23 and, in accordance with r 1.23(10)(c)(i), referred the appellant’s claim to an independent expert for an opinion.
2. The independent expert interviewed the appellant on 5 November 2013 and subsequently gave her opinion in a report and opinion dated 18 December 2013. This opinion was that the appellant had not suffered relevant family violence. On 23 April 2014, the independent expert subsequently provided a further report after meeting again with the appellant, informing the Tribunal that the independent expert’s opinion had not changed.
3. It is unnecessary to canvass the submissions that were made by the appellant's representative challenging the independent expert's first and further reports. The history of the case before the Tribunal is not relevant to the challenge that the appellant now seeks to make to the Tribunal's decision.
4. The Tribunal concluded, in its decision at [54]-[56]:

54. The Tribunal is satisfied that the opinion of 18 December 2013, confirmed by the advice of 23 April 2014 that the opinion had not changed, is authorised by the Regulations, in that it is provided by an independent expert who is a person suitably qualified to make the assessment. The independent expert is an employee of a Gazetted organisation, LSC Psychology, the organisation specified by the Minister in IMMI 13/023, for the purpose, and the opinion was properly made.

55. Under r. 1.23 the Tribunal is required to take as correct an independent expert’s opinion, properly made. Accordingly, the Tribunal finds that the applicant is not taken to have suffered family violence committed by the sponsor for r. 1.22.

56. Given the above conclusion that the claim of family violence has not been established, the applicant does not meet the requirements of cl. 820.221(3) for the grant of the visa. There is no evidence before the Tribunal that the applicant meets any of the alternative sub criteria. As the applicant does not meet an essential criterion for the visa, the Tribunal must affirm the decision under review.

# Appellant’s submissions

1. The appellant’s central submission is that it should be inferred from the reasons for the opinion given by the independent expert dated 18 December 2013 that that independent expert did not apply the correct test in assessing whether the appellant had suffered relevant family violence. The appellant submitted that the statutory criteria required the independent expert to ask whether the appellant had suffered “relevant family violence” a defined term meaning “conduct, whether actual or threatened, towards [the appellant] that causes [the appellant] to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety”. The appellant submitted that if he established that the independent expert did not apply the correct test, then it would follow that there had not been a lawful “opinion of an independent expert” within the meaning of r 1.23(10)(c)(i). This was said to follow from the reasoning in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476. The appellant submitted that “in the absence of such a lawful opinion, the Tribunal had not lawfully completed the task under r 1.23(10)(c)(ii), and had not lawfully concluded the review insofar as it raises a claim that the [appellant] suffered family violence”.
2. The appellant submitted that it should be inferred from the independent expert’s opinion dated 18 December 2013 that she “approached her task on the footing that it was necessary that the [appellant] have perceived, *during the course of the relationship*, that the sponsor’s conduct about which he is now complaining, had a deleterious effect on his well-being” (emphasis in original). The appellant argued that this was a too narrow construction of the definition of “relevant family violence”. The appellant’s argument focussed on the definition as “conduct, whether actual or threatened, towards the [appellant] that causes him to be reasonably apprehensive about his own well-being” and, in particular, on the word “apprehensive”. The appellant submitted that this word was “broad enough to embrace emotions that are not consciously perceived” and that “a person might be ‘apprehensive about their well-being’ without being aware of that state of affairs or without noticing that they are apprehensive about their well-being”. As counsel for the appellant put it at the hearing, the term “apprehension” in this context is capable of extending to the situation where a person might not realise that the thing which they are experiencing is apprehension in relation to his or her well-being.
3. The appellant submitted that the independent expert’s opinion “appears to accept that the [appellant] suffered the conduct about which he now complains, but opines that it did not amount to relevant family violence because there was never any ‘apprehension about his own well-being’ *during* the relationship” (emphasis in original). The appellant submitted that, contrary to the independent expert’s opinion, despite the fact that appellant did not consciously perceive the apprehension during the relationship, the appellant’s claims were capable of constituting relevant family violence. As counsel for the appellant put it, there was "evidence from which an expert might be capable of effectively reverse-engineering a state of mind at a particular point in time" and that, by not addressing herself to the correct test, the expert had erroneously failed to perform this task. Counsel submitted that it should not be inferred from the expert's reference to the evidence that she had in fact turned her mind to the very question to be answered because, in this context, she referred, wrongly, to a "victim of abuse" and to "victimisation", both of which had a narrower reference that the term "well-being". The appellant submitted that it was to be inferred from the independent expert’s discounting of this possibility that she applied the wrong test and did not provide an “opinion” within the meaning of r 1.23. Counsel for the appellant further submitted that, given their evident purpose, these provisions should be given "a construction that is as broad as the words can tolerate".

