# HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

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SIE SOK APPELLANT

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR RESPONDENTS

*Sok v Minister for Immigration and Citizenship* [2008] HCA 50
*16 October 2008*
M60/2008

**ORDER**

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 5 March 2008 and 2 April 2008 and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

**Representation**

D S Mortimer SC with R M Niall for the appellant (instructed by Erskine Rodan & Associates)

M A Perry QC with W S Mosley for the first respondent (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent

## CATCHWORDS

### Sok v Minister for Immigration and Citizenship

Citizenship and migration – Visa – Spouse visa – Non-judicially determined claim of domestic violence – Grant of relevant permanent visa required visa applicant to remain spouse of sponsor at time of grant – Exception where relationship had ceased and visa applicant had suffered domestic violence committed by sponsoring spouse – Minister's delegate not satisfied applicant was spouse of sponsor – Grant of visa refused – After Minister's refusal, applicant claimed to have suffered domestic violence – Timing of claim – Whether domestic violence exception can be engaged where applicant first raises domestic violence claim in application to Migration Review Tribunal ("Tribunal") for review of Minister's refusal – Whether Div 1.5 of Migration Regulations 1994 (Cth) ("Regulations") applies to review by Tribunal or confines criteria for grant of visa to claims before original decision-maker.

Citizenship and migration – Visa – Spouse visa – Non-judicially determined claim of domestic violence – Conduct of review by Tribunal – Tribunal to exercise powers and discretions conferred by Migration Act 1958 (Cth) ("Act") on Minister – Under Div 1.5 of Regulations, Minister must be satisfied applicant suffered domestic violence – If not satisfied, Minister must take opinion of independent expert as correct – Whether Tribunal can reach state of non-satisfaction without permitting applicant to appear before Tribunal to give evidence and present arguments under s 360 of Act – Whether review conducted in accordance with requirements of Div 5 of Pt 5 of Act – Whether opinion of independent expert dispositive.

Words and phrases – "non-judicially determined claim of domestic violence", "not satisfied", "relevant domestic violence", "spouse".

*Migration Act* 1958 (Cth), ss 348, 357A(1), 359, 360.
Migration Regulations 1994 (Cth), reg 1.15A, Div 1.5, Sched 2 cl 100.221.

1 GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. In 2002, the appellant, a citizen of Cambodia, married an Australian citizen. His wife sponsored his application for a temporary visa[1] and a permanent visa[2] permitting him to enter and remain in Australia. The temporary visa was granted and the appellant entered Australia in 2002.

2 Subject to a qualification which, as will later appear, is of central importance in this case, one condition for the grant of the permanent visa for which the appellant applied is that, at the time the visa is granted, the visa applicant be the "spouse" of the sponsor. Regulation 1.15A of the Migration Regulations 1994 (Cth) ("the Regulations") identifies when, for the purposes of the Regulations, "a person is the spouse of another person". So far as presently relevant, that requires[3] that the Minister be satisfied that the persons concerned

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**1** Partner (Provisional) (Class UF) visa Subclass 309 (Spouse (Provisional)).

**2** Partner (Migrant) (Class BC) visa Subclass 100 (Spouse).

**3** Regulation 1.15A(1) and (1A) provided:

> "(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:
>
> (a) in a married relationship, as described in subregulation (1A); or
>
> (b) in a de facto relationship, as described in subregulation (2).
>
> (1A) Persons are in a married relationship if:
>
> (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and
>
> (b) the Minister is satisfied that:
>
> (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
>
> (ii) the relationship between them is genuine and continuing; and
>
> (iii) they:
>
> (A) live together; or

(Footnote continues on next page)

"have a mutual commitment to a shared life as husband and wife to the exclusion of all others"[4], that "the relationship between them is genuine and continuing"[5], and that either[6] they live together or "do not live separately and apart on a permanent basis".

3 The qualification to the requirement that the visa applicant remain the "spouse" of the sponsor, which was said to be engaged in this case, is that, where the relationship between the applicant and the sponsor has ceased, the applicant will remain entitled to a permanent visa if, after the applicant first entered Australia as the holder of a relevant temporary visa, the applicant suffered domestic violence committed by the sponsoring spouse[7].

