FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

Nugrohowati v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamCG2 22

File number:	ADG 266 of 2020
Judgment of:	**JUDGE YOUNG**
Date of judgment:	21 January 2022
Catchwords:	**MIGRATION** - application for judicial review of a decision of the Administrative Appeals Tribunal to refuse Partner Visa - where the applicant sought a visa on the basis of family violence - where the Tribunal not satisfied the applicant suffered family violence - where the Independent Expert not satisfied the applicant suffered family violence - where the Independent Expert's opinion taken to be correct by the Tribunal - whether the Independent Expert adequately considered test for family violence - court satisfied the Independent expert failed to properly apply legal test for family violence - jurisdictional error made out - costs reserved
Legislation:	*Criminal Code Act 1983* (NT) ss 1, 228 *Family Law Act 1975* (Cth) s 4AB *Migration Act 1958* (Cth) ss 65, 357A, 359A, 477 *Migration Regulations 1994* (Cth) rr 1.21, 1.23, 1.24
Cases cited:	*Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30. *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155. *Nugrohowati v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1941. *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115. *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30. *Perez v Minister for Immigration and Border Protection* [2017] FCAFC 180. *Rogers v Minister for Home Affairs* [2019] FCCA 473.

Division:	Division 2 General Federal Law
Number of paragraphs:	79
Date of hearing:	7 and 8 December 2021
Place:	Darwin
Counsel for the Applicant:	Mr Mancini
Solicitor for the Applicant:	Diaspora Legal
Counsel for the First Respondent:	Mr Sherman
Solicitor for the First Applicant:	Australian Government Solicitor

ORDERS

ADG 266 of 2020

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**WENNY NUGROHOWATI** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **JUDGE YOUNG**

DATE OF ORDER: **21 JANUARY 2022**

THE COURT ORDERS THAT:

1. A writ of certiorari issue directed to the Second Respondent quashing the decision of the Second Respondent dated 30 June 2020.
2. Costs are reserved.
3. Parties may file and serve written submissions in relation to costs within fourteen (14) days of the date of this order.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE YOUNG:

1 This is an application for judicial review of a decision of the Administrative Appeals Tribunal (**the Tribunal**) made on 30 June 2020 affirming a decision of the Minister's delegate made on 30 October 2017 to refuse the applicant a Partner (Temporary) (class UK) Visa under section 65 of the Migration Act (**the Act**).

2 The delegate refused the application because she was not satisfied that the applicant was the de facto partner of the sponsor. It appears that for some unknown reason the applicant had not provided a response to the delegate's request for further information and in the absence of information the delegate was not satisfied of the applicant's entitlement to a visa. By the time the applicant sought a review before the Tribunal it was not in issue that the applicant was the de facto partner of the sponsor at the relevant time.

3 The relationship between the applicant and the sponsor ended sometime around 18 January 2018 when the sponsor, Dr Edwards, notified the Department that he withdrew his sponsorship. In February 2018 the applicant and the sponsor ceased living together and have not resumed cohabitation.

4 The applicant then sought a visa on the new basis that she had suffered family violence, as defined in the Act, from her partner.

5 The Tribunal was not satisfied the applicant had suffered relevant family violence and the Tribunal referred the matter to an independent expert in order to make an assessment of a non-judicially determined claim of family violence in accordance with the provisions of Division 1.5 of the Act.

6 The independent expert was not satisfied that the applicant suffered family violence. Under the statutory regime the independent expert's opinion was taken to be correct for the purposes of deciding whether the applicant satisfied the prescribed criterion pursuant to r 1.23(10) of the Migration Regulations (**the Regulations**).

Factual background

7 The applicant and the sponsor, Dr Edwards[1], began their relationship in about December 2010 in Batam, Indonesia.

8 The applicant is 48 years old. She completed secondary education in Indonesia, married and had two children between 1999 and 2003. In 2003 she married an Australian and lived in Singapore and Indonesia. In October 2010 she met Dr Edwards in Batam. It appears at that stage she was working in a food vending business. She began living with Dr Edwards in December 2010. Dr Edwards and the applicant subsequently purchased properties in Indonesia, some or all being placed in the name of the applicant as, apparently, persons who are not Indonesian citizens were not entitled to own freehold property in Indonesia. One, at least, of these properties owned by the applicant became the subject of dispute between her and Dr Edwards at the time of the breakdown of their relationship.

9 In May 2016 the applicant and Dr Edwards moved to live in Darwin. It appears that by 2017 Dr Edwards, who is currently 72 years old, was suffering from significant health issues.

10 The applicant was referred to a social worker with Top End Health Service in September 2017 by a member of the Aged Care Assessment Team who was providing a service to Dr Edwards. According to a letter dated 11 December 2017 from a Ms Cartmill, a senior social worker with the Top End Health division of the Northern Territory Department of Health, Dr Edwards had a complex medical history including dysphagia, high falls risk and long-term alcoholism. He required constant care and support with most daily living activities which was provided by the applicant.