# Respondent’s submissions

1. The respondent contended that the appellant's interpretation of "relevant family violence" was "not open on a plain reading of the relevant provisions". The respondent submitted that the definition in r 1.21 "focusses on how the victim felt (fearful or apprehensive) at the time of the alleged conduct and whether that feeling was reasonably based". This meant, so the respondent argued, that the alleged victim fell outside the definition if that person did not experience these feelings at the time of the alleged conduct. In the respondent’s submission, the appellant’s proposed interpretation should be rejected and the independent expert did not err in her application of the Regulations, even if she did exclude consideration of the appellant’s feelings which developed after the end of his relationship with the sponsor.
2. In the alternative, the respondent submitted that, even if the appellant’s interpretation of "relevant family violence" were accepted, the independent expert clearly considered and rejected the appellant’s claim that he suffered relevant family violence. The respondent contended that statements in the independent expert’s report demonstrated that the independent expert considered "whether the feelings that the appellant claimed to have after the relationship concluded could have been as a result of family violence but rejected that as the case". As a consequence, so the respondent submitted, even if the appellant’s interpretation of "relevant family violence" were correct, the independent expert did not fall into error in the formation and expression of her opinion, which was valid for the purpose of r 1.23(10).

# consideration

1. The independent expert’s opinion that the appellant had not suffered relevant family violence (as defined in r 1.21(1) of the Regulations) was explained principally in her opinion of 18 December 2013. The independent expert provided the Tribunal with her assessment in a relevantly completed Family Violence Referral Form M52. Counsel for the appellant submitted that the discussion that appeared under the title "Reasons, referring to evidence this assessment is based upon" in the box headed "Independent expert's opinion" should be understood as the reasons that the independent expert relied on for her opinion that the appellant "did not meet the criteria of family violence as defined in r. 1.21(1)". The first respondent did not take issue with this approach. There were also other parts of the assessment to which counsel for the appellant drew the Court's attention, which he said threw some light on what appeared under the "Reasons" heading. It is, however, unnecessary to refer to what appears elsewhere in the assessment completed by the independent expert because that does not materially affect the Court’s understanding of the expert's opinion, as discussed below. Counsel for the appellant also made it clear that he did not rely on anything that occurred at the second meeting with the expert.
2. The following are the passages under the heading "Reasons", which were chiefly relied on by the parties:

[The appellant] was unable to identify a specific date as to when the alleged family violence in the form of emotional or financial abuse commenced, believing that the relationship was flawed from the outset. ... He lacked insight during the relationship, claiming that he only now perceives [his sponsor's] behaviour as abusive, which is concerning given that a victim of abuse would likely recognise that they were experiencing fear or apprehension during the relationship and likely would have felt powerless to control or change the circumstances. There is no evidence or information to suggest that this was the case for [the appellant].

Throughout the course of the relationship, [the appellant] did not perceive [the sponsor's] behaviour as problematic and it was only after he travelled to Albania in March 2011 and realised that [she] wanted to end the relationship that he began to perceive her as deceptive. As such, it is extremely difficult to believe that [the appellant] was victim of family violence, where he would have experienced apprehension or fear for his well being or safety as a direct result of [his sponsor's] behaviour. This is further highlighted as he did not experience her as abusive, controlling or manipulative during the numerous examples he now provides while involved in the relationship.

