Migration and Refugee Division Commentary

Partner visas

Current as at 19 September 2019

Compelling and/or Compassionate Circumstances/Reasons

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Overview

The Migration Regulations 1994 (the Regulations) contain certain criteria that may be waived, or found not to apply, on the basis of compelling and/or compassionate considerations. The most frequent matters seen by the Tribunal that involve 'compelling' and/or 'compassionate' considerations are:

- compelling or compassionate circumstances for not applying or waiving Partner visa criteria or sponsorship requirements;[1]
- compelling or compassionate reasons for absence or departure from Australia (Resident Return visas and Resolution of Status visas) (see below); and
- compelling or compassionate circumstances to waive the requirements of Public Interest Criterion (PIC) 4020 (see below).

Other references to compelling circumstances/reasons contained in the Regulations can be found in criterion 3003(d) and criterion 3004(d) of Schedule 3 (see below); public interest criterion 4013 (see below); compelling reasons for granting a visa having regard to the degree of persecution (Refugee and Humanitarian visas)(see below); 'compelling personal reasons' to work in Australia (Visitor visas);[2] and 'compelling need to work' (Bridging visas).[3]

In addition to reference in the Regulations to the terms 'compelling' or 'compassionate' reasons/circumstances, consideration of 'compelling' or 'compassionate' reasons/ circumstances may also arise in the context of case law, Ministerial Directions or departmental policy. Examples include the exercise of the discretion to waive the health requirement (Public Interest Criterion (PIC) 4007) (see below) and the discretion to cancel a visa (for example, cancellation under a prescribed ground in s.116).

General Principles

There is no specific definition of 'compelling' or 'compassionate' in either the *Migration Act 1958* (the Act) or the Regulations. Whether a circumstance or reason is compelling and/or a compassionate ground is a question of fact and degree for the Tribunal and one which requires a subjective assessment which takes into account all of the circumstances.[4] In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears (e.g. 'compelling reasons **for the grant of the visa**'; 'compelling reasons **for the absence** [from Australia]'; 'compelling circumstances **affecting the nominator**', etc.) and the purpose of the relevant provision. For example, in *Lui v MIBP*[5] the applicant argued that as there had been a decision that there were compelling and compassionate circumstances under r.2.05(4) to waive condition 8503 on a business visa this was enough to find compelling reasons for not applying the

[1] 12-month rule for de facto visas (see below), 'waiver' of Schedule 3 criteria for onshore partner visas (see below) and 'waiver' of regulations 1.20J, 1.20KA and 1.20KB sponsorship limitations (see below)
[2] Clause 600.611(4)
[3] Clause 050.212(6A)(c), cl.050.212(8)(b).
[4] *Anani v MIMAC* [2013] FCCA 1140 (Judge Barnes, 26 July 2013) at [34]. While the Court's comments were made in relation to s.41(2A) and r.2.05(4) in particular, they appear equally as applicable to where those terms appear elsewhere in the Act or Regulations. See also Whitlam J's comments in *McNamara v MIMIA* [2004] FCA 1096 (Whitlam J, 25 August 2004) at [10].
[5] *Lui v MIBP* [2015] FCA 1368.

Sch.3 criteria in relation to a subclass 820 visa application. The Court disagreed, commenting that the decision under r.2.05(4) could not amount to a compelling reason for cl.820.211(2)(d)(ii) when considering whether there were compelling reasons for not applying the Sch.3 criteria '… because the circumstances relevant to the waiver of condition 8503 was a different question from that raised by cl 820.211(2)(d).'[6]

The following general principles can be extracted from case law that has considered the meaning and scope of the various forms of the phrase 'compelling and/or compassionate':

- A determination as to whether a particular reason or reasons is compelling involves an evaluative judgment based on the circumstances of the case and with regard to the legislative context and any applicable policy.[7]

- To be 'compelling' the reasons in question must force or drive the decision-maker irresistibly to some end.[8] While the word 'compelling' may include reasons which are forceful, involve moral necessity or are convincing, it does not, by itself, necessarily require an involuntary element involving circumstances beyond a person's control.[9]

- It is relevant to take into account the purpose of the statutory provision in determining whether there are compelling reasons. However, circumstances which do not have a direct link to the purpose should not be excluded from consideration.[10]

- In assessing compelling and/or compassionate factors, the Tribunal should avoid applying any gloss, or using any policy interpretation, that would unduly fetter the scope of the discretion contained in the legislative expression. To do so could be to apply a higher test than the expressed words require and amount to jurisdictional error.[11]