11 In her letter Ms Cartmill reported that:

> *Since the referral was made at the end of September, I have met with Ms Nugrohowati on several occasions. During each meeting it was evident that Ms Nugrohowati was experiencing high levels of anxiety. The main cause of anxiety was the constant threats made by Mr Edwards to contact the Department of Immigration and request her deportation to Indonesia.*

[1] It was not apparent in the materials to what degree or honour the pre-nominal title "Doctor" referred but the materials generally refer to the sponsor as Dr Edwards and I will follow that course.

12 The letter noted that while there was no complaint by the applicant of physical abuse she had disclosed "*verbal and emotional abuse, financial abuse, intimidation and social isolation*". She said that the applicant continued to provide care for Dr Edwards but found it increasingly difficult to do so as his "*abuse towards her can escalate very quickly and has a negative impact on* [the applicant's] *mental health*".

13 Ms Cartmill's letter went on to say that the applicant "*has a diagnosis of anxiety and depression and has been attending a psychologist following a referral by her GP*…". The letter concluded by advising that Ms Cartmill had referred the applicant to the Domestic Violence Legal Service for information and support in relation to an application for a Domestic Violence Order. The substance of the letter was subsequently included in a statutory declaration completed by Ms Cartmill and relied upon by the applicant to satisfy the evidentiary requirements of Migration Regulation 1.24 in making a non-judicially determined claim of family violence.

14 On 17 November 2017 a general practitioner, Dr Michael Tong, referred the applicant to a psychologist, Mr Jey Lamech, under a Mental Health Care Plan. As explained below, it appears that the applicant had already spoken to Mr Lamech before this. Dr Tong's referral letter referred to the applicant's "*acute distress related to relationship problems*". The Mental Health Care Plan provided some more detail. It referred to the applicant's claim that Dr Edwards threatened the applicant that if "*she doesn't do housework etc. that he threatens to cancel her visa*". There is also reference to him threatening her visa if she did not agree to have a property in Batam "*signed over to his name*". The Mental Health Care Plan noted that the applicant "*Needs to see psychologist for assistance with process to gain independent permanent residency*".

15 Mr Lamech prepared a report in the form of a statutory declaration dated 15 January 2018 evidently intended to satisfy the requirements of Regulation 1.24.

16 Mr Lamech's report stated that he saw the applicant on four occasions after the referral to him by Dr Tong on 17 November 2017. He said that the applicant was first referred to him by her migration agent on 10 September 2017 "*in relation to her well-being".*

17 Mr Lamech's report contains a history given by the applicant referring to verbal abuse by the sponsor, the threat of withdrawing his sponsorship resulting in deportation unless the applicant signed over to him a property in Batam, and the humiliation of facing a return to Indonesia

destitute. The report also refers to the additional humiliation of the applicant caused by evidence of an SMS conversation between the sponsor and "*his new love interest*" in Indonesia.

18 The report expressed the opinion that the applicant had

> *… started to lose her self-esteem and pride. She became docile as noted by the psychometric assessment by trying to agree with her partner and at times minimising the terrible abuser the [sic] issues to bring peace, and thus not pursuing a restraining order or to seek any police order.*

19 After detailing the applicant's physical and mental symptoms resulting from these matters Mr Lamech said that the applicant met the diagnosis for depression. He said she had been the victim of "*physical and verbal abuse*" by the sponsor. It is not in dispute that the applicant at no stage made a complaint of physical abuse against the sponsor and Mr Lamech's reference to physical abuse is an error. He completed the report by concluding that the applicant had been the victim of family violence by reason of verbal abuse by the sponsor.

20 The applicant provided a statutory declaration to the Tribunal and other documentation, including copies of SMS messages from September 2017 between the sponsor and a female associate in Batam who appears to have played some role in managing the property or properties of the sponsor and/or applicant in Batam. This person also seemed to be in communication with the applicant and have some information about the applicant and her situation, which she relayed to the sponsor. Some of the SMS messages from the sponsor expressly state his intention to use the threat of sponsorship withdrawal or visa withdrawal to pressure the applicant to transfer one or more of the properties in Batam to him. The person told the sponsor, in the context of discussion about the sponsor's demand that the applicant transfer property to him, that the applicant was worried about her visa and that she was also worried about how she would pay her mortgage in Batam if she were removed from Australia. The sponsor said "*The visa is the bargaining chip*" and later "*Let her sweat and give me more*". He said that the applicant was considered a "*gold digger*" by a mutual acquaintance.

21 Although this was not mentioned by the Tribunal or the independent expert, this aspect of Dr Edward's conduct or threatened conduct arguably satisfies the definition of blackmail or extortion under s. 228 of the Northern Territory Criminal Code:

Blackmail and extortion

> *(1) Any person who makes any demand with menaces with intent to obtain some benefit for himself or another or to cause some detriment or injury to another is guilty of an offence and is liable to imprisonment for 14 years.*
>
> *(2) It is a defence to a charge of an offence against this section to prove that the making of such demand was reasonable by the standards of an ordinary person similarly circumstanced to the accused person.*

Section 1 of the Criminal Code defines "*menace*" as:

> ***menace** includes a threat of an injury, accusation or detriment of any kind to be caused or to be made against any person either by the offender or by any other person if the demand is not complied with.*

It is inappropriate to make any finding about this, not least because Dr Edwards has not been heard, and it is unnecessary. Regardless of how the conduct is categorised it speaks for itself and is relevant to the later assessment of whether the applicant was subject to family violence as defined in the Regulations.