[The appellant] disclosed information he believed to be family violence in the form of threatening behaviour, jealousy and financial control. There was insufficient information in this regard. It appears that his means of coping was through avoidance, poor communication, and the assumption that his partner should be aware of the impact of her behaviour on him. ... [The appellant] demonstrated seemingly poor attitudes, with his lowered sense of self being related to gender expectations ... . When he met [his sponsor], she apparently asserted control over finances and this left him feeling vulnerable to her although he was aware of this from the outset of the relationship and made a conscious choice to pursue [her] and travel to Australia. He did not seek to challenge her and accepted her support, and only in hindsight does he now perceive this as her controlling him, likely a result of visa circumstances versus being a victim of family violence.

It is understandable that an individual can develop insight retrospectively, although if he experienced a genuine sense of victimisation, he would have likely recognised this at some point in the relationship, even if he did not seek to appropriately confront or deal with the problems. Furthermore, [the appellant] stated that he made attempts to reconcile his relationship, even after [his sponsor] enquired about withdrawing her sponsorship of him while he was in Albania. He was motivated to rekindle the relationship, maintaining contact with [his sponsor] for several months even after the relationship ended. This further highlights that he was not fearful or apprehensive for his well-being or safety as a result of [his sponsor's] behaviour, but rather motivated to remain in the relationship where he perceived a future with her, despite feeling angry and devastated that she sought to end the relationship without consulting him. It was only after [his sponsor] refused to reconcile their differences that he began to interpret her behaviour and his experiences with the relationship as abusive. To this end, it is my opinion that [the appellant] does not meet the specific criteria of family violence as defined in Regulation 1.21(1) of the Migration Regulations (1994).