4 Two questions arise in this appeal. First, can this domestic violence qualification be engaged if the visa applicant first raises a claim of domestic violence in an application to the Migration Review Tribunal ("the Tribunal") for review of the refusal of the Minister's delegate to grant the visa sought? The second question concerns how the Tribunal is to conduct its review. The Tribunal is bound[8] to invite an applicant for review "to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review". May the Tribunal decide that it is not satisfied that the alleged victim has suffered relevant domestic violence without

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(B) do not live separately and apart on a permanent basis."

**4** reg 1.15A(1A)(b)(i).

**5** reg 1.15A(1A)(b)(ii).

**6** reg 1.15A(1A)(b)(iii).

**7** Migration Regulations 1994 (Cth) ("the Regulations"), Sched 2, cl 100.221(4)(c)(i)(A). The Migration Amendment Regulations 2007 (No 13) (Cth) amended this clause and other provisions of the Regulations, including provisions of Div 1.5, by substituting the expression "family violence" for "domestic violence" and making a number of consequential amendments. Neither party suggested that anything turned on the alterations made in 2007. It is therefore convenient to continue to refer to the Regulations in the form in which they stood when the Tribunal was considering the matter.

**8** *Migration Act* 1958 (Cth) ("the Act"), s 360.

having permitted the applicant to appear before the Tribunal to give evidence and present arguments relating to that issue?

5 Both questions should be answered in the sense urged by the appellant. The Tribunal must consider a claim of domestic violence, made by an applicant for a visa of the kind here in question, even though no such claim was made before the Minister refused to grant the visa sought. The Tribunal may not conclude that it is not satisfied that the alleged victim has suffered relevant domestic violence without first having invited the applicant for review to appear before the Tribunal to give evidence and present arguments and, if the invitation is accepted, before hearing the evidence and arguments which the applicant for review seeks to place before the Tribunal in relation to whether he or she has suffered relevant domestic violence.

The course of events

6 The appellant's applications for a temporary visa and for a permanent visa were made together in October 2002. A condition for the grant of the temporary visa that was sought was[9] that application for that visa be made at the same time and place as an application for the relevant permanent visa. Subject to some exceptions which are not now material, one of the criteria for the grant of the permanent visa now in issue is[10] that at least two years have passed since the application was made. The appellant's application for a permanent visa was, therefore, not considered until 2005. In March 2005, following an interview by a delegate of the Minister and a visit to two addresses where it was thought that the appellant and his wife may be living, the Minister's delegate decided to refuse the visa on the ground that the delegate was not satisfied that the appellant was the spouse of the sponsor. Pursuant to s 347 of the *Migration Act* 1958 (Cth) ("the Act"), the appellant applied for review of this refusal by the Tribunal.

7 In February 2006, the review was still pending and the appellant, through his migration agent, submitted materials to the Tribunal claiming that he had been the victim of domestic violence at the hands of his sponsor.

8 Division 1.5 of the Regulations (regs 1.21-1.27) makes special provisions relating to domestic violence. Regulation 1.22(1) provides that:

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**9** The Regulations, Sched 1, item 1220A(3)(c).

**10** reg 2.03 and Sched 2, cl 100.221(2)(c).

> "A reference in these Regulations to a person having suffered domestic violence is a reference to a person being taken[11], under regulation 1.23, to have suffered domestic violence."

Regulation 1.23 identifies when a person is taken to have suffered or committed domestic violence. It does that by dealing separately with cases where a court has decided that there has been domestic violence, and cases where there is what is called a "non-judicially determined claim of domestic violence"[12]. The claim made by the appellant was of the latter kind. Accordingly, the appellant had to submit evidence in support of his claim in accordance with the requirements of regs 1.23(1A)(b)(ii) and 1.24. It is not disputed that the material the appellant submitted to the Tribunal met those requirements.

9 Regulation 1.23(1B) provides for the determination of a non-judicially determined claim of domestic violence. The opening words of reg 1.23(1B) are: "[i]f an application for a visa includes a non-judicially determined claim of domestic violence, the Minister must consider whether the alleged victim has suffered relevant domestic violence". "[R]elevant domestic violence" is defined[13] as "violence against the alleged victim or his or her property that causes the alleged victim ... to fear for, or to be apprehensive about, the alleged victim's personal well-being or safety".

10 Regulation 1.23(1B) then goes on to provide for the pursuit of alternative courses according to whether the Minister is satisfied or is not satisfied that the alleged victim has suffered relevant domestic violence. So, the regulation provides, as noted earlier, that "the Minister must consider whether the alleged victim has suffered relevant domestic violence", and continues:

> "and:
>
> (a) *if satisfied* that the alleged victim has suffered relevant domestic violence – consider the application on that basis; or

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**11** Section 5(23) of the Act provides that "[t]o avoid doubt, in this Act ***is taken***, when followed by the infinitive form of a verb, has the same force and effect as ***is deemed*** when followed by the infinitive form of that verb".

**12** reg 1.23(1A).

**13** reg 1.23(2)(b).

(b) *if not satisfied* that the alleged victim has suffered relevant domestic violence – seek the opinion of an independent expert about whether the alleged victim has suffered relevant domestic violence". (emphasis added)

Regulation 1.23(1C) then provides for what is to occur once the Minister, not being satisfied that the alleged victim has suffered relevant domestic violence, has sought the opinion of an independent expert. It provides that:

> "The Minister must take an independent expert's opinion on the matter mentioned in paragraph (1B)(b) 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 domestic violence."

11 These provisions of reg 1.23 may be contrasted with the provisions they replaced. The provisions in force before the applicable form of reg 1.23 was made in 2005[14] provided that a person was taken to have suffered domestic violence if the alleged victim submitted certain kinds of evidence. The evidence submitted was not to be weighed or evaluated; the conclusion that the alleged victim was taken to have suffered domestic violence followed from the submission of evidence that met the description given in the Regulations[15].

12 By contrast, the provisions of reg 1.23 that are applicable in this case oblige the Minister to consider whether the alleged victim has suffered relevant domestic violence and then take alternative courses according to whether the Minister is satisfied that the alleged victim has suffered such violence, or is not satisfied of that fact. That is, unlike the earlier form of Regulations, reg 1.23 requires evaluation of the claim that is made by the visa applicant. And as these reasons later show, when the Tribunal undertakes its task of reviewing the refusal of a visa, it must evaluate the applicant's claim to have suffered relevant domestic violence.

13 In the present case, none of the provisions of Div 1.5 of the Regulations was engaged when the delegate of the Minister refused to grant the appellant a permanent visa. The appellant had not then made a claim that he had suffered

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**14** By the Migration Amendment Regulations 2005 (No 4) (Cth).

**15** *Cakmak v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 183 at 198-199 [49]-[53].

domestic violence. That claim was first made while the review sought by the appellant of the delegate's refusal was pending in the Tribunal.

14 The Tribunal sought to conduct its review of the decision to refuse to grant the appellant a permanent visa according to the steps and procedures prescribed by Div 1.5. Thus, in response to the submission of written evidence supporting the appellant's claim to have suffered domestic violence, the member constituting the Tribunal for the review, without inviting the appellant to appear to give evidence or make submissions, recorded a finding that she was "not satisfied" that the appellant had suffered relevant domestic violence. The Tribunal then referred the matter for the opinion of an independent expert.

15 In April 2006, the Tribunal received an opinion from an independent expert that the appellant had not suffered relevant domestic violence. A copy of the opinion was sent to the appellant and the appellant made submissions in response. The Tribunal then appointed a hearing but later cancelled that appointment. In the meantime, the appellant provided further evidence in support of his claim to have suffered domestic violence and on 29 May 2006 the Tribunal told the appellant that it would seek a further opinion from an independent expert. It is unnecessary to explore why the Tribunal considered it appropriate to take this step.