22 Other SMS messages were produced between the sponsor and another woman in Indonesia who addressed the sponsor as "*Darling*". According to the applicant, she was the sponsor's former girlfriend. The applicant asked the woman to come to Australia to care for him because he was in poor health. This came to nothing, apparently, as a visa for the woman's son could not be obtained.

The Tribunal hearing

23 The matter was heard before the Tribunal in two parts, on 20 August 2019, and later on 19 June 2020 when the Tribunal invited comment on Ms Durkin's report. On the first date the Tribunal member heard oral evidence from the applicant, Ms Cartmill, Dr Edwards, the applicant's employer and former employer and another lay witness. The applicant was represented by her migration agent. Apparently at the request of the applicant and surprisingly, given the nature of the application, Dr Edwards was called to give evidence at the Tribunal hearing. Part of the explanation may be that the applicant, according to what she said later, was not aware until shortly before the hearing that Dr Edwards has withdrawn his sponsorship although I note that the applicant's Form 1410 "Statutory declaration for family violence claim" was completed on 30 January 2018.

24 Perhaps more surprisingly, on 28 August 2019 the applicant sent an email to her migration agent asking if Dr Edwards could write a letter to the Tribunal to support her application. Given that he had provided oral evidence to the Tribunal the reason for this is not apparent. The migration agent, also surprisingly given what appears to be the tenor of Dr Edward's oral evidence recorded in the Tribunal's decision, Dr Edward's previous attitude and conduct demonstrated in the SMS messages and the nature of the application, agreed that he could do so. The applicant then forwarded the migration agent's reply and possibly other documents in her application to Dr Edwards. This resulted in an email letter dated 4 September 2019 sent directly to the Tribunal by Dr Edwards. He does not appear to have provided a copy to the agent or the applicant. (There is also reference to a second letter or email sent to the Tribunal in the report of the independent expert).

25 Far from giving support to the applicant, Dr Edward's letter contained an attack on the integrity of the applicant's migration agent and the genuineness of the application:

> …
>
> *I would like to point out that while am happy to write a character reference for Ms Nugrohowati I am unwilling to become a party to an action which in any way attempts to besmirch my good character. It has come to my notice that [the applicant's migration agent] is using subversive, if not illegal, means in order to obtain the required visa for his paying client, Ms Nugrohowati.*
>
> …
>
> *My main objective here is not to ensure that Ms Nugrohowati is denied a visa but to suggest that she had given an appropriate one, which clearly is not the one that is the focus of this review. It is no secret that we separated some 18 months ago and we have not had a relationship since then. We have, however, remained friends.*
>
> *I would also like the opportunity to uphold my good name. I do not have a history of violence, either verbal or physical and I realise that the accusations are nothing more than an attempt to circumvent the regulations by trying to show domestic violence. In other words, it appears to be an attempt at exploiting what might be seen as a 'loophole' in the regulations.*
>
> *Please feel free to contact me on [a telephone number] or on this email address*

should you wish to discuss this matter further.

Regards

Glyn Edwards

26 The assertion by Dr Edwards that he and the applicant "*remained friends*" perhaps provides a clue as to why the applicant, naively it might be thought, considered Dr Edward's involvement in the Tribunal hearing would assist her.

27 Following the hearing the Tribunal member was not satisfied, pursuant to Migration Regulation 1.23(10)(c), that the applicant suffered relevant family violence and, accordingly, pursuant to the requirement of the regulation, sought the opinion of an independent expert about whether the applicant had suffered relevant family violence.

The independent expert's report

28 The opinion was sought from Ms Durkin, a psychologist. Ms Durkin interviewed the applicant in a face to face interview in Darwin on 11 February 2020 and by telephone on 26 March 2020. This was more than two years after the applicant and Dr Edwards separated.

29 Ms Durkin completed her report on 31 March 2020 and expressed the opinion that the applicant had not suffered relevant family violence.

30 Ms Durkin's report was completed on a pro forma document. In Part B12 of the document Ms Durkin recorded the applicant's history. She noted that Dr Edwards had required a high level of care from the applicant due to his poor health. She noted the applicant readily provided this care, viewing it as part of her role as the sponsor's partner. She noted that the applicant said that when Dr Edwards was unwell and in hospital he was kind and apologetic. However, when he returned home he treated her poorly including psychological abuse and, in particular, verbal abuse. She said Dr Edward's change in behaviour on returning from hospital to home was triggered by Dr Edwards abusing alcohol. The applicant also believed Dr Edwards was engaging in an affair.