The word 'compelling' is often, but not always, used together with the word 'compassionate' in the Regulations. Generally, having regard to the ordinary meaning of those words, 'compassionate' can be defined as 'circumstances that invoke sympathy or pity', where 'compelling' (to compel) may include 'to urge irresistibly' and to 'bring about moral necessity'. Where the words 'compelling' and 'compassionate' are used in conjunction with each other (i.e. "…compelling *and* compassionate circumstances…") the requirement is cumulative in the sense that even if some of the circumstances

[6] *Lui v MIBP* [2015] FCA 1368 (Markovic J, 7 December 2015) at [40].
[7] See *Plaintiff M64/2015 v MIBP* [2015] HCA 50 (French CJ, Bell, Keane and Gordon JJ; and with Gageler J delivering a separate judgment), at [53]. See commentary below under Compelling Reasons for Refugee and Humanitarian Visa Grant.
[8] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 (French CJ, Bell, Keane and Gordon JJ; and with Gageler J delivering a separate judgment) at [31].
[9] *Paduano v MIMIA* (2005) 143 FCR 204 at [37]. Note certain regulations are worded, however, so as to specifically require such an 'involuntary element'. For example, r.2.05(4) requires 'compelling and compassionate circumstances … over which the person had no control'. In considering r.2.05(4), the Court in *Anani v MIMAC* [2013] FCCA 1140 (Judge Barnes, 26 July 2013) found that the delegate's reference to policy to the effect that compelling circumstances generally referred to circumstances that were involuntary and characterised by necessity such that the visa holder was faced with a situation in which there was little or no alternative but to seek to remain in Australia did not establish a misstatement or misunderstanding of the law (at [33]).
[10] *Al Souhmarani v MIBP* [2016] FCCA 2866 (Judge Street, 7 November 2016), applying *Monakova v MIMIA* [2006] FMCA 849 (Phipps FM, 16 June 2006). In these cases, the relevant purpose was permitting the person to make an application for a partner visa in Australia.
[11] *Paduano v MIMIA* (2005) 143 FCR 204, at [37]. See also *Schaap v MIMIA* [2000] FCA 1408 (Whitlam J, 6 October 2000) which held that there is no requirement that a circumstance could not have been foreseen in r.2.05, at [8]-[9]

are found to be compassionate, that will not suffice if the circumstances are not also compelling.[12] Rather, what is required is an event or events that are far-reaching and most heavily persuasive.[13]

Issue arising in specific contexts

12-month rule for de facto visas

Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. One of the requirements is that the de facto relationship existed for a period of 12 months immediately before the date of the application, unless the applicant can establish 'compelling and compassionate circumstances for the grant of the visa'.[14]

An assessment of these circumstances is not confined to the time of application and may extend to relevant circumstances at the time of decision.[15] It should be noted that the emphasis is not on the ousting of the '12 month rule', but whether such circumstances exist for the grant of the visa sought.[16] Accordingly, the Tribunal's consideration should not cease at the question whether or not compelling and compassionate circumstances exist. The Tribunal must go on to consider, if compelling and compassionate circumstances are found to exist, whether or not those compelling and compassionate circumstances exist *for the grant of the visa*.

PAM3 states that 'compelling and compassionate' is a high threshold, and that under policy compelling and compassionate circumstances may include, but are not limited to cases where:

- the applicant has a dependent child of the relationship;
- de facto relationships are illegal in the country in which one or both members of the couple reside; or

[12] *Anani v MIMAC* [2013] FCCA 1140 (Judge Barnes, 26 July 2013) at [29]. While the Court in that case was considering the waiver provision in r.2.05(4) as it applied to condition 8503, the reasoning would appear equally as applicable where the composite term of 'compelling and compassionate' is used elsewhere in the Act or Regulations.

[13] In *Thongpraphai v MIMA* [2000] FCA 1590 (O'Loughlin J, 10 November 2000) which considered r.2.05, the Court stated at [21] that 'both words [compelling and compassionate] call for the occurrence of an event or events that are far-reaching and most heavily persuasive. Incidental matters are not to be taken into account except where it is appropriate to have regard to their totality.' In the context of waiving condition 8503 in accordance with r.2.05(4), the Court in *Hamoud v MIBP* [2015] FCCA 1087 (Judge Driver, 28 April 2015) concluded at [19] that when read together, *Thongparaphai v MIMA* [2000] FCA 1590 (O'Loughlin J, 10 November 2000) and *Terera v MIMIA* [2003] FCA 1570 make clear that 'circumstances' that fit the description 'compelling and compassionate' must not be a mere 'incidental matter' but must be 'far-reaching and most heavily persuasive' so that they result in a 'major change' to the applicant's situation.

[14] r.2.03A as introduced by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144). The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03A (4), (5). The pre 1 July 2009 definitions of 'de facto relationship' in r.1.15A (2A) and 'interdependent relationship' in r.1.09A had the same requirement: r.1.1.5A(2A), r.1.09A(2A).

[15] *Antipova v MIMIA* (2006) 151 FCR 480. In *obiter*, while considering the pre 1 July 2009 definition of 'de facto relationship' in r.1.15A(2A), Gray J said at [104]: 'The wording of reg 1.15A(2A) suggests strongly that, at whatever stage of whatever decision-making process the question of special circumstances arises, it is to be determined by reference to whatever circumstances exist at the date of decision. It would be a strange result if the circumstances to be considered differed according to whether the application of the definition of "spouse" was required to be applied at the time of application of the visa, or at the time of decision, or at some other stage, so that different views might be taken as to whether compelling and compassionate circumstances for the grant of the visa existed at different times. The wording of the provision suggests strongly that this is not the intention'. His Honour concluded, at [107]-[108] that the Tribunal in that case was wrong to follow *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 because that decision was distinguishable on the basis that it related to a very different provision to r.1.15A(2A), being a visa criterion that is specifically required to be satisfied at the time of application. Note *Boakye-Danquah* was later overruled by the Full Federal Court in *Waensila v MIBP* [2016] FCAFC 32 (Dowsett, Robertson and Griffiths JJ, 11 March 2016). Refer to the below discussion on Schedule 3 time of application requirements.

[16] *Antipova v MIMIA* (2006) 151 FCR 480 at [104], and at [106]-[107] citing *Neofotistou v MIMIA* [2005] FCA 919 (North J, 26 May 2005) at [24]-[25].

- a same sex couple has married overseas (whereby the couple is prevented from registering their relationship under State / Territory law).

PAM3 goes on to state that the pregnancy of the sponsor or applicant at the time of application would not (of itself) amount to 'compelling and compassionate circumstances for the grant of the visa', but that there may be exceptional or unique circumstances relating to the pregnancy that may do so. It also states that the genuineness of the de facto relationship does not, in itself, constitute 'compelling and compassionate circumstances', given that r.2.03A prescribes additional criteria that must be considered only after the applicant has satisfied the s.5CB requirements of a de facto relationship.[17]

Although decision makers should have regard to the examples set out in PAM3, care should be taken not to apply these inflexibly or to elevate any of these to the level of a legislative requirement.

In circumstances where the applicants have a dependent child of the relationship, the Federal Court has held that the child need not have been born of the relationship. The Tribunal should have regard not just to whether there is a child affected by the application, but whether compelling and compassionate circumstances arise out of the relationship between the applicant, sponsor and child.[18]

'Waiver' of Schedule 3 criteria for onshore partner visas

Certain onshore applications for partner visas are required to meet additional Schedule 3 criteria (including a requirement that the visa application be made within the period when the substantive visa was last held) unless 'the Minister is satisfied there are compelling reasons for not applying those criteria'.[19]

The Explanatory Statement to Statutory Rules 1996, No. 75 which accompanied the introduction of the provisions, stated (in relation to cl.820.211) that the inclusion of a 'waiver' provision was in recognition of the hardship that may result in circumstances where an unlawful non citizen seeks to apply for a spousal (partner) visa, but would otherwise be forced to leave Australia and apply offshore. The waiver was introduced to provide flexibility for the Minister where compelling circumstances arise, but only where there are reasons of a 'strongly compassionate' nature.[20] The Statement referred to the following circumstances as examples of where a waiver may be justified:

- there are Australian-citizen children from the relationship; or
- the applicant and his or her nominator are already in a long-standing spouse (partner) relationship which has been in existence for two years or longer.

Previous versions of PAM3 had mirrored the examples provided in the Explanatory Statement, as well as suggesting a range of other examples of circumstances that would amount to compelling

[17] PAM3 – Migration Regulations - Div 2.1/Reg 2.03A - Criteria applicable to de facto partners – About Regulation 2.03A – 'Compelling and compassionate circumstances' (re-issue date 10/10/2015) .Interestingly, although of less relevance now, the PAM guidelines for pre-1 July 2009 applications are less detailed and the existence of a dependent child of the relationship is the only example given of 'compelling and compassionate circumstances': see PAM3: Div 1.2/r.1.15A at paragraph 35.3 (re-issue date 9/08/2008).

[18] *Graham v MIMIA* [2003] FCA 1287 (Lee J, 22 October 2003). This was a concession by the Minister (at [8]) that the Court considered appropriate.

[19] cll.820.211(2)(d)(ii) & 826.212(2)(e)(ii). Note that Subclass 826 was removed from 1 July 2009: Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144), Schedule 1, item [257].

[20] While the Explanatory Statement provides background information, the focus should remain on the wording in cl.820.211(2)(d)(ii). It would be erroneous to ask if there were reasons of a 'strongly compassionate' nature when the wording of the provision asks if there are 'compelling reasons'.

circumstances.[21] However, those examples were removed on 1 July 2014 and the policy guidance now focuses on the circumstances that resulted in the applicant becoming unlawful and emphasises the consideration of whether the circumstances are beyond the applicant's control.[22]

While the circumstances highlighted in PAM3 will often be relevant to the assessment of the waiver, the Tribunal should ensure that consideration of an applicant's 'compelling reasons' are not limited to the circumstances surrounding their unlawful status. It is obliged to consider *all* the circumstances of the case including those arising after visa application and up to the time of decision[23] and any matters put forward by an applicant and determine on the evidence as a whole whether there are compelling reasons for not applying the Schedule 3 criteria.[24] Furthermore, it would appear to improperly limit the circumstances contemplated in cl.820.211(2)(d)(ii) to require that the circumstances are beyond the applicant's control.

Other aspects of the current PAM3 guidance are less problematic. For example, policy indicates that, as a general rule, the existence of a genuine spouse or de facto relationship between the applicant and the sponsoring partner, and the hardship that may be suffered if the parties are separated and the applicant is forced to apply for a partner visa outside of Australia, should not of itself amount to compelling circumstances. There is some support for this position in the judgment of *Sidhu v MIBP*, where the Federal Circuit Court found it was open to the Tribunal to conclude that the fact that the couple had been married (for less than a year) was not of itself a sufficiently compelling reason to justify waiving the Schedule 3 requirements.[25] Additionally, in *Chan v MIBP*, the Federal Circuit Court held that the existence of a long-term relationship does not of itself mean that the Tribunal must find that there are compelling reasons for not applying the Schedule 3 criteria.[26]

Ultimately, whether the circumstances are 'compelling' will be a matter of fact and degree for the Tribunal to determine. In doing so, the Tribunal is required to apply 'his [or her] own mind to the issues raised', engage with the materials for him or herself, evaluate them and to give them genuine consideration. A cursory consideration will not suffice.[27] Further, the purpose of the waiver provision is a relevant consideration for the Tribunal to take into account.[28] In the context of cl.820.211(2)(d)(ii),

[21] See, for example, the PAM3 as at 22/3/2014 provided for a list of examples of compelling circumstances including, inter alia, maternity issues (and age-related maternity issues); extended periods of separation; employment and financial circumstances; impact on step-children; the circumstances in the applicant's home country; and psychological and material hardship.
[22] PAM3 - Migration Regulations - Sch2 Visa 820 - Partner - The UK-820 primary applicant – Eligibility at [8.7] (re-issue date: 19/11/2016). It identifies a list of matters decision-maker should have regard to, including any history of non-compliance by the applicant; the length of time the applicant has been unlawful; the reasons why the applicant became unlawful; the reasons why the applicant did not seek to regularise their status sooner and what steps, if any, the applicant has taken to regularise their status (other than applying for a partner visa).
[23] *Waensila v MIBP* [2016] FCAFC 32 (Dowsett, Robertson and Griffiths JJ, 11 March 2016) per Robertson J at [22] and Griffiths J at [59], overruling the Federal Court decision in *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 which held that 'compelling reasons' was limited to those arising out of the circumstances as at the time of visa application.
[24] *MZYPZ v MIAC* [2012] FCA 478 (Bromberg J, 9 May 2012) at [12]. See also *Sidhu v MIBP* [2014] FCCA 167 (Judge Hartnett, 2 February 2014) at [36] and [37].
[25] [2014] FCCA 167 (Judge Hartnett, 2 February 2014)
[26] [2017] FCCA 2893 (Judge Street, 23 November 2017) at [14].
[27] In *MZYPZ v MIAC* [2012] FCA 478 (Bromberg J, 9 May 2012) at [19]. The Court held that the process required by cl.820.211(2)(d)(ii) entails a duty to consider whether compelling reasons exist. It held that whether it was safe for the appellant to return to Sri Lanka, in the circumstances where there was some probative material indicating that it was unsafe for him to return, was an issue capable of grounding a finding that compelling reasons existed. The Court found that, by rejecting this material on the unstated assumption that because his previous RRT application had been rejected that the material before the Tribunal must also be rejected, the Tribunal failed to engage with this material and give it genuine consideration.
[28] *Al Souhmarani v MIBP* [2016] FCCA 2866 (Judge Street, 7 November 2016) at [26]. In considering the principles in *Monakova v MIMA* [2006] FMCA 849 (Philips FM, 16 June 2006), the Court held that to the extent that *Monakova* might be read as identifying a principle that the Tribunal should disregard circumstances of hardship unless a direct link is manifested of the applicant suffering hardship if required to leave Australia, that would be going beyond the statutory provision and might constitute a misconstruction of the relevant kind (at [32]).

that purpose is to deal with cases where there are compelling reasons for not putting particular applicants to the hardship of having to leave Australia to apply for a partner visa.[29]

Schedule 3 – Timing of Compelling Circumstances

In considering whether there are compelling reasons for not applying Schedule 3 requirements, the Tribunal is required to have regard to circumstances that existed at the time of application and circumstances that arose after the time of visa application.[30]

In *Waensila v MIBP*[31] the Full Federal Court held that Tribunal erred in failing to take into account events or circumstances that emerged after the date of the visa application in considering whether there were compelling reasons for not applying Schedule 3 criteria. The Court observed that the purpose of the waiver is to provide greater flexibility to respond to compelling circumstances[32] and the text of the relevant provisions in cl.820.211(2)(d)(ii) do not contain any clear words that have the effect of confining that consideration to events which only existed at the time of the visa application.[33]

'Waiver' of regulations 1.20J, 1.20KA and 1.20KB sponsorship limitations

The approval of sponsorships for all subclasses of partner visas is subject to certain limitations on sponsorships contained in r.1.20J and r.1.20KA. The approval of sponsorships for partner visas and child visas is also subject to limitations on 'sponsors of concern' as defined in r.1.20KB.

Regulation 1.20J - Limitation on serial sponsorship

Regulation 1.20J is concerned with preventing serial sponsorship. It allows sponsorship approval in circumstances where a sponsor has successfully sponsored more than one partner, only 'if the Minister is satisfied that there are compelling circumstances affecting the sponsor'.[34] In this provision the compelling circumstances must specifically affect the *sponsor*. For further detail on the nature of the sponsorship limitations, see MRD Legal Services Commentary: Limitation on Sponsorships.

The legislative intention of this provision can be found in the Explanatory Statement which indicates that the Minister can approve sponsorships or nominations if 'compelling circumstances' exist.[35] These include:

- the previous spouse or interdependent partner has died;
- the previous spouse or interdependent partner has abandoned the sponsor or nominator, and there are children requiring care and support;
- the new relationship is long-standing;[36] or

[29] *Al Souhmarani v MIBP* [2016] FCCA 2866 (Judge Street, 7 November 2016) at [18], citing Griffiths J in *Waensila v MIBP* [2016] FCFAC 32.
[30] *Waensila v MIBP* [2016] FCAFC 32 (Dowsett, Robertson and Griffiths JJ, 11 March 2016).
[31] *Waensila v MIBP* [2016] FCAFC 32 (Dowsett, Robertson and Griffiths JJ, 11 March 2016) per Robertson J at [22] and Griffiths J at [59], overruling the Federal Court decision in *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 which held that 'compelling reasons' was limited to those arising out of the circumstances as at the time of visa application.
[32] *Waensila v MIBP* [2016] FCAFC 32 per Dowsett J at [2], Robertson J at [18] and Griffiths J at [56].
[33] *Waensila v MIBP* [2016] FCAFC 32 per Dowsett J at [2], Robertson J at [16] and Griffiths J at [58].
[34] r.1.20J(2).
[35] Explanatory Statement to SR 1996 No. 211.
[36] What is a reasonable period for the purpose of defining 'long-standing' will depend on the evidence, the circumstances of each case and the nature of the hardship/detriment that would be suffered if the sponsorship/nomination were not approved. While the length of the relationship should be 'long-standing', this period of time per se should not be the determinative factor but ought to draw its significance from a number of other factors relevant to the case. Guidance may be drawn from the

- there are dependent children of the new relationship.

These points have been incorporated into PAM3 in relation to this provision.[37] These examples are not exhaustive and the Tribunal should consