Federal Court of Australia

Naidu v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1423

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **SNADEN J** |
|  |  |
| Date of judgment: | 21 November 2023 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia (**FCCA**) – where primary judge dismissed application for judicial review of a decision by the Administrative Appeals Tribunal – whether ratio of *Karsten v Minister for Immigration and Anor (No. 3)* [2019] FCCA 1560 properly applied – whether FCCA should have sought clarification regarding unclear submission – whether independent expert required to accept evidence – whether independent expert required to put appellant on notice – whether procedural fairness afforded – whether marriage had dissolved – whether existence of intervention order enlivened reg 1.23(4) of the *Migration Regulations 1994* (Cth) – whether appellant afforded substantial justice – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth), ss 31, 353, 357A, 379A, 379C, 379G, 476  *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth)  *Migration Regulations 1994* (Cth), regs 1.21, 1.22, 1.23, 2.03, sch 2 |
|  |  |
| Cases cited: | *BSE17 v Minister for Home Affairs* [2018] FCA 192  *Leone v Minister for Home Affairs* (2020) 277 FCR 526  *Muin v Refugee Review Tribunal* (2002) 190 ALR 601  *Naidu v Minister for Immigration & Anor* [2020] FCCA 2715 *Karsten v Minister for Immigration and Anor (No. 3)* [2019] FCCA 1560  *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497  *SZMAR v Minister for Immigration and Citizenship* (2009) 112 ALD 524  *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 238 FCR 588 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 85 |
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| Date of hearing: | 30 May 2023 |
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| Counsel for the Appellant: | Mr R Gordon |
|  |  |
| Solicitor for the Appellant: | Gordon & Co Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr C McDermott |
|  |  |
| Solicitor for the First Respondent: | Australian Government Solicitor |
|  |  |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | VID 681 of 2020 |
|  | | |
| BETWEEN: | KOMAL PARTIKA NAIDU  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| --- | --- |
| order made by: | SNADEN J |
| DATE OF ORDER: | 21 november 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal, to be assessed in default of agreement in accordance with the court’s Costs Practice Note (GPN-COSTS).

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

REASONS FOR JUDGMENT

SNADEN J:

1. The appellant is Fijian. She and her now ex‑husband met in Australia in 2013, and were subsequently married in Fiji. On 17 September 2013, the appellant applied for Partner (Provisional) and Partner (Migrant) visas on the basis of her relationship with her then husband (her “**Sponsor**”). On 5 May 2014, the appellant was granted a Partner (Provisional) visa under the *Migration Act 1958* (Cth) (hereafter, the “**Act**”). That visa entitled her to remain in Australia for so long as her application for a Partner (Migrant) visa (hereafter, the “**Visa Application**”) remained live and undecided.
2. In August 2015, the relationship between the appellant and her Sponsor ended. Shortly thereafter, the appellant applied for an intervention order, which was refused (the “**First Intervention Order Application**”). On 27 August 2015, her Sponsor advised the Department of Immigration and Border Protection (as it was then known; hereafter, the “**Department**”) that he wished to withdraw his sponsorship of the appellant’s Visa Application. On 22 October 2015, the appellant notified the Department that the relationship had ceased and asserted that she had been the victim of family violence perpetrated by her Sponsor.
3. On 15 January 2016 and pursuant to reg 1.23(1)(c) of the *Migration Regulations 1994* (Cth) (hereafter, the “**Regulations**”), the first respondent (the “**Minister**”) referred the appellant’s claim of family violence for assessment by an independent expert (the “**First Expert**”). On 26 March 2016, the First Expert opined in writing that the appellant, contrary to her suggestion, had not been a victim of relevant family violence. On 21 June 2016—and in reliance upon that opinion—a delegate of the Minister refused the Visa Application (the “**Delegate’s Decision**”).
4. Less than two months earlier, on 2 May 2016, the appellant had made another application for an intervention order (the “**Second Intervention Order Application**”). That application was granted on 31 May 2016 (the “**Intervention Order**”).
5. On 4 July 2016, the appellant lodged with the second respondent (the “**Tribunal**”) an application for review of the Delegate’s Decision (hereafter, the “**Review Application**”). On 5 January 2018, the Tribunal referred the appellant’s claim of family violence for assessment by a second independent expert (the “**Second Expert**”). On 22 January 2018, the Second Expert met with the appellant; and, on 24 February 2018, also opined in writing that the appellant had not been a victim of relevant family violence.
6. On 23 March 2018, the Tribunal sent to the appellant’s representative an invitation to comment on or respond to the Second Expert’s opinion (the “**Tribunal’s Letter**”). That invitation went unanswered. On 19 July 2018, the appellant’s representative sent to the Tribunal a letter asking for an update on the progress of the Review Application (the “**Appellant’s Letter**”).
7. On 9 August 2018, the Tribunal affirmed the Delegate’s Decision to refuse the appellant’s Visa Application (that affirmation is referred to hereafter as the “**Tribunal’s Decision**”).
8. The appellant then sought judicial review of the Tribunal’s Decision in the Federal Circuit Court of Australia (as it was then known—the “**FCCA**”). That application (the “**Judicial Review Application**”) was heard and, on 5 October 2020, was dismissed with costs: *Naidu v Minister for Immigration & Anor* [2020] FCCA 2715 (the “**FCCA Judgment**”; Judge Mercuri).
9. By notice filed on 19 October 2020, the appellant appeals from the entirety of the FCCA Judgment. She moves the court for orders to set that judgment aside and, in lieu thereof, to set aside the Tribunal’s Decision and remit the Review Application back to the Tribunal for rehearing.
10. For the reasons that follow, the appeal shall be dismissed with costs.

# The appellant’s claim

1. By a statutory declaration dated 28 September 2015 (and submitted to the Department), the appellant stated that her Sponsor had:
2. been verbally abusive and moody, had emotionally harassed her, had punished her, had withdrawn financial support and had threatened her with deportation;
3. accused her of not having interest in him, being unfaithful, and/or being a lesbian;
4. choked her;
5. refused to give her any money and taken all of the money from their joint accounts;
6. forced her to sign a letter of resignation from her workplace, which her Sponsor and her father‑in‑law then faxed to her employer; and
7. told police that she was not welcome in his home.
8. The appellant also submitted to the Department a statutory declaration dated 29 September 2015 of a psychologist, Dr Vella. That declaration stated that, in Dr Vella’s professional opinion, the appellant had suffered family violence. Attached to it was a report dated 25 September 2015 (the “**Dr Vella Report**”).
9. The appellant also submitted to the Department a statutory declaration of that same date, made by a friend of hers. It recounted conversations that she (the friend) had had with the appellant about some marriage difficulties that the appellant was said to have been facing.
10. After receiving a letter from the Department indicating that the First Expert had assessed that she had not been a victim of relevant family violence, the appellant filed the Second Intervention Order Application. By that application, she alleged that her Sponsor had enquired about how she had been able to remain in Australia given that he had withdrawn his sponsorship, about whether she had been to a lawyer, and about where she was living and working. The appellant stated this had caused her to feel intimidated and fear for her safety. She also stated that her Sponsor had called on a number of occasions and threatened her. The Second Intervention Order Application was granted by consent without admission of any allegations.
11. In support of her Review Application, the appellant submitted a statutory declaration affirmed 27 December 2017, in which she stated (amongst other things) that:
12. from 25 August 2015, she was under threats of direct physical harm;
13. she was physically thrown out of her home by her Sponsor and his father, resulting in police intervention;
14. with the assistance of a relative she went to WAYSS Ltd (a crisis centre), where she was interviewed;
15. her Sponsor and his family then began to inquire with friends and relatives as to her whereabouts, and “threatening that [she] should return to their home or leave to Fiji”;
16. on the request of her Sponsor and hoping for reconciliation, she had met with him, but he had been more interested in finding out how she was able to remain in Australia given that he had withdrawn his Sponsorship;
17. on 2 April 2016, she had received a call from her Sponsor, during which he shouted at and threatened her;
18. on 10 April 2016, she had received a call from her Sponsor, during which he insisted that she apologise to her Sponsor’s parents (apparently as they had supported the sponsorship), before then threatening her family and parents in Fiji;
19. on 31 May 2016, she had obtained the Intervention Order against her Sponsor; and
20. she had also suffered from emotional and psychological abuse from her Sponsor.

# The statutory framework

1. The Regulations prescribe the criteria that need to be satisfied in order that an applicant might be provided a visa: the Act, s 31(3). Criteria so prescribed are set out in Schedule 2 of the Regulations: the Regulations, reg 2.03.
2. At the relevant time, the criteria for the grant of a Partner (Migrant) visa were set out in Clause 100.221 of Schedule 2 of the Regulations, which relevantly provided:

**100.221**

(1) The applicant meets the requirements of subclause (2), (2A), (3), (4) or (4A).

(2) The applicant meets the requirements of this subclause if:

(a) the applicant:

(i) is the holder of a Subclass 309 (Spouse (Provisional)) visa or a Subclass 309 (Partner (Provisional)) visa; or

(ii) was the holder of a Subclass 309 (Spouse (Provisional)) visa granted before 1 November 1999 that has ceased to be in effect because the applicant:

(A) was outside Australia at the end of the 30 month period specified in the Subclass 309 visa for travelling to and entering Australia; or

(B) left Australia after the end of the 30 month period specified in that visa for travelling to and entering Australia; and

(b) the applicant is the spouse or de facto partner of the sponsoring partner; and

(c) subject to subclauses (5), (6) and (7), at least 2 years have passed since the application was made.

…

(4) The applicant meets the requirements of this subclause if:

(a) the applicant first entered Australia as the holder of a Subclass 309 (Spouse (Provisional)) visa or a Subclass 309 (Partner (Provisional)) visa and either:

(i) continues to be the holder of that visa; or

(ii) is no longer the holder of that visa because the visa:

(A) was granted before 1 November 1999; and

(B) has ceased to be in effect because the applicant:

(I) was outside Australia at the end of the 30 month period specified in the Subclass 309 visa for travelling to and entering Australia; or

(II) left Australia after the end of the 30 month period specified in that visa for travelling to and entering Australia; and

(b) the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased; and

(c) after the applicant first entered Australia as the holder of the visa mentioned in paragraph (a)—either or both of the following circumstances applies:

(i) either or both of the following:

(A) the applicant;

(B) a member of the family unit of the sponsoring partner or of the applicant or of both of them;

has suffered family violence committed by the sponsoring partner;

…

Note: For special provisions relating to family violence, see Division 1.5.

1. Thus, at the relevant time, the appellant would have been entitled to a Partner (Migrant) visa if she would have been the spouse or de facto partner of her Sponsor but:
2. her relationship with her Sponsor had ceased; and
3. after she first entered Australia, she had suffered family violence committed by her Sponsor.
4. Division 1.5 of Part 1 of the Regulations contains special provisions relating to family violence, relevantly including at the relevant time:

**1.21 Interpretation**

In this Division:

…

***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.

… [and]

***violence*** includes a threat of violence.

**1.22 References to person having suffered or committed family violence**

(1) A reference in these Regulations to a person having suffered family violence is a reference to a person being taken, under regulation 1.23, to have suffered family violence.

(2) A reference in these Regulations to a person having committed family violence in relation to a person is a reference to a person being taken, under regulation 1.23, to have committed family violence in relation to that person.

**1.23 When is a person taken to have suffered or committed family violence?**

(1) For these Regulations, this regulation explains when:

(a) a person (the ***alleged victim***) is taken to have suffered family violence; and

(b) another person (the ***alleged perpetrator***) is taken to have committed family violence in relation to the alleged victim.

…

…

*Circumstances in which family violence is suffered and committed—court order*

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

(a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and

(b) unless the alleged victim had, before 1 January 1998, claimed to Immigration to have suffered domestic violence committed by the alleged perpetrator—that order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.

(5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order 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.

…

*Circumstances in which family violence is suffered and committed—non‑judicially determined claim of family violence*

…

(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.

…

(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.

(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.

1. To summarise, then: where a visa applicant was granted an intervention order (or other relief that falls within the purview of reg 1.23(4) of the Regulations) in respect of violence that took place during the currency of his or her relationship with a sponsor, a decision‑maker considering an application for a relevant visa was obliged to proceed on the basis that family violence had been suffered. However, where an applicant relied upon non‑judicially determined claims of family violence that were not accepted, the Minister (or other decision maker) was required to seek the opinion of an independent expert; and such opinions were taken to be correct for the purpose of deciding whether the family violence had been suffered while the relationship existed: reg 1.23(13)(b) of the Regulations.
2. Relevantly, family violence is (and was) defined to include threatened conduct that causes fear or reasonable apprehension about one’s wellbeing or safety: the Regulations, reg 1.21.

# The second expert opinion and the Tribunal’s Decision

1. The Tribunal was not satisfied that the appellant had suffered family violence. The appellant’s claim that she had was, thus, referred to the Second Expert (as reg 1.23(10)(c)(i) of the Regulations required). The Second Expert, a forensic psychologist, interviewed the appellant on 12 February 2018 with the assistance of a Fijian interpreter. On 24 February 2018, the Second Expert delivered her opinion that the appellant had not suffered relevant family violence.
2. In coming to that conclusion, the Second Expert reasoned that:
3. the appellant had had difficulty recalling the exact month that she and her Sponsor had met;
4. the appellant’s accounts to the Second Expert differed substantially and escalated across time;
5. conflict between the appellant and her Sponsor appeared to centre around her Sponsor and the appellant’s in‑laws accusing the appellant of infidelity;
6. the focus of the type and severity of the violence changed significantly in response to the Delegate’s Decision;
7. the appellant provided vague and illogical arguments to explain discrepancies, which undermined the validity of her claims;
8. the appellant’s inconsistencies and escalation of violence that she alleged indicated significant unreliability in her account, motivated by the appellant’s belief that she would be shamed if she returned to Fiji;
9. the doubts raised by the appellant’s inconsistencies meant no weight should be placed on the appellant’s account;
10. the appellant made errors in her reports of alleged incidents of physical and sexual violence, and was either unable or unwilling to provide reasonable explanations for inconsistencies;
11. the appellant was an unreliable historian who presented as lacking credibility; and
12. while the appellant appeared genuinely distressed by the breakdown of her relationship, she had not made genuine attempts to seek support in response to alleged violence.
13. On 23 March 2018, the Tribunal sent correspondence by email to the appellant’s representative inviting the appellant to comment on or respond to the Second Expert’s opinion. The appellant’s representative would later state in a letter to the Tribunal (and submit to the FCCA), that this correspondence was never received (though it was common ground before the FCCA that the correspondence had been sent by the Tribunal to the email address provided by the appellant’s representative).
14. It is convenient at this juncture to set out the relevant sub‑sections of ss 379A and 379C of the Act:

**379A Methods by which Tribunal gives documents to a person other than the Secretary**

*Coverage of section*

(1) For the purposes of provisions of this Part or the regulations that:

(a) require or permit the Tribunal to give a document to a person (the recipient); and

(b) state that the Tribunal must do so by one of the methods specified in this section;

the methods are as follows.