31 Ms Durkin noted that in September 2017 the applicant was working longer hours leaving Dr Edwards alone at home. The applicant said that he began asking her to sign over the title of the home they owned in Indonesia to his sole name. He said he would continue to support her partner visa application only if she complied. The applicant said that she refused as she believed such an arrangement would create a poor impression if the Department of Home

Affairs became aware of it. She said Dr Edwards was displeased and began arguing with the applicant daily about this. He swore at her, including telling her to "*fuck off*" and calling her derogatory names such as "*prick*" and "*stupid bitch*". She said that Dr Edwards called her a "*gold digger*", as did his daughter. He said to the applicant that "*Australia doesn't need people like you*" and told her to return to Indonesia.

32 Ms Durkin noted that the applicant said she was sad and disappointed with the sponsor's behaviour and the fact that he was not treating her well or appreciative of the care and support she was providing. The applicant said she did not wish to cease contact with Dr Edwards and, even then, was willing to engage in his care. The applicant "*rationalised his conduct, attributing it to his problematic use of alcohol and him being unwell …*". Ms Durkin noted that the applicant experienced distress about the relationship breaking down and the affair she believed Dr Edwards was undertaking. Ms Durkin noted that Dr Edwards "*refuted*" the affair (she probably meant "*denied"*). Ms Durkin noted that the applicant was scared about the relationship ending, was uncertain of the future and unsure how she would cope financially or without support in Australia and, in particular, how she would explain the breakdown in the relationship to her family in Indonesia. Ms Durkin noted that the applicant's "*most significant concern*" and "*primary worry*" was about the issue with her family.

33 Ms Durkin noted that on two occasions between September 2017 and January 2018 the applicant had slept at work because she was experiencing "*mental pressure*" as a result of Dr Edward's behaviour, in particular him yelling at her. Ms Durkin sought "*clarification*" of this statement and noted that the applicant said she was experiencing mental pressure about the relationship ending and she interpreted the yelling is indicative of Dr Edward's motivation to separate.

34 Ms Durkin also recorded that in mid-January 2018 Dr Edwards discovered the applicant had been in contact with the lawyer about her visa situation and had also seen a psychologist regarding the situation at home. That angered him such that he began engaging in verbal abuse and, according to the applicant, that incident resulted in the end of the partnership. The applicant and Dr Edwards continued to live together until February 2018 when he moved, without warning, to Port Macquarie in New South Wales (where his children live). Ms Durkin recorded that the applicant and Dr Edwards have "*remained friends*" since then and the applicant has "*continued to assist the sponsor and care for him at times*". Until December 2018 the applicant believed that Dr Edwards would continue to support her partner visa

application and only after making her application under the family violence provisions, and only briefly before she went to the Tribunal, did she discover that Dr Edwards had withdrawn his sponsorship.

35 Ms Durkin recorded that the applicant said she was still friends with Dr Edwards despite his "*reportedly*" ongoing negative conduct towards her and said that as long as she was able she would continue to help him. Ms Durkin noted with some evident surprise that the applicant had called Dr Edwards as a witness at a hearing, such was her "*reportedly close relationship with him*".

36 After recording the applicant's history Ms Durkin was required to provide details of incidents in a checkbox format. A note specified that "*If there were more than three incidents, detail them on an attachment*". No attachment was provided. The first part required a "*Summary of incident as described part B 12 e.g. verbal; physical; financial abuse)*". Ms Durkin answered this question "*Psychological Abuse*". The next part required specification of the "*Nature of the conduct (as assessed by IE)*". The available options to answer were "*actual", "threatened", "both actual and threatened" and "neither actual nor threatened*". Ms Durkin answered this question "*neither actual nor threatened*".

37 The next part of the box asked "*In the IE's opinion, did the conduct in the incident cause the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own well-being or safety*? Ms Durkin checked the box for "No".

38 The next part of the document was headed "*Explain why/why not*". It is worth reproducing all of Ms Durkin's answer:

> *Ms Nugrohowati described her relationship with the sponsor becoming increasingly unstable across the course of 2017 and 2018, during which time the couple engaged in mutual discord. By Ms Nugrohowati's account, the sponsor wanted to terminate the relationship with her, for whatever reason, but also obtain full ownership of a property they owned. He reportedly used the property as a means of bargaining with Ms Nugrohowati, offering her ongoing support with her partner visa application in return for title of the property. When Ms Nugrohowati would not agree to that, conflict erupted in the relationship. Ms Nugrohowati endorsed arguing back with the sponsor, she did not report being scared of him when he would yell at her nor did she*

apparently hold particular concern about the derogatory names he called her. What she did worry about was the termination of the partnership. She was scared she would have no money or social supports to assist her. Ms Nugrohowati did not endorse experiencing any other emotions or engaging in any other behaviours in response to the sponsor's conduct that would be considered consistent with an anxiety response.