16 In July 2006, the Tribunal received the second independent expert's opinion, again to the effect that the appellant had not suffered relevant domestic violence. Again, the Tribunal sent a copy of the opinion to the appellant, and on 10 October 2006 the Tribunal held a hearing at which the appellant adduced evidence and presented arguments in support of his claim to have suffered domestic violence.

17 On 30 October 2006, the Tribunal affirmed the delegate's decision to refuse to grant the appellant the permanent visa he sought. The Tribunal's reasons indicated that it acted on the basis that it was required to take as correct the independent expert's opinion that the appellant had not suffered relevant domestic violence.

18 The appellant applied to the Federal Magistrates Court for relief under s 39B of the *Judiciary Act* 1903 (Cth), and associated relief, directed to the Tribunal's decision. The Federal Magistrates Court (Riley FM) granted[16] the

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**16** *Sok v Minister for Immigration* [2007] FMCA 1525.

appellant the relief he sought. The Court declared the Tribunal's decision to be "unlawful, void and of no force and effect" and made orders in the nature of certiorari to quash the decision, prohibition prohibiting the Tribunal and the Minister from giving effect to the decision, and mandamus requiring the Tribunal to rehear and determine according to law the application for review. The Federal Magistrate held[17] that the Tribunal was obliged by s 360 of the Act to invite the appellant to a hearing before seeking the opinion of an independent expert and that it had failed to do that.

19 The Minister appealed to the Full Court of the Federal Court of Australia. That Court (French, Lindgren and Jacobson JJ) allowed[18] the Minister's appeal, set aside the orders of the Federal Magistrates Court, and ordered that the proceedings in the Federal Magistrates Court be dismissed.

20 The Full Court allowed the Minister's appeal on the basis that the provisions made by Div 1.5 of the Regulations applied only to the original decision-maker and did not apply to the Tribunal in the exercise of its review function[19]. It followed, in the Full Court's opinion[20], that the Tribunal erred in concluding that the appellant could be taken to have suffered domestic violence "notwithstanding that he had not been taken to have suffered domestic violence when his application for the visa had been considered by the Minister". The Full Court concluded[21] that "[i]t is only in the application to the Minister that a person can be 'taken' to have suffered domestic violence".

21 These conclusions were not urged by the Minister. When raised by the Full Court in the course of argument, the Minister submitted that neither the provisions of Div 1.5 of the Regulations nor the Act as a whole precluded the Tribunal dealing with a claim to have suffered domestic violence which was a claim first made in connection with a review by the Tribunal.

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**17** [2007] FMCA 1525 at [20], [27].

**18** *Minister for Immigration and Citizenship v Sok* (2008) 165 FCR 586.

**19** (2008) 165 FCR 586 at 597 [61].

**20** (2008) 165 FCR 586 at 597 [67]

**21** (2008) 165 FCR 586 at 597 [67].

22 Although, in light of the conclusions the Full Court reached about the application of Div 1.5 of the Regulations, it was not necessary for it to do so, the Full Court further concluded[22] that the Tribunal was not required by s 360 of the Act to invite the appellant to appear before it, before forming the view that the Tribunal was not satisfied that the alleged victim has suffered relevant domestic violence. It followed, in the opinion of the Full Court, that if Div 1.5 of the Regulations applied to the Tribunal, the Tribunal would have been entitled to seek an independent expert opinion when it did, and that having obtained that opinion, the Tribunal would have been bound to give effect to the conclusion reached in that opinion.

23 By special leave the appellant now appeals to this Court. In this Court both parties submitted that the Full Court erred in concluding that Div 1.5 of the Regulations applies only to the original decision-maker and has no application to the Tribunal in the exercise of its review function and both parties submitted that the Full Court erred in concluding that it is only in the application to the Minister that a person can be taken to have suffered relevant domestic violence. The parties take opposing positions, however, about whether the Tribunal may reach the point of not being satisfied that the alleged victim has suffered relevant domestic violence before having invited the applicant for review to give evidence and submit arguments.

A claim of domestic violence made after the Minister's refusal

24 The relevance of the timing of the appellant's claim to have suffered domestic violence is to be determined by identifying the Tribunal's task. The decision which s 348 of the Act obliged the Tribunal to review was the decision by a delegate of the Minister to refuse to grant the appellant a particular visa.

25 The way in which the Tribunal conducts its review is regulated by the Act. Both parties accepted that, in a case like the present, where the decision under review is a decision to refuse the grant of a visa, the central question for the Tribunal will be whether, at the time the Tribunal makes its decision, the visa applicant is entitled to the grant of the visa that is sought. So much appears to follow from the provisions of s 65(1), which oblige the Minister to grant a visa if the Minister is satisfied that the criteria for the grant of the relevant visa are met, and the grant of power to the Tribunal by s 349(1) to "exercise all the powers and discretions that are conferred by this Act on the person who made the decision"

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**22** (2008) 165 FCR 586 at 598 [72].

or by analogy with the cases[23] concerning the remedying on review of an otherwise incomplete or invalid visa application. The point not being debated, it is not necessary to pursue it further.

26 The starting point for considering the relevance of the claim the appellant first made to the Tribunal, that he had suffered domestic violence, is to examine the criteria for the grant of the relevant visa. Those criteria are to be found in cl 100.221 of Sched 2 to the Regulations. So far as now relevant, the critical provision is cl 100.221(4) which provides that:

> "The applicant meets the requirements of this subclause if:
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> (a) the applicant first entered Australia as the holder of a Subclass 309 (Spouse (Provisional)) visa and ...
>
> (i) continues to be the holder of that visa; ...
>
> and
>
> (b) the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring spouse has ceased; and
>
> (c) after the applicant first entered Australia as the holder of the visa mentioned in paragraph (a) ...
>
> (i) ...
>
> (A) the applicant ...
>
> has suffered domestic violence committed by the sponsoring spouse".

27 In deciding how the Tribunal is to set about determining whether the visa applicant has suffered domestic violence committed by the sponsor it is necessary to notice two points. First, as noted earlier, reg 1.22 provides that the

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**23** See, for example, *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495; *Thayananthan v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 297; *SZGME v Minister for Immigration and Citizenship* (2008) 168 FCR 487 at 494-498 [22]-[36].

reference in cl 100.221(4)(c)(i)(A) to the applicant having suffered domestic violence "is a reference to a person being taken, under regulation 1.23, to have suffered domestic violence". Secondly, when, as here, a visa application is refused, the applicant seeks review by the Tribunal, and a criterion for granting the relevant visa, which the applicant claims to meet, is that he has suffered domestic violence, the question – whether a person is taken under reg 1.23 to have suffered domestic violence – is committed to the Tribunal.

28 Contrary to the opinion of the Full Court[24], the relevance of the appellant's claim to have suffered domestic violence is not to be determined by first considering the terms of Div 1.5 and observing that the provisions of that Division are hinged upon an application for a visa and that an application for a visa is made to the Minister. Neither the provisions of Div 1.5 generally, nor the frequent references made in the Division to the Minister, confine the criteria for the grant of the visa prescribed by cl 100.221 to those cases in which the visa applicant has made a claim of domestic violence *before* the initial consideration of the visa application. Rather, in reviewing the refusal to grant the permanent visa, the Tribunal is to determine whether the criterion for the grant of that visa (that the appellant "has suffered domestic violence committed by the sponsoring spouse") is met. And that criterion is met only if the appellant is to be taken, under reg 1.23, to have suffered domestic violence. In deciding that question, the Tribunal may exercise all of the powers and discretions conferred by that Division of the Regulations on the Minister.

29 Hence, the first question identified at the outset of these reasons – can the domestic violence qualification to the relevant visa requirements be engaged if the claim is first made in the Tribunal – is to be resolved in the appellant's favour.

Seeking an independent expert's opinion before a Tribunal hearing

30 Regulation 1.23(1B) provides that, where there is a non-judicially determined claim of domestic violence, the Minister must consider whether the alleged victim "has suffered relevant domestic violence" and then, *if not satisfied* that the alleged victim has suffered relevant domestic violence, seek the opinion of an independent expert. The Minister must[25] take the opinion of the independent expert to be correct.

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**24** (2008) 165 FCR 586 at 597 [63]-[66].

**25** reg 1.23(1C).

31 When the Tribunal comes to exercise the powers and discretions given to the Minister under reg 1.23, and in particular when the Tribunal is considering an application for a visa that includes a non-judicially determined claim of domestic violence, the consideration which the Tribunal must give to the claim is regulated by those provisions of the Act which prescribe the Tribunal's procedures. Of critical importance to the present matter is the obligation imposed on the Tribunal by s 360(1) to invite the applicant for review to appear before the Tribunal to give evidence and present arguments relating to "the issues arising in relation to the decision under review".

32 In many, perhaps most, cases, "the issues arising in relation to the decision under review" that are referred to in s 360(1) will most easily be identified[26] by considering the reasons for decision given by the primary decision-maker (the Minister or the Minister's delegate). In the present case, however, the appellant raised a new issue in relation to the decision under review when he made his claim to have suffered domestic violence. Once the appellant made the claim that he had suffered relevant domestic violence, the Tribunal was bound by s 360 to invite him to appear before it to give evidence and present arguments relating to that issue, and any other issue that could be described as "arising in relation to the decision under review".

33 As the Minister rightly submitted, s 359 of the Act permits the Tribunal, in conducting its review, to "get any information that it considers relevant". In particular[27], the Tribunal may invite a person to give additional information. Sections 359A, 359B and 359C make consequential provisions about giving the applicant for review certain information, about how an invitation to give additional information or to comment on information is to be extended, and about the consequences that are to attach to a failure to give additional information or comments. Thus, so the Minister's argument proceeded, it was open to the Tribunal to seek additional information concerning an applicant's claim to have suffered relevant domestic violence. More particularly, the Minister submitted, it was open to the Tribunal to obtain further "evidence" concerning the claim by seeking the opinion of an independent expert of the kind referred to in reg 1.23(1B)(b) if, on the material then before it, the Tribunal was not satisfied

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**26** *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162-163 [34]-[35]; [2006] HCA 63.

**27** s 359(2).

that the alleged victim had suffered relevant domestic violence. The Minister recognised, indeed submitted, that the Tribunal was then bound to take the independent expert's opinion to be correct for the purposes of deciding whether the alleged victim satisfied the relevant visa criterion. But the Minister further submitted that, while this may "narrow" or "confine" the issues arising in relation to the decision under review, it would not deprive s 360(1) of any relevant operation. It was said not to have that effect because the obtaining of an opinion would leave open for argument whether the opinion that had been obtained satisfied the description used in reg 1.23(1B)(b): "the opinion of an independent expert".

34 The conclusions asserted by the Minister should not be accepted. The bases for rejecting those conclusions can be expressed in a number of different ways but all of them depend upon giving close attention to the relevant statutory requirements, particularly s 360 of the Act.

35 The need to focus closely upon those provisions of the Act that regulate the Tribunal's conduct of its review is reinforced by consideration of s 357A(1). That sub-section, the validity of which was assumed by both the appellant and the Minister, provides that Div 5 of Pt 5 of the Act (ss 357A-367) "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with". It follows, then, that s 357A provides that the prescription by s 360, of when the Tribunal is to invite an applicant to appear before it to give evidence and present arguments, is an exhaustive statement of that aspect of the requirements of the natural justice hearing rule.