…

*Transmission by fax, email or other electronic means*

(5) Another method consists of a member or an officer of the Tribunal transmitting the document by:

…

(b) email; …

…

**379C When a person other than the Secretary is taken to have received a document from the Tribunal**

(1) This section applies if the Tribunal gives a document to a person other than the Secretary by one of the methods specified in section 379A (including in a case covered by section 379AA).

…

*Transmission by fax, email or other electronic means*

(5) If the Tribunal gives a document to a person by the method in subsection 379A(5) (which involves transmitting the document by fax, email or other electronic means), the person is taken to have received the document at the end of the day on which the document is transmitted.

1. On 9 August 2018, the Tribunal affirmed the Delegate’s Decision. The Tribunal reasoned that:
2. in relation to the Second Intervention Order Application, the application and final order were both issued after the appellant’s relationship with her Sponsor had broken down and, therefore, the Tribunal was unable to rely upon a judicially‑determined claim of the applicant having suffered family violence;
3. pursuant to reg 1.23(10)(c), the Tribunal was required to take as correct the opinion of the Second Expert as to whether the appellant had suffered family violence;
4. the Second Expert had stated that relevant family violence that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, her personal wellbeing or safety had not occurred;
5. the opinion of the Second Expert had been provided to the appellant for comment, but the appellant had not responded to it;
6. the Tribunal was satisfied that the opinion of the Second Expert was authorised by law in that the Second Expert was a suitably‑qualified employee of an organisation specified for that purpose, and her opinion had been properly formed;
7. accordingly, it had no alternative but to find that the appellant had not suffered family violence committed by her Sponsor; and
8. the appellant did not meet any alternative criteria for the grant of the Visa Application.

# The FCCA Judgment and the present appeal

1. The appellant sought in the FCCA judicial review of the Tribunal’s Decision. That application proceeded upon three grounds, namely (errors and numbering original):

1. The Tribunal fell into error because it incorrectly found that it was obliged by regulation 1.23 of the Migration Regulations 1994 (Cth) (the “**Regulations**”) to take as correct an opinion of Dr Suzanne Vidler (the “**Second IE**”) that the Applicant had not been subject to “relevant family violence” in circumstances where the opinion of the expert was vitiated by an incorrect application of the meaning of “relevant family violence” as set out in the Regulations.

**Particulars**

i. The Tribunal held that in the absence of new materials reg.1.23 of the Regulations obliged it to take the opinion of the Second IE as correct.

ii. The Tribunal was only obliged to take the opinion of the Second IE as correct if it was formulated according to law.

iii. The Second IE’s opinion was not formulated according to law because the definition of relevant family violence set out at Division 1.5 of the Regulations (Special provisions relation to Family Violence) was not correctly applied by the Second IE.

iv. The Second IE’s opinion was not an opinion within the meaning of the Regulations and therefore it was an error for the Tribunal to rely on this opinion.

2. The Tribunal fell into error by failing to take into account a relevant consideration that it was bound to take into account

**Particulars**

v. The Applicant’s migration agent at the hearing made submissions regarding the effect of the family violence suffered by the Applicant and the effect such family violence may have on her state of mind.

vi. These submissions were relevant to the assessment of whether or not the Applicant had suffered relevant family violence as defined in the Regulations, both the Tribunal and the Second IE.

vii. The Tribunal not convey these submissions to the Second IE to assist with the preparation of her report.

viii. The Tribunal had notice of the Applicant’s attempts to obtain intervention orders against her former partner and her former father in law and a final intervention order made by the Magistrates’ Court of Victoria.

ix. The Tribunal did not consider how these artefacts were relevant to the Applicant’s claim of having suffered relevant family violence when it was obliged by the Regulations to do so.

3. The Tribunal failed to ensure that the Applicant had been afforded procedural fairness.

**Particulars**

x. The Second IE had an obligation to put adverse information to the Applicant. The Second IE’s report does not record adverse information being clearly put to the Applicant nor does it record the Applicant’s actual responses to the puttage of such adverse information.

xi. The Tribunal has an obligation pursuant to s.359A Migration Act 1958 (Cth) (the “Act”) to ensure that the Applicant has the opportunity to respond to any adverse information before it.

xii. The Tribunal attempted to communicate with the Applicant’s agent but received no response.

xiii. Before making its decision, the Applicant’s agent wrote to the Tribunal seeking an update on the matter. It was clear from the agent’s communication that he had not seen the Tribunal’s correspondence requesting further comment.

1. Each of those challenges was rejected. The learned primary judge concluded as follows, namely that:
2. there was no error similar to that which had been identified in *Karsten v Minister for Immigration and Anor (No. 3)* [2019] FCCA 1560 (Judge Manousaridis; hereafter, “***Karsten***”), namely that the word “violence” had been construed too narrowly (so as to improperly exclude belittling, frightening, or similar conduct); and nor could it be inferred that the Second Expert misunderstood the meaning of the term “relevant family violence” (FCCA Judgment, [47]);
3. to the extent that ground one was purportedly made out by the Dr Vella Report, the Intervention Order and the submissions made to the Tribunal, the Second Expert had had regard to each and simply formed a different view (FCCA Judgment, [56]);
4. the Tribunal was aware of and considered the Intervention Order and the submissions made by the appellant, such that the conclusions that it made (namely, that it was unable to rely upon a judicially‑determined claim of the appellant having suffered family violence and that the appellant had, in fact, not suffered relevant family violence) were open to it (FCCA Judgment, [78]); and
5. by virtue of the provisions outlined at [25] above, the Tribunal’s Letter was deemed to have been received at the end of the day that it was sent (FCCA Judgment, [95]), the Appellant’s Letter did not contain new information that obliged the Tribunal to invite the appellant to appear and give evidence (FCCA Judgment, [99]), and the appellant did not identify any other adverse information that was not put to her (FCCA Judgment, [91]).
6. The present appeal proceeds upon the following six grounds (errors original):

1. Her Honour erred by finding that the facts of the case in *Karsten* cannot be applied in this review when the basis on which the Tribunal and the Independent Expert approached the overall material and submissions before them it was not on an incorrect understanding of relevant family violence. The doubts raised about the inconsistencies were not strong so that it was unable to be reconciled with the overall material, to identify the substance of family violence when police had attended as a consequence of physical violence and threats with a consistent interview by WAYS, and the shelter where the [appellant] was placed by the police.

2. Her Honour erred by adopting the submissions of the First Respondent that it was unclear which aspect of the intervention order documents and the submissions were not considered by the 2nd independent expert. Her Honour failed to clarify same and did not recognise that other than just referring the material in the report, it does not reflect any aspect of it being actually considered. Her Honour did not provide substantial justice to the [appellant].

3. Her Honour erred in finding that the Independent Expert was not required to accept the evidence or put the [appellant] on notice as the delegate and then the Tribunal did not accept the evidence.

4. Her Honour failed in finding procedural fairness has not been applied in the way the opinion of Dr. Vella was discounted without any reference to the [appellant] or discounting the attendance by the police, the shelter provided by the police and the report provided by WAYS.

5. Her Honour failed to find that at the time both the intervention orders were made, the marriage of the [appellant] was not dissolved and both arose out of the [Sponsor] and the [appellant] attempting to reconcile their differences, but impacted by the interference of the inlaws. The intervention orders judicially determined the violence during the relationship.

6. Her Honour erred in finding that in the chronology of the events following the report of the Second Independent Expert, substantial justice was provided to the [appellant].

1. The grounds now pressed have little connection with the grounds that were advanced before the FCCA. To the extent that the appellant wishes to argue grounds of appeal not raised before the primary judge, she requires leave to agitate them before this court: *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 238 FCR 588, 598 [46] (Kiefel, Weinberg and Stone JJ). I shall return to that issue below.

# Submissions and hearing

1. The appellant’s submissions focused, in part, upon the expert opinions that were offered about her having suffered relevant family violence. In particular, she submitted as follows (references omitted):

THE INDEPENDENT EXPERT REPORTS

In support of her allegations of family violence the Appellant provided the Minister (and subsequently the Tribunal) with a report from Dr Melissa Vella. Dr Vella provides a professional opinion that the Appellant has suffered the family violence that she complains of at the hands of her sponsor.

The Appellant also provided a copy of the Application and Summons for an intervention Order and the Final Intervention Order made by the Magistrates’ Court of Victoria at Sunshine on 31 May 2016.

Both the First Independent Expert and the Second Independent Expert had access to the above documents when they considered the Appellant’s family violence claims.

Only the Second Independent Expert refers to the report of Dr Vella.

It is submitted that the Second Independent Expert’s comments refer to the observations of Dr Vella at paragraph 5 of her report but not the overall finding that psychological and financial abuse have occurred as described by the Appellant.

Furthermore, the Second Independent Expert reports listening to the Tribunal hearing but makes no reference to the submissions made by the Appellant’s agent at approximately minute 33 of the recording.

These submissions detail the instructions of the Appellant with regards to her feelings and state of mind, as well as the observations of the agent, in the wake of the family violence that she claims to have suffered.

The Second Independent Expert makes no statement of opinion as to the agent’s submissions, rather she prefers to attempt to draw an inference that the Appellant was not cooperative with the Tribunal on the basis of her unwillingness to use an interpreter, when no interpreter was requested at the hearing.

At the time of the decision, “relevant family violence” was defined at reg 1.21 as follows:

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

(a) the alleged victim; or

(b) a member of the family unit of the alleged victim; or

(c) a member of the family unit of the alleged perpetrator; or

(d) the property of the alleged victim; or

(e) the property of a member of the family unit of the alleged victim; or

(f) the property of a member of the family unit of the alleged perpetrator; that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.”

In *Karsten v Minster for Immigration and Anor* [2019] FCCA 1560 Manousaridis J found at [50]:

“In my opinion, then, the effect of the authorities is that “violence”, as that word appears in reg. l.23(2)(b) of the Regulations [as it then was], is not restricted to acts or threatened acts of physical violence; **it includes belittling, intimidating, frightening, or similar conduct directed to the person claiming to be the victim of domestic violence**. If, contrary to the opinion I have expressed, in Sok Branson J did make a finding about the meaning of “domestic violence” as a term of art, her Honour held that **“domestic violence” means “an abuse of power within a domestic relationship such that the less powerful partner in the relationship experiences fear of psychological or physical harm”**.

[emphasis added]

It is submitted that the report of Dr Vella, the existence of the Final Intervention Order and the submissions of the Appellant’s agent to the Tribunal are demonstrative of the Appellant having been exposed to conduct (of the sponsor), actual and threatened, that caused the Appellant to reasonably fear for, or to be reasonably apprehensive about, her own wellbeing or safety.

Furthermore, it is arguable that this fear and/or apprehension is what drove the Appellant to seek an intervention order after the relationship had ended.

It is further submitted that in coming to her opinion that the Second Independent Expert has not applied the above definitions of relevant family violence.

By not applying the correct definition of relevant family violence, the Second Independent Expert has not provided an opinion that is contemplated by reg.1.23(10)(c) of the Regulations.

In circumstances where the appointed expert proceeds on an incorrect understanding of the definition of relevant family violence, the expert’s is not one that is arrived at according to law and it is not an opinion on which it was open for the Tribunal to take as correct.

THE FINAL INTERVENTION ORDER

Although this Final Intervention Order was made by consent and at a time after the couple had separated, the Tribunal failed to appreciate that the Final Intervention Order was an order of a State Court and that even though it was made with the consent of the sponsor, the court still has a discretion to refuse to make an order under s. 78(1) of the Family Violence Protection Act 2008 (Vic) (“**FVPA**”).

This arguably may include circumstances where the court assesses there is no risk of family violence occurring without a final order in place.

Furthermore, a court may refuse to make a consent order under s.78(5) of the FVPA.

In *AB v Magistrates’ Court* [2011] VSC 61, Mukhtar AJ stated:

“There is nothing in my view to stop a Court refusing to make a consent order under s. 78(5) without conducting a prior hearing into particulars. For example, a Court may form a view that parts of a consent order are manifestly inappropriate or risky. Or a **hearing may be called for to remove some apprehension or to satisfy the Court that consent orders are not problematic is some way**.”

[emphasis added]

It is respectfully submitted that the Magistrates’ Court was of the view that it was appropriate in the circumstances to make the Final Intervention Order to ensure any risk to the safety of the Appellant posed by the sponsor was mitigated to the extent possible by the making of such an order.

It is further respectfully submitted that the existence of the Final Intervention Order and the willingness of the sponsor to accept such order, that affects some of his rights, without a thorough ventilation of the issues in dispute gave rise to a potential inference that the family violence complained of by the Appellant had occurred.

Furthermore, the Tribunal did not acknowledge or refer to the submissions made by the Appellant’s agent at the Tribunal hearing (at approximately minute 33 of the recording of the Tribunal).

It is submitted these submissions were relevant to the conduct of the Appellant and provided an alternative and feasible explanation to that which is posited by and relied upon by the Second Independent Expert in her report.

As the Appellant seeks to satisfy the exemption at cl 100.221 of Schedule 2 of the Regulations to justify the grant of the Second Stage Partner Visa, reg 1.23(10)(a) of the Regulations binds the Minister to consider relevant family violence as defined at reg 1.21 of the Regulations.

It is submitted that the Final Intervention Order and the Appellant’s agent’s oral submissions are relevant to the Appellant’s claim of having suffered family violence at the hands of the sponsor and are evidence of relevant family violence.

A failure to take into account a relevant consideration is made out only if the decision maker fails to take into account a consideration that he or she is bound to take into account in making the decision: *MZXGP v Minister for Immigration and Multicultural Affairs & Anor* [2006] FCA 1314 at [13].

The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons.

But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive, and the issue has at least been identified at some point.

It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected: *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [47].

Furthermore, it is well established that the Tribunal is required to correctly construe and consider each claim (including each element or integer of each claim) made by an applicant. (*Htun v Minister for Immigration* (2001) 194 ALR 244; [2001] FCA 1802 at [42] (Allsop J, with whom Spender and Merkel JJ agreed); *Dranichnikov v Minister for Immigration* (2003) 197 ALR 389; [2003] HCA 26 at [22]‑[24], [27] (Gummow and Callinan JJ), at [88]‑[89] (Kirby J), at [95] (Hayne J)).

This includes claims that are expressly raised by an applicant or are apparent on the material before the Tribunal. *NABE v Minister for Immigration (No 2)* (2004) 144 FCR 1; [2004] FCAFC 263 at [58]‑[61] (Black CJ, French and Selway JJ).

In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, the passage cited by McHugh, Gummow and Hayne JJ, with whom Gleeson CJ agreed, from *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at [179] shows that the High Court was concerned with the results or consequences of an error of law:

“if such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, · it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.”

With the above in mind, it is submitted that by failing to take into account the existence of and the circumstances surrounding the making of the Final Intervention Order and the Appellant’s agent’s oral submissions, that were directly relevant to the consideration of the Appellant’s claim of family violence, the Tribunal made a material jurisdictional error.

PROCEDURAL FAIRNESS

The Family Violence Referral Form completed by the Second Independent Expert contains a notation to the effect that an independent expert appointed pursuant to Division 1.5 of the Regulations has a legal duty to provide procedural fairness to a person who claims to be a victim of domestic/family violence.

The notation further states that “a failure to disclose adverse third‑party information or, if the information is confidential, at least the gist of it, could constitute a denial of procedural fairness”.

The Second Independent Expert’s report makes reference to perceived inconsistencies between the accounts given by the Appellant but it is not clear in her report what adverse matters were specifically put to the Appellant and what the Appellant’s responses were to the specific adverse issues that were raised by the Second Independent Expert.

Furthermore, it is unclear if procedural fairness as described in the form was afforded at all or what process was undertaken to ensure that the requirement was complied with.

The First Independent Expert’s report contained a checkbox that indicates if procedural fairness applies or not at “B13 “.

The forms used by the First and Second Independent Expert have some similarity, but it is unclear whether the same or a different process is engaged by the service provider which is assumed to have been engaged by the Minister in a panel arrangement.

Section 359A of the Act obligates the Tribunal to give to the Appellant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal would be the reason, or a part of the reason, for affirming the decision that is under review.

It is accepted that the Tribunal attempted to communicate adverse findings to the Appellant in writing on or about 23 March 2018.

Whilst it is accepted the correspondence exists or was attempted, the Appellant’s agent (who was authorised to receive correspondence in this matter on her behalf) did not receive the Minister’s correspondence.

The Appellant’s agent sent the Tribunal a letter on 19 July 2018 requesting an update on the basis they had not heard anything further since the hearing in January 2018.

Without further reference to the Appellant or her agent, the Tribunal affirmed the Minister’s decision on or about 10 August 2018.

It is also accepted there is no positive obligation on the Tribunal to follow up with an Appellant that does not reply to correspondence and in fact s.359C(2) of the Act gives the Tribunal the discretion to make a decision without taking any further action to obtain an Appellant’s views on the information.

Notwithstanding the above, it is clear from the Appellant’s agent’s correspondence that the agent had not seen the Tribunal’s original procedural fairness letter.

At that point the Tribunal had not made a decision regarding the Appellant’s matter and the agent’s seemingly innocent enquiry regarding progress since the last known activity on the matter on 22 January 2018 can be regarded as new information in the matter.

Accordingly, this new information in regard to a matter under review obligated the Tribunal to the Appellant to appear to give further evidence or present arguments as whether in the circumstances she should be given an opportunity to respond to the adverse information: s.360(1) of the Act.

Brennan J stated at [627] in *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550:

*“As the obligation to observe the principles of natural justice is not correlative to a common law right but is a condition governing the exercise of a statutory power, t****he repository satisfies the condition by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised****. When the question for the court is whether the condition is satisfied, the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair.”*

[emphasis added]

It follows that, as Mason J stated in *Kioa v West* (at [34]), the critical question in most cases is “what does the duty to act fairly require in the circumstances of the particular case?”.

In the same decision Gibbs CJ said (at [11]) that the “fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power.

With the above in mind, it is submitted that the Tribunal’s obligation pursuant to s.359A was not complied with and accordingly, the Appellant was not afforded procedural fairness.

1. At the hearing, counsel for the appellant stated that the appeal concentrates on two intertwined considerations, namely:
2. the definition of family violence under the Regulations and whether the Second Expert correctly interpreted the meaning of that phrase; and
3. the effect of the Intervention Order.
4. The first respondent submits in response that:
5. the merits of the Second Expert’s opinion are not amenable to judicial review;
6. the Second Expert could not properly be thought to have misunderstood what was or was not “relevant family violence”, nor thereby to have failed to have regard to any of the claims made by the appellant or to have wrongly excluded matters from consideration;
7. the Tribunal properly considered the intervention order materials and made findings of fact that were open to it;
8. having been sent to the appellant’s representative’s correct email address on 23 March 2018, the Tribunal’s Letter was deemed under s 379C(5) of the Act to have been received at the end of that day;
9. that being so, the Tribunal fulfilled its procedural fairness obligations in relation to the Second Expert’s opinion; and
10. the Appellant’s Letter contained no “information” that obliged the Tribunal to seek a further response.

# Grounds of appeal

## Ground one

1. In *Karsten*, the Migration Review Tribunal (hereafter, “**MRT**”) referred an allegation of family violence to an independent expert pursuant to reg 1.23 of the Regulations. The expert’s opinion included the statement that the applicant had reported that the sponsor had never physically abused him, but that she had threatened to have him deported. The opinion went on to state (amongst other things) that “threats of being deported from Australia are not sufficient evidence of domestic violence in their own right”. Pursuant to reg 1.23(1C) of the Regulations, the MRT took as correct the expert’s opinion and affirmed the decision not to grant a partner visa. As noted by the appellant in her submissions, Judge Manousaridis summarised the authorities on the meaning of “violence” (at [50]):

…the effect of the authorities is that “violence”, as that word appears in reg.1.23(2)(b) of the Regulations, is not restricted to acts or threatened acts of physical violence; it includes belittling, intimidating, frightening, or similar conduct directed to the person claiming to be the victim of domestic violence. …

1. His Honour went on (at [54]‑[55]) to conclude that:

…the threat by a sponsor to have the holder of a subclass 820 visa deported to his or her country of origin in circumstances where the holder is afraid or otherwise unwilling of returning to his or her own country of origin, and the sponsor is aware of the holder’s fear or unwillingness to return to his or her own country of origin, is capable by itself of constituting “relevant domestic violence” as that expression is defined in reg.1.23(2)(b) of the Regulation.

…

The Expert rejected this part of the applicant’s claim by stating that threats of being deported from Australia could not by themselves constitute sufficient evidence of “domestic violence”. In my opinion, this manifested a misunderstanding by the Expert of the meaning of “violence” or of “relevant domestic violence” as defined in reg.1.23(2)(b) of the Regulations.

1. His Honour found that the relevant expert’s opinion was not one that had been arrived at according to law, was not an “opinion” authorised by reg 1.23(1C) of the Regulations and, therefore, was not an opinion that was open to the MRT to take as correct.
2. Here, the appellant submits that by not applying the correct definition of “relevant family violence”, the Second Expert did not provide an opinion of the kind contemplated by reg 1.23(10)(c) of the Regulations. In oral submissions, counsel for the appellant stated that the Second Expert “discounted all the evidence or any of the evidence or submissions of the appellant as to the factual matrix” of what constituted family violence. It was said that the Second Expert “misconstrued the definition or the interpretation of family violence” and “fixated herself on purely physical acts where she did not take into account or discounted, in totality, without justification, that there were – there was belittling, there was intimidating, frightening or similar conduct direct[ed] to the appellant”.
3. In fact, the Second Expert paid explicit regard to the threats to which the appellant referred. The Second Expert’s opinion was delivered by way of a completed “Family Violence Referral Form M52”, which contained various checkboxes and boxes for textual responses to predetermined questions. That form contained various locations that allowed the Second Expert to indicate the nature of the various species of conduct that the appellant alleged, by way of checking a checkbox labelled “actual”, “threatened”, “both actual and threatened”, or “neither actual nor threatened”. By checking the checkbox “neither actual nor threatened”, followed by relevant explanations as how she came to that view, it is apparent that the Second Expert expressly considered the allegations of threatening conduct. In the FCCA Judgment, the learned primary judge concluded (at [47]) that it could not:

…be inferred from the manner in which the Second Independent Expert treated the findings by Dr Vella or the submissions made on behalf of the applicant that the Second Independent Expert misunderstood the meaning of the term ‘relevant family violence’ for the purposes of the Regulations. Rather, the Second Independent Expert came to a different conclusion on this question to that which was agitated for on behalf of the applicant. This discloses no jurisdictional error.

1. With respect, I agree. Unlike in *Karsten*, where the reasons of the expert bespoke an incorrect understanding that a mere threat was beyond the concept of “relevant family violence”, here the suggestion appears to be little more than that the Second Expert must have proceeded upon a similarly incorrect understanding because she reached a different conclusion than that for which the appellant had agitated. Such an inference cannot soundly be drawn. There is nothing in the Second Expert’s opinion that demonstrates any incorrect understanding of what is or is not “relevant family violence”. In fact, the Second Expert’s opinion demonstrates that she was alive to the possibility that threats might fall within the meaning of that concept.
2. The appellant’s complaint goes further: her grounds of appeal state that doubts arising from inconsistencies in her narrative could not have been so strong that they were unable to be reconciled with her claim; and that that reality should underline that a misunderstanding as to what is or is not “relevant family violence” transpired. I reject that submission. In order to establish jurisdictional error, it is not sufficient merely to show that it was open to the Second Expert to be satisfied that inconsistencies could be reconciled with the overall material. Rather, it must be shown that it was *not* open to the Second Expert to conclude as she did, namely that the inconsistencies throughout, and the escalation of violence recounted within, the appellant’s account indicated significant unreliability: *BSE17 v Minister for Home Affairs* [2018] FCA 192, [33] (Moshinksy J). To ask this court to overturn the Tribunal’s decision on the basis sought is an invitation to indulge in impermissible merits review.
3. The first ground of appeal is not made out.

## Ground two

1. The appellant alleges that the FCCA fell into error by failing to accept that the Second Expert had not considered aspects of the intervention order documents and the submissions. The appellant appears to be referring to paragraph [54]‑[55] of the FCCA Judgment, where the learned primary judge held:

A fair reading of the Second Independent Expert’s opinion discloses that the Second Independent Expert did have regard to the report prepared by Dr Vella. Relevantly, the Second Independent Expert notes:

*Dr Vella concluded within her report that Mrs Naidu had been subject to psychological and financial abuse based on Mrs Naidu’s self reports, however indicated that her symptoms were a result of “cumulative distress, grief of the loss of a relationship that she speaks of as ‘the one’, and fear and uncertaintly (sic) about her future in Australia.*

Similarly, the first respondent submits it is unclear which aspects of the intervention order documents and the submissions made on behalf of the applicant at the tribunal hearing the applicant says were not considered by the Second Independent Expert. The Second Independent Expert makes reference to these materials in her report.

1. The appellant maintains that the primary judge failed to recognise that mere reference to material in a report does not equate to actual consideration of it.
2. The appellant also alleges that:
3. the primary judge wrongly accepted the submission of the first respondent that it was unclear which aspect of the intervention order documents and the submissions were said to have gone improperly unconsidered by the Second Independent Expert; and
4. her Honour ought to have clarified her understanding in that regard.
5. It was alleged that some combination of the matters described at [42]‑[44] above “did not provide substantial justice to the [appellant]”. Although there is some conceptual overlap, the appellant’s second ground of appeal does not perfectly marry with any of the grounds of review that she pursued before the FCCA. She likely requires leave to agitate the point on appeal. Whether that is so can be put aside momentarily. For the reasons that follow, the ground lacks merit. Either it should be rejected on that basis, or leave to agitate it (if required) should be denied on an equivalent basis.
6. To the extent that either the first respondent or the primary judge were unable to understand the appellant’s grounds of review, nothing turns upon that. The appellant acknowledges that she was on notice that there was an aspect of her grounds of review that may have been unclear, and she was given adequate opportunity to address any such want of clarity.
7. In any case, I reject the underlying contention. It is apparent that the Second Expert did properly consider the intervention order documents and the submissions provided to the Tribunal. Among other references to the Intervention Order in her opinion, she stated in the form of “additional information” (errors original):

Form 1410 submitted by Mrs Naidu on the 28th of September 2015 which documented ongoing threats perpetrated by her husband “if I do not get out of Australia or say something about him, he will see the end of me.” When asked by the writer why she had not disclosed these threats during interview and/or on other occassions, Mrs Naidu reported that she had forgotten to mention the threats. Mrs Naidu also documented within the statutory declaration that during the incident on the 25th of August 2015, her husband and in laws had threatened to assault her. This information was omitted in subsequent collatoral accounts and during interview with the writer.

…

Application and Summons for an Intervention Order dated 2nd of May 2016 and Intervention Order dated 31/5/2016 which detailed her agreeing to meet with her husband post their seperation. Mrs Naidu reported that her husband had demanded to know where she was working, whom she was living with, whether or not she had consulted with a lawyer and how she was allowed to remain in Australia despite him withdrawing sponsorship. She also stated that he had threatened that she should not stay in Australia if she did not return to the relationship. Mrs Naidu also reported having received further phone calls from her husband where he was shouting and threatening that she was still his wife and therefore required to inform him of her whereabouts. Mrs Naidu falied to report to the writer that she had met with her husband post seperation. When asked asked about the discrepancy, Mrs Naidu fell silent and either refused or was unable to provide an explanation.

1. It is clear from the Second Expert’s opinion that, not only did she refer to the intervention order documents and Tribunal submissions, she did so in a way that made clear that she had properly considered them.
2. The appellant’s written submissions assert that the existence of the Final Intervention Order, and the willingness of her Sponsor to accept that order, gave rise to a potential inference that the family violence complained of by the appellant had occurred. Again, that submission invites the court to review the Tribunal’s Decision on its merits. Those circumstances might well suffice to suggest that a different decision was open to be made; but they do not establish jurisdictional error.
3. Finally, the appellant alleges that the FCCA did not provide “substantial justice” to the appellant. “Substantial justice”, that is the obligation to decide each case on its merits and avoid technicalities, is a requirement that was imposed upon the Tribunal by s 353 of the Act. The FCCA’s role, by comparison, was to undertake judicial review: the Act, s 476. Absent jurisdictional error, the FCCA was required to dismiss the application. To ask that the FCCA provide “substantial justice” to the appellant is akin to asking that it review the Tribunal’s Decision on its merits.
4. The second ground of appeal is not made out.

## Ground three

1. Ground three did not feature in the appellant’s Judicial Review Application. To agitate it now, the appellant requires the court’s leave. For the reasons that follow, the ground lacks merit and leave to agitate it should (and will) be refused on that basis.
2. By her written submissions, the appellant contends that the Dr Vella Report and the existence of the Intervention Order are “demonstrative” of the appellant having been exposed to actual or threatened family violence. That contention rises no higher than to cavil with the merits of the Second Expert’s opinion. It does not identify any error of jurisdiction.
3. Nevertheless, it should be said that the Second Expert was not obliged to accept the evidence that was before her. Rather, she was required to make her own, *independent* assessment as to whether or not the appellant was a victim of relevant family violence: the Regulations, reg 1.21. There can simply be no doubt that she did so. Her conclusion is, of course, potentially open to criticism on its merits; but there is simply no basis presently for impugning it as a product of jurisdictional error.
4. The appellant’s third appeal ground goes further. It is suggested that there was an obligation (imposed upon somebody—neither the grounds of appeal nor the submissions specified who) to put the appellant on notice that the Tribunal or the Second Expert did not accept the appellant’s evidence. In fact, the Tribunal wrote to the appellant and told her that it had referred her claim for assessment by an independent expert; and, by way of the Tribunal’s Letter, wrote to the appellant and invited her to give comment upon or respond to the Second Expert’s opinion.
5. It may be the case that the appellant did not, in fact, receive the Tribunal’s Letter. Respectfully, the learned primary judge was correct, however, to hold that the Tribunal’s Letter “was deemed to have been received by the [appellant’s] representative (and, therefore, the [appellant]) at the end of [the day on which it was emailed] by virtue of section 379A(5)(b), section 379C(1) and (5) and section 379G(1) and (2) of the Act”: Primary Judgment, [95]. That is a complete answer to what the appellant maintains.
6. The third ground of appeal is not made out.

## Ground four

1. By her fourth appeal ground, the appellant alleges that the FCCA was in error insofar as it failed to find that she had been denied procedural fairness. Such a finding, she says, ought to have been made given:
2. that the Dr Vella Report had been “discounted without any reference to the [appellant]”; and
3. the “discounting” of:
   1. the attendance by the police (see above, [15](2));
   2. the shelter that had been provided by the police to the appellant; and
   3. the "report” provided by WAYSS Ltd.
4. The Second Expert, it was said, “discounted all the evidence or any of the evidence or submissions of the appellant as to the factual matrix of … what constituted family violence”. In fact, the Second Expert dedicated a paragraph to consideration of the Dr Vella Report, a paragraph to the events of 25 August 2015 (which included reference to the involvement of police), and a paragraph to the letter of support from WAYSS Ltd (which annexed a “Client Assessment and Referral Set”—presumably “the report” that the appellant complains was “discount[ed]”). To the extent that the appellant claims that the Second Expert “discounted” them by not duly considering them, such an argument cannot be sustained. To the extent that the appellant cavils with the conclusions that the Second Expert reached after considering them, what she seeks is something that the court is not empowered to afford: namely, the review of those conclusions on their merits.
5. Whilst it is true that the Second Expert did not consider the shelter that had been purportedly provided by the police to the appellant, that fact was not before the Tribunal, or the Second Expert, or the FCCA. On the evidence supplied by the appellant to the Department, the police offered, but the appellant did not accept, access to a shelter.
6. A further difficulty for the appellant regarding her fourth ground of appeal is that the FCCA was only asked to consider the question of procedural fairness in the context of the appellant’s third ground of review (see above, [27]). It was said that the Tribunal’s Letter had not been received by the appellant and that the Tribunal’s decision to proceed to resolve her Visa Application in the absence of any response to it was apt to constitute a denial of procedural fairness.
7. To the extent that the appellant asks this court to consider whether or not procedural fairness was afforded in the circumstances outlined at [58] above, this court must find that it was. In *SZMAR v Minister for Immigration and Citizenship* (2009) 112 ALD 524, Barker J described the scope of procedural fairness obligations in the context of reviewing decisions pursuant to Div 4 of Part 7 of the Act. Those provisions of the Act pertain to decisions about the granting or cancellation of protection visas. Speaking of s 422B, which is titled “exhaustive statement of natural justice hearing rule”, his Honour observed (at [72]):

[I]t is to the Act that one must primarily turn to find or define the Tribunal’s obligations to act fairly or provide procedural fairness. This is because, in the area of migration law in Australia, the Act has delimited the ordinary grounds of judicial review of administrative action that otherwise apply in most spheres of official decision‑making in Australia.

1. The equivalent of s 422B in Part 5 of the Act (which is presently relevant) is s 357A. Like s 422B of the Act, s 357A of the Act was introduced by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth). It clarifies the position that Div 5 of Part 5 is, like Div 4 of Part 7, taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters with which it deals. Here, there is no aspect of the Tribunal’s Decision that failed to comply with Div 5 of Part 5 of the Act.
2. To the extent that the appellant asks the court to consider that certain evidence was improperly “discounted”, that is nothing more than an invitation to consider whether certain evidence was given appropriate weight. As Davies, Steward and Jackson JJ observed in *Leone v Minister for Home Affairs* (2020) 277 FCR 526, 543 [41]:

Attacking the “weight” to be given to a factual consideration is merits review, save for the most extreme of cases that would justify a finding of legal unreasonableness. It is a basal principle of administrative law that, generally speaking, it is for the decision‑maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising statutory power: *Minister for Aboriginal Affairs v Peko‑Wallsend Ltd* (1986) 162 CLR 24 at 41.

1. By her written submissions, the appellant maintained that:
2. the Second Expert’s comments referred to the Dr Vella Report, but not the overall finding that psychological and financial abuse had occurred, and that the Second Expert made no reference to particular submissions made on behalf of the appellant;
3. the Tribunal did not acknowledge or refer to the submissions made on behalf of the appellant at approximately minute 33 of the Tribunal hearing; and
4. the Intervention Order and the submissions made on behalf of the appellant were relevant to the appellant’s claim of having suffered family violence.
5. It was not necessary for the Second Expert, or the Tribunal specifically to refer to every element within every piece of evidence, and every individual statement made by the appellant in submissions. It is enough that the Tribunal and the Second Expert read, identified, understood and evaluated the appellant’s representations: *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497, 512 [36] (Kiefel CJ, Keane, Gordon and Steward JJ; Gageler J agreeing with the outcome; Edelman and Gleeson JJ dissenting but not on that point). It is clear from the opinion of the Second Expert that she had sufficient regard to the Dr Vella Report and the respective submissions made on behalf of the appellant. Equally, it is clear that the Tribunal was required to (and did) take as correct the opinion of the Second Expert.
6. The appellant’s fourth ground of appeal must fail.

## Ground five

1. In her articulation of appeal ground five, the appellant refers to when “both” intervention orders were made. In fact, the First Intervention Order Application was refused. Only one intervention order was made. It may be that the appellant intends to refer to the two intervention order applications (namely the First Intervention Order Application and the Second Intervention Order Application), rather than the singular Intervention Order. Alternatively, it may be that the appellant intends to refer to the singular Intervention Order. As will become apparent, it does not much matter.
2. Either way, the appellant submits that, at that time (that is, at the time of the making of each of the two applications, or alternatively at the time that the Intervention Order was made), her marriage to her Sponsor had not dissolved, and that the applications or order arose out of her and her Sponsor attempting to reconcile their differences. By ground five, it is suggested that the Intervention Order amounted to a judicial determination that she had been subjected to relevant family violence; and that the FCCA was in error in failing to so find.
3. Appeal ground five was not pursued as an independent ground of challenge before the FCCA. In order to agitate it on appeal, the appellant requires the leave of the court. For the reasons to which I shall now come, the ground is not sufficiently arguable to warrant the grant of leave.
4. The only ground of review before the FCCA that bore upon the intervention order applications (or the actual Intervention Order) was ground two (see above, [27]). The appellant alleged that the Tribunal fell into error by failing to take into account that “[t]he Tribunal had notice of the [appellant’s] attempts to obtain intervention orders against her former partner and her former father in law and a final intervention order made by the Magistrates’ Court of Victoria”. It is immediately apparent that the FCCA was not asked to make any finding as to whether the marriage had or had not dissolved at the time that the intervention order applications (or the Intervention Order) were made. The appellant cannot now establish error on the part of the FCCA insofar as it did not make a finding that it was never asked to make.
5. Further, and in any event, the factual foundation upon which appeal ground five rests is doubtful, to say the least. Before the Tribunal was a statutory declaration of the appellant dated 28 September 2015. It recorded that the appellant’s relationship with her Sponsor ended on 25 August 2015—which was prior to the First Intervention Order Application.
6. Ground five does not, however, stop there. As has been noted, the appellant alleges that “[t]he intervention orders judicially determined the violence during the relationship”. Again, the use of the plural “orders” makes it unclear whether the appellant is referring to the two intervention order applications, or the single Intervention Order. Counsel for the appellant asserted that the Intervention Order, which was applied for and granted after the appellant and her Sponsor had separated, was “an extension of the conduct of the former partner during the marriage” such that the intervention order was “in effect…a judicial determination of family violence”. By the Second Expert “paying little or no weight” to the Intervention Order, this was said to amount to “not taking the Intervention Order into account”.
7. There appear to be two allegations embedded within the second dimension to ground five, namely that:
8. as a result of the Intervention Order, the appellant ought to have been taken to have suffered family violence pursuant to reg 1.23(4); and
9. the Second Expert failed properly to consider the intervention order applications (or Intervention Order).
10. In relation to the first of those propositions, reg 1.23(4) is (and was) conditional upon the violence that led to the granting of the order having occurred “while the married relationship…existed between the alleged perpetrator and the spouse…of the alleged perpetrator”: the Regulations, reg 1.23(5). The Tribunal correctly observed, however, that the Second Intervention Order Application (which resulted in the Intervention Order), was issued “after the…relationship had broken‑down” and notes the appellant’s own remarks in the Second Intervention Order Application—made 8 months after separation—that “[a]t the time of our separation I applied for [the First Intervention Order], however it was refused”. Notably, the Second Intervention Order Application only makes allegations in relation to her Sponsor that occurred post-separation.
11. After outlining the findings of the Tribunal, her Honour concluded that the finding that the Tribunal was unable to rely on a judicially‑determined claim was “clearly open to the Tribunal”: FCCA Judgment, [72]. With respect, that conclusion is just as clearly correct.
12. In relation to the second of the two propositions outlined at [74] above, the appellant appears to take the view that the Second Expert ought to have found that she was a victim of family violence. As much was said to be evident in part by her having made the Second Intervention Order Application, which, it was said, was “an extension of the conduct…during the marriage”.
13. That submission cannot succeed. The Second Expert’s opinion discloses appropriate consideration of the applications and the Intervention Order, observing that the Second Intervention Order Application and Intervention Order only “detailed her agreeing to meet with her husband post their separation”. As with other aspects of her appeal, the appellant again invites this court to review the Tribunal’s Decision on its merits.
14. That invitation is declined. The fifth ground of appeal is not (or, if leave to pursue it were granted, would not be) made out.

## Ground six

1. The sixth and final ground of appeal asserts that the FCCA was wrong to find that, having regard to the chronology of events following the delivery of the Second Expert’s opinion, substantial justice was provided to the appellant.
2. As discussed above (at [50]), substantial justice appears to be a reference to the obligation imposed upon the Tribunal by s 353 of the Act. Conceptually, it should be understood to encompass the deciding of any given case on its merits and in a way that avoids technicalities: *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, 604 [7] (Gleeson CJ).
3. The appellant submits that it was “clear” from the Appellant’s Letter that the Tribunal’s Letter had not been received. Whether that is so is debateable; but, in any event, the appellant faces a taller hurdle. Section 379C of the Act is no mere technicality. Respectfully, the learned primary judge was correct when she held (FCCA Judgment, [96]):

In those circumstances, and having regard to section 357A of the Act, even if the court were to accept that the applicant’s representative did not receive the letter sent on 23 March 2018, it would not amount to a breach of procedural fairness, as alleged.

This conclusion is not affected by the applicant’s representative’s letter of 19 July 2019. The receipt of that letter did not, and indeed in light of the legislative provisions referred to above, arguably could not, alter the procedural fairness obligations which the tribunal was bound to follow.

1. The Tribunal did decide the appellant’s case on its merits and in a way that avoided technicality. Any suggestion that the Tribunal’s obligations to provide substantial justice under the Act were not complied with cannot succeed.
2. The sixth ground of appeal is not made out.

# Disposition

1. None of the grounds of appeal (including those for which the appellant requires leave) is made good and the appeal should (and will) be dismissed on that basis. There is no reason why the usual order for costs ought not to be made and it will be.

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| I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Snaden. |

Associate:

Dated: 21 November 2023