Based on the information available, it is concluded that the sponsor's conduct did not cause Ms Nugrohowati to reasonably fear for, or to be reasonably apprehensive about, her well-being or safety. Indeed, Ms Nugrohowati said she has maintained a friendship with the sponsor despite him reportedly continuing to verbally abuse her. That would add further weight to the argument that Ms Nugrohowati was not anxious about the behaviour perpetrated by the sponsor, but what such behaviour reflected – namely his motivation to terminate the partnership.

39 The next part of the document was headed "*Alleged victim's access to and utilisation of support services*". This was followed by the question "*Did the alleged victim seek professional help or support? Examples include domestic violence counselling (e.g. refuge, social worker other than in the course of this assessment), or judicial or police intervention*".

40 Ms Durkin referred to the applicant having sought support from a clinician, Johanna Sawyer, undertaking an Aged Care Assessment Team assessment of Dr Edwards. The applicant apparently asked Ms Sawyer about her visa rights and disclosed that Dr Edwards was "*verbally aggressive*". Ms Sawyer reported that he "… *is not physically aggressive towards her, however is verbally undermining and very sarcastic*". Ms Sawyer referred the applicant to a senior social worker at Top End Health Service, Ms Cartmill. Ms Durkin referred to Ms Cartmill's letter, referred to earlier in these reasons, which said she, Ms Cartmill, had seen the applicant on a number of occasions and determined she was "… *experiencing high levels of anxiety. The main cause of anxiety was the constant threats made by [the sponsor] to contact the Department of Immigration and request her deportation to Indonesia*".

41 Ms Durkin also referred to Mr Lamech's report which, according to her summary, identified "*three key areas of concern including, the loss of a partner, constant verbal abuse by an aggressive partner and mental health issues associated with shame, frustration and life purpose*".

42 The document also provided for the independent expert to refer to any "*Additional information*". Ms Durkin referred to two letters from Dr Edwards which had been submitted to the Department and reproduced parts of them, including what appeared to be a self-serving explanation of the dispute about the property in Indonesia. She recorded Dr Edward's allegations of dishonesty against the applicant's migration agent. She noted that Dr Edwards "*refuted a number of comments that Ms Nugrohowati has made about his behaviour…*". It would appear that Ms Durkin probably meant "*denied*" rather than "*refuted*" (as she had misused the word in the same way previously) but apart from the observation that Dr Edward's "*opinion may be influenced negatively by the situation*" Ms Durkin did not appear to attempt any assessment of the reliability of Dr Edward's exculpatory assertions of his conduct. In particular she did not describe the threats made by Dr Edwards in relation to the applicant's deportation as anything more than a "*means of bargaining".* She described his "*outline of the relationship discord*" as "*broadly consistent*" with the applicant's.

43 The final part of the document was headed "*Independent expert's opinion*" and included more boxes to tick, including whether she was of the opinion that family violence had occurred. She ticked the box "*has not occurred*". In relation to the statement whether she was satisfied the "*alleged perpetrator's conduct*" was "*actual*", "*threatened*", "*both actual and threatened*" or "*neither actual nor threatened (go to 'Reasons for my decision')*" she ticked the final box, "*neither actual nor threatened …*".

44 Under the heading "*Reasons for my decision*" Ms Durkin said as follows:

> *Ms Nugrohowati met the sponsor in 2010 in Indonesia and the couple reportedly established a stable and loving relationship thereafter and Ms Nugrohowati became the sponsor's carer. They continued to reside in the Asian region until May 2016 when they moved to Darwin due to the sponsor's poor health. By September 2017, Ms Nugrohowati's relationship had become strained, as the sponsor reportedly sought to end the partnership and negotiate the distribution of the property. Within that context, the couple reportedly began engaging in conflict, with Ms Nugrohowati noting that the sponsor's of use of alcohol influenced his style of engagement with her, rendering him particularly verbally aggressive. She said that he would yell at her and call her names, such as "stupid bitch" and he would swear at her generally. To Ms Nugrohowati's mind, this behaviour illustrated the sponsor's frustration with*

the relationship and his desire to end the relationship. That apparently scared her as she was unsure how she would cope financially without the sponsor and she worried about a lack of support in Australia. She was also apparently afraid of advising her family about the end of the relationship and, indeed, has yet to do so due to her fear of a negative reaction and feelings of shame. Ms Nugrohowati did not endorse being concerned by the sponsor's behaviour per se and did not describe feeling any emotions or engaging in any behaviours indicative of anxiety about the sponsor's alleged conduct. Moreover, she has remained friends with the sponsor despite his reported ongoing verbal abuse of her and she stated that she will continue to be supportive of him despite that. This strongly supports the argument that Ms Nugrohowati was not worried by the sponsor's behaviour, but rather the termination of the relationship. For these reasons it is concluded that the sponsor's behaviour did not cause Ms Nugrohowati to reasonably fear for, or to be reasonably apprehensive about, her own safety or well-being. The sponsor's comments about the nature of the relationship in the last months of the partnership further supports that assertion.

Given the above, it is my position this that Ms Nugrohowati did not experience family violence according to the definition of relevant family violence, outlined in regulation 1.21 of the Migration Regulations, 1994.