36 The Minister submitted that reg 1.23(1B) obliged the decision-maker to consider whether there had been relevant domestic violence and then choose between alternative courses according to whether the decision-maker was satisfied or not satisfied about that question. The Minister's submission that, when the Tribunal was the relevant decision-maker, it could arrive at what was described, in argument, as a "fork" in the procedural road by pronouncing itself not satisfied, by the material then available, that the alleged victim has suffered relevant domestic violence, sought to locate the relevant fork in the road at a point which attached no significance to s 360(2)(a). That provision dispenses the Tribunal from the obligation to invite the applicant to appear to give evidence and present arguments if, on the basis of the material before it, the Tribunal considers that it should decide the review in the applicant's favour. And if the Tribunal were to form that opinion, it would follow that par (a) of reg 1.23(1B) would be engaged, because the Tribunal would be satisfied that the alleged victim had suffered relevant domestic violence. In the words of reg 1.23(1B)(a),

the Tribunal would then be bound to consider the application for review "on that basis".

37 The necessary premise for the Minister's argument was that the Tribunal was *not* satisfied on the basis of the material before it that the review should be decided in the applicant's favour. The Minister submitted that the Tribunal could nonetheless take the second of the two roads identified in reg 1.23(1B) by declaring itself not to be satisfied that the alleged victim had suffered relevant domestic violence. So to read the provisions denies that the only relevant qualification to the obligation imposed on the Tribunal by s 360(1), to invite the applicant to attend to give evidence and present arguments, is provided by s 360(2)(a). And by hypothesis, s 360(2)(a) was not engaged in this case.

38 The same conclusion can be expressed in terms drawn from reg 1.23. In those terms it may be said that the Tribunal has not undertaken its task of considering whether the alleged victim has suffered relevant domestic violence before either, in exercise of the power given by s 360(2)(a), it decides the review in the applicant's favour on the basis of the material before it, or it exercises the power given by s 360(1), and invites the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review. If the Tribunal is not satisfied on the material before it that it should decide the review in the applicant's favour, it must give the applicant the hearing required by s 360(1). And if that is the Tribunal's obligation, the Tribunal cannot be said for the purposes of reg 1.23 to have *considered* the issues raised on the review, in the manner required by the Act, until it has issued the requisite invitation under s 360(1) and, if the invitation is accepted, heard the evidence and arguments that are advanced.

39 The last basis for rejecting the Minister's submissions focuses upon that step in the Minister's argument which sought to characterise the obtaining of an independent expert opinion as the Tribunal obtaining "further information" or "evidence". Neither of those descriptions is apt.

40 It is necessary to bear steadily in mind that obtaining the opinion of an independent expert will determine any issue about whether there had been relevant domestic violence. That is to say, the obtaining of an opinion that satisfies the description in reg 1.23(1B)(b) – "the opinion of an independent expert" – is dispositive of an issue arising in relation to the decision under review by the Tribunal. Indeed, in the present case, the opinion was treated as dispositive of the appellant's claim to a permanent visa. It is therefore not right to argue, as the Minister's submission did, from a premise that the Tribunal can obtain additional information relating to an issue arising in relation to the

decision under review, to a conclusion that an issue arising on the review may be decided against the applicant for review without first having invited the applicant to appear to give evidence and present arguments. Describing the opinion of the independent expert as "further information" or "evidence" neither requires nor permits that conclusion. The conclusion urged by the Minister would reduce the hearing required by s 360 to an opportunity to comment on whether the opinion obtained met the statutory criteria. It would deny any operation for the section in respect of an issue arising in relation to the decision under review that will often be an issue of critical importance to the fate of the review. That step cannot be taken.

41 The second question identified at the outset of these reasons – may the Tribunal decide that it is "not satisfied" of an applicant's claim to have suffered domestic violence before inviting the applicant to give evidence and present arguments – should also be resolved in the appellant's favour.

Conclusion and orders

42 For these reasons, the Federal Magistrate was right to conclude that the Tribunal had not conducted the review which the appellant had sought in accordance with the requirements of the Act, in particular s 360. The failure to do so constituted jurisdictional error and the Federal Magistrates Court was right to grant the appellant the relief which it did.

43 It follows that the appeal to this Court should be allowed with costs, the orders of the Full Court of the Federal Court of Australia made on 5 March 2008 and 2 April 2008 should be set aside and in their place there should be orders that the appeal to the Full Court of the Federal Court of Australia is dismissed with costs.