1. In a further report dated 23 April 2014 following the appellant's reinterview, the independent expert noted, amongst other things, that the appellant did not provide "any new information or examples pertaining to his relationship with the sponsor or his experiences within this relationship" and that her opinion remain unchanged. Neither the appellant nor the first respondent relied on any aspect of this report.
2. The appellant's case rested on the proposition it might be inferred principally from the passages set out at [31] above that the independent expert predicated her opinion on the erroneous assumption that relevant family violence could not be established unless the appellant perceived, "during the course of the relationship", that the sponsor's conduct had "a deleterious effect on his well-being”. I reject this proposition because I would not infer from the passages set out at [31] above (or other any other part of the 18 December 2013 assessment) that the independent expert made this assumption in reaching her opinion as to whether or not the appellant had suffered relevant family violence.
3. In explaining her opinion, the independent expert affirmed that it was **likely** that victims of family violence would recognise that they were experiencing fear or apprehension during the relationship but felt powerless to control or change the circumstances. She substantially repeated this observation when she stated that if the appellant had felt "a genuine sense of victimisation, he would have likely recognised this at some point in the relationship". The independent expert did not, however, treat this as a test for relevant family violence, as the appellant would have it. That is, the expert did not say, as the appellant contended in closing submissions, that "I usually expect to see these features within the case. ... I expect to see some ... conscious perception of these feelings or emotions during the course of the relationship. I haven't seen them and pens down". There was no "pens down" in a conclusive sense. Rather, these statements represented only part of the expert's evaluation of the information she had relevant to her opinion. The expert’s opinion indicates that the expert understood that the appellant claimed to have an apprehension about his well-being caused by his sponsor's conduct, in the circumstance where this apprehension arose after the relationship had ended. The expert did not treat this circumstance as necessarily fatal to his claim, specifically acknowledging that an individual can develop "insight retrospectively", that is, after the relevant relationship has ended. Rather, it may be inferred from the passages set out at [31] above (read as a whole) that she addressed the question whether the appellant suffered relevant family violence caused by his sponsor's conduct, notwithstanding that he claimed to have perceived to have done so only after the relationship ended.
4. Critically, the independent expert examined the other aspects of the information in her possession, including the appellant’s inability to identify when the alleged family violence began, his perception throughout the relationship that his sponsor's conduct was not "problematic", and the fact his alleged perception of family violence arose when he realised that she wanted to end the relationship. The expert noted the appellant's claim of family violence in the form of "threatening behaviour, jealousy and financial control", but observed that there was "insufficient information" to support it, noting his own "poor attitudes", the inadequacy of his own coping mechanisms, and his failure to challenge her asserted control, which on his account had characterised their relationship from the outset, and his "conscious choice" to follow her to Australia and accept her support. The independent expert also noted that the appellant had sought to renew his relationship with his sponsor even after the relationship had ended, showing, in the expert's view, that he was not fearful or apprehensive about his well-being when with her. These aspects of the expert's opinion indicate that the expert engaged with the information she had been given to assess on the basis of her expertise whether the appellant had fear or apprehension for or about his well-being or safety caused by his sponsor's conduct during the currency of the partner relationship. Since the expert determined that the appellant had no such fear or apprehension the further issue, as to whether or not such a state of mind was reasonable, did not arise.
5. When read in context, nothing turns on the expert's reference to "victim of abuse" and "victimisation". The expert clearly made her assessment by reference to the definition of "relevant family violence" in r 1.21 of the Regulations and her use of these terms is to be read in this context as merely shorthand references, so far as the expert was concerned, for the relevant concepts in that definition. The principle referred to in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 272 with respect to reasons given by an administrative decision-maker such as the Tribunal informs the nature of the approach that should be taken here.
6. I accept that the independent expert treated the absence of evidence or information that the appellant had recognised that he was experiencing fear or apprehension while in the relationship as a factor militating against his claim that he had suffered relevant family violence. Given the other matters to which the expert referred in her report, however, it was clearly within her expertise and open to her to do so. Having examined the information she was given, the independent expert noted that the appellant had perceived his sponsor as controlling him "only in hindsight", which was "likely a result of visa circumstances versus being a victim of family violence". The independent expert went on, as noted already, to accept that an individual may develop retrospective insight but to discount this possibility in the appellant's case. She noted in particular that he interpreted his sponsor's behaviour as abusive only after she had refused to reconcile their differences.
7. Having regard to all the matters to which the independent expert referred, the proposition that the independent expert formed her opinion on an assumption that relevant family violence could not be established unless the appellant perceived, "during the course of the relationship", that the sponsor's conduct had “a deleterious effect on his well-being” cannot succeed, even supposing this assumption to be mistaken. In all the circumstances, it was clearly within her expertise and open to the independent expert to conclude that the appellant did not meet the criteria of relevant family violence as defined in r 1.21(1) of the Regulations.
8. In these circumstances, it is unnecessary to rule on the construction of the definition of "relevant family violence". As I remarked at the hearing, in the end it did not appear to me that there was any appreciable difference between the parties on construction of this definition. It is clear that in order to form an opinion that a claimed victim (the visa applicant) has suffered relevant family violence an independent expert must address the question whether or not the claimed victim suffered conduct, whether actual or threatened, that caused him or her to fear for, or to be apprehensive about, his or her own well-being or safety. The definition is first concerned with whether the sponsor's conduct caused the claimed victim to have fear or apprehension; and secondly, whether that fear or apprehension was "reasonable" in all the circumstances. If the claimed victim did not have such fear or apprehension caused by the sponsor-partner's alleged conduct, then the definition cannot be satisfied. Further, where the Minister or the Tribunal is obliged to seek and accept an opinion of an independent expert, r 1.23(14) expressly provides that the violence that led to the independent expert having the opinion that the claimed victim has suffered relevant family violence must have occurred while the relationship, married or de facto, existed between the sponsor-partner and the claimed victim. It would follow from this, that under the relevant regulations, a claimed victim's fear or apprehension about his or her well-being or safety and the conduct causing it must occur while the spousal or de facto relationship exists. This perhaps leaves open the question whether a visa applicant might satisfy the definition of “relevant family violence” where he or she claims to have recognised after (but not during) the relationship that his or her sponsor's conduct had caused fear for or apprehension about his or her well-being or safety during the currency of the relationship.

# disposition

1. As already indicated, for the reasons stated, I would grant the appellant leave to amend the notice of appeal in the terms set out at above and I would dismiss the appeal.

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| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny. |

Associate:

Dated: 2 August 2016