45 After the report was completed the Tribunal sent the report to the applicant pursuant to s 359A of the Act and invited her to comment. The applicant disagreed with the conclusion of the report and complained about various matters, including that the report was affected by lack of procedural fairness. The Tribunal put these matters to the independent expert and sought her comment. The Tribunal then considered the responses of the applicant to the report, the responses of the independent expert to the matters raised by the applicant and discussed those with the applicant. The Tribunal was not satisfied the independent expert's opinion was affected by procedural fairness and was satisfied it was valid under the Migration Regulations. The Tribunal concluded that it was required by Regulation 1.23 to take the opinion as correct and, accordingly, found the applicant had not suffered family violence committed by the sponsoring partner and therefore did not meet the requirements of cl. 820.221(3)(a) and(b)(i)(A) for the grant of the visa or any alternative sub-criteria. The Tribunal affirmed the decision under review.

Grounds of review

46 The 37 grounds of review are repetitive and prolix. One ground, 34, was not pressed but another ground was added by unopposed amendment. In submissions the applicant's counsel dealt with these grounds in six related groups and five individual grounds, two of which repeated earlier grounds or made a generalised claim of invalidity. The respondent's counsel's submission's adopted the same course and I will do so too, providing a summary description of the related grounds.

47 To add to the challenge, counsel for the applicant's written submissions, while addressing these groups of grounds, at times raised arguments having a tenuous relationship with the actual grounds which were the subject of the submissions. The first respondent, while pointing out the deviation from the formal grounds of review, made submissions in response and I am satisfied that no unfairness arose.

Grounds 1 to 6

48 The applicant alleged the Tribunal used the departmental movement records of Dr Edward as "*the reason, or part of the decision, for affirming the decision …"* but failed to appropriately give the applicant particulars as required by s 359A(1)(a) of the Act. The report of Mr Lamech had referred to Dr Edward's "*new love interest*" in Indonesia. The Tribunal concluded this reference was wrong. It noted the movement records showed Dr Edwards had not returned to Indonesia since arriving in Australia in 2016 with the applicant and the SMS messages to a woman in Indonesia did not contain any "*semblance of a romantic exchange*". The applicant was said to have agreed with this.

49 In any event, the fact that there were exchanges between Dr Edwards and two women in Indonesia (one of whom on one occasion at least referred to Dr Edwards as "*darling*" and whom Dr Edwards was trying to have come to Australia to care for him) was peripheral to the issue of whether the applicant had suffered family violence. The Tribunal did not rely on this information in reaching its conclusion that the applicant had not suffered family violence and I accept the submission of the first respondent that this material was not "*the reason, or part of the reason, for affirming the decision …*" because once Ms Durkin's opinion that the applicant had not suffered family violence was accepted the Tribunal was required to affirm the decision. These grounds are not made out.

Grounds 7 to 12

50 These grounds alleged that the Tribunal failed to comply with the requirements of s 359A by not giving the applicant appropriate particulars in relation to the date of withdrawal of sponsorship by Dr Edwards. The date of withdrawal of the sponsorship, as distinct from the withdrawal itself - which in turn led to the family violence based claim of the applicant, was entirely peripheral to the Tribunal's reasoning and was not "*the reason, or part of the reason, for affirming the decision ...*". Further, as with the previous grounds, I accept the first respondent's submission that the reason for affirming the decision was the acceptance of Ms Durkin's opinion.

51 The applicant's counsel's written submissions in relation to these grounds also raised an argument that the independent expert had not properly engaged with and formed an opinion about each of the allegations of family violence and, further, that this was the Tribunal's role which it "*abdicated*". This submission does not bear any obvious relationship to grounds 7 to 12, although the substance of the argument appears to be raised in ground 33. I will deal with it there.

Grounds 13 to 17

52 These grounds claimed, as with the previous grounds, that the Tribunal failed to comply with the requirements of s 359A in giving the applicant appropriate particulars of Ms Durkin's report and its relevance. The additional ground added by amendment appears to me to be the same point expressed differently.

53 The complete report was provided to the applicant and it was discussed with her by the Tribunal at the second hearing. She, assisted by her migration agent, made submissions about the report and criticisms of it. These matters are dealt with in the Tribunal's reasons. Against this background, these grounds do not have any merit in my view.

54 Counsel for the applicant's written submissions raised further arguments which had tenuous, at best, connections to these grounds. It was submitted that the applicant ought to have been permitted to make submissions about various matters including the type of expert to be retained for the purpose of expressing an opinion about whether the applicant has suffered family violence; the identity ("*name*") of the expert; the information and materials to be provided to the expert; the "*particular inquiry*" to be conducted by the expert; the availability of another type of expert; the reasons why the expert was required; the effect of the Tribunal's failure, in

the first instance, to be satisfied that the applicant had not suffered family violence; whether that decision was communicated to the expert; and the effects of such a decision on the expert.

55 I accept the submissions of the first respondent about these matters. Section 357A of the Act provides that Division 5 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with. There is no statutory support for the argument raised by the applicant. It is without merit and must fail.

56 Lengthy submissions were also made about the format of the pro forma document used by Ms Durkin, asserting that the form distracted her from her statutory task. This argument is related to matters raised in ground 33 and I will deal with it there.

Grounds 18 to 20

57 The gist of these grounds is an allegation that the Tribunal, in writing to the applicant on 20 April 2020, providing her with a copy of Ms Durkin's report and inviting comment, said that it "*may*" take it into account in deciding whether she had suffered family violence. It was asserted that was misleading because the Tribunal "*must*" take the opinion as correct. The first respondent, relying on *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30, submitted that the Tribunal was required to take the opinion as correct only if it were a valid opinion, formed in compliance with the Regulations, and until the applicant had been given the opportunity to make submissions about that, as she did, the use of the word "*may*" was correct. I accept that submission. These grounds fail.

Grounds 21 to 26

58 The gist of the complaint in these grounds is that the Tribunal did not follow the legislative pathway required by the Regulations, in particular it did not address itself to the elements in the definition of "*relevant family violence*" in reg 1.21 and failed to make necessary inquiries. The first respondent submitted, first, that it is evident from the reasons of the Tribunal that it was aware of and identified the correct legal test and, secondly, was under no duty to make inquiries, referring to *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155. In relation to the second point, I accept that the Tribunal was under no obligation to make inquiries in this case. In relation to the first point, the Tribunal's reasons make rather general statements about the elements of the necessary statutory inquiry but the Tribunal, in referring the matter to an independent expert for an opinion, was bound to accept that opinion if it were validly formed. If that opinion were validly formed I would take the view that the any

deficiencies in the Tribunal's reasoning of the kind alleged by the applicant were not material. Conversely, if the independent expert's opinion was not validly formed and was accepted as correct that in itself may constitute jurisdictional error. This is addressed below.

Grounds 27 to 31

59 These grounds appear to be, in substance, a restatement of grounds 21 to 26. My remarks about those grounds apply.

Ground 32

60 This is a general and prolix claim of error "*by virtue of the foregoing matters*", according to the applicant's written submissions. It is not a separate ground of review and no separate consideration is required.

61 Ground 33 will be dealt with below. Ground 34 was not pressed. Ground 35 is a general claim, without particulars, that Ms Durkin did not apply the correct test for determining whether the applicant suffered family violence. I will treat it as raising the same complaint as ground 33. Ground 36 is general claim, rolling up grounds 33, 34 and 35. No separate consideration is required apart from ground 36.4 which purports to seek prohibition against Ms Durkin for apprehended bias. The inclusion of this sub-ground appears to be an error. The Court has ruled on this claim and for the reasons set out in the interlocutory decision of *Nugrohowati v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1941 such relief can only be granted in respect of the Tribunal and not Ms Durkin.

Ground 33

62 This ground alleges that Ms Durkin did not "*properly assess whether the conduct of Dr Glynn Edwards alleged* [in the various statutory declarations of the applicant and her witnesses] *had occurred*". The ground set out particulars in 21 paragraphs identifying the various allegations, including threats to cancel, or have cancelled, the applicant's visa if she did not sign over the property in Indonesia to Dr Edwards and verbal abuse and denigration.

Consideration

63 The statutory task for the independent expert is determined by the terms of the relevant regulations. For the purpose of a non-judicially determined claim of family violence reg 1.21 defines family violence as:

> ***"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.

64 Further, reg 1.23(12) requires that the Minister:

> *... must be satisfied that the relevant family violence, or part of the relevant family violence, 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.*

65 Accordingly, the elements of the test for family violence are:

(1) conduct, actual or threatened;

(2) towards, in this case, the applicant;

(3) that causes;

(4) the alleged victim to reasonably fear for, or be reasonably apprehensive about, her well-being or safety;

(5) while the marriage or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the perpetrator.

66 In this case the contentious elements were (1) the existence of conduct, actual or threatened, and (3) whether such conduct, if any, caused (4) the applicant to reasonably fear for, or be reasonably apprehensive about, her well-being or safety.

67 The definition of family violence in reg 1.21 is reasonably skeletal compared to, say, that in s 4AB of the Family Law Act which focuses on "*violent, threatening or other behaviour ... that coerces or controls …*" but, nevertheless, in most cases it should not be difficult to identify the relevant conduct. It will be identified by the applicant or will be apparent from its nature. Here

the applicant pointed to, in particular, the sponsor's conduct in threatening to withdraw his sponsorship for her spouse visa unless she transferred property to him and associated verbal abuse and denigration of her. There was no dispute that this conduct had taken place and the SMS messages from the sponsor corroborated the applicant's claim. In my view, this was conduct calculated to coerce and control the applicant and, arguably, the threat to withdraw the sponsorship unless property was transferred to the sponsor constituted the criminal offence of blackmail.

68 In the pro forma document completed by the independent expert she did not identify this conduct in the box requiring a "*Summary of the incident as described in Part B12*". The independent expert wrote "*Psychological Abuse*" in the box. In the preceding section Part B12 the independent expert's narrative referred to the applicant's complaint of "*psychological abuse, in particular verbal abuse*". There she also recorded the applicant's statement that the sponsor was "*frequently asking her to sign over the title of a home they owned in Indonesia, placing it entirely in his name. He said he would continue to support her partner visa if she complied*". Later in the document the independent expert described the sponsor's conduct as "*He reportedly used the property as a means of bargining (sic) with Ms Nugrohowati, offering her ongoing support with her partner visa application in return for the title of the property*".

69 There is nothing in the independent expert's description to suggest that she characterised the sponsor's conduct in relation to the property as threatening or coercive. On the contrary, she described the conduct as "*bargaining*". There is nothing to suggest in her description that she considered the sponsor's behaviour may satisfy the first element, "*conduct*", in the statutory test.

70 That conclusion is bolstered by the fact that, as noted, the only conduct the independent expert identified in the appropriate box of the pro forma document was "*psychological abuse*", which she concluded was "*neither actual nor threatened*". In other words, the independent expert found the first element of the test was not satisfied because there was no relevant "*conduct*" by the sponsor. Having made that finding it was not possible for her to find there had been family violence.

71 Counsel for the first respondent submitted that the form of the pro forma document, with its boxes, was not a legislative requirement and errors in completing the form were not jurisdictional. He submitted that the independent expert's recognition of the elements of the test were apparent in her narrative elsewhere in the document. The difficulty with that

submission, and the reason I am unable to accept it, is that it was not in dispute that the sponsor made a threat to the applicant to withdraw his sponsorship unless she transferred property to him. By checking the box that conduct was "*neither actual nor threatened*" the only reasonable inference to be drawn, in my view, is that the independent expert did not believe such behaviour was "*conduct*" for the purpose of satisfying the first element of the test. That conclusion is supported by the innocuous description, "*bargaining*", used by the independent expert to describe conduct that was coercive, controlling, and threatening. Nowhere in the document does the expert use these or similar words to describe the sponsor's conduct.

72 I am satisfied the independent expert failed to properly apply the legal test for family violence or asked herself the wrong question about the existence of relevant "*conduct*" by the sponsor.

73 Similarly, the independent expert failed to identify other behaviour that satisfied the "*conduct*" element of the test. It does not appear to have been in dispute that the sponsor subjected the applicant to verbal abuse and denigration, sometimes associated with his threats about sponsorship. This should also have been identified as "*conduct*" for the purpose of the test.

74 If the independent expert had properly applied the test to the categories of "*conduct*" identified by the applicant, particularly the sponsor's threats to withdraw his sponsorship of her visa application unless she transferred property to him, she would then have been required to assess whether that conduct caused the applicant to reasonably fear for, or be reasonably apprehensive about, her own wellbeing or safety. By failing to properly identify the relevant conduct the independent expert was deflected from her statutory task. The evidence that would need to be considered about the sponsor's conduct would have included Ms Cartmill's evidence that she had seen the applicant on several occasions from late September 2017 and it was "*evident that Ms Nugrohowati was experiencing high levels of anxiety. The main cause of anxiety was the contant threats made by Mr Edwards to contact the Department of Immigration and request her deportation to Indonesia".* It would have been necessary to consider whether this, apparently unchallenged, claim was evidence that the sponsor's conduct caused the applicant to be, at least, reasonably apprehensive about her own wellbeing. Similarly, if verbal abuse or denigration had been identified as relevant conduct it would have been necessary to consider whether the applicant's claims that on occasions she had slept at work because of the sponsor yelling at her was evidence that she was reasonably apprehensive about her wellbeing.

75 I am satisfied that by reason of the independent expert's failure to identify the sponsor's threats to withdraw sponsorship as "*conduct*" for the purpose of the statutory test she has not discharged her statutory task.

76 The first respondent accepted in *Nugrohowati v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021 FCCA 1941, [12] that it was "*well-established that the defective formation of an opinion by an independent expert provides a basis for setting aside a decision of the Tribunal based upon that opinion*" and referred to *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115, *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30, *Perez v Minister for Immigration and Border Protection* [2017] FCAFC 180 and *Rogers v Minister for Home Affairs* [2019] FCCA 473.

77 The decision of the Tribunal will be quashed.

78 Somewhat confusingly, in the applicant's amended application both the box for "yes" and the box for "no" are ticked in answer to the question whether she seeks an extension of time. The Tribunal's decision was made on 30 June 2020 and the application was made on 4 August 2020, that is, 35 days later. The application was made within the time required by s 477 of the Act.

79 My provisional view is that the applicant should pay the Minister's costs in respect of the first part of the proceeding, including the costs reserved in *Nugrohowati v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1941 and the Minister should pay the applicant's costs in respect of this part of the proceeding. If the parties are unable to agree they are to make written submissions within 14 days.

I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Young.

Associate:

Dated: 21 January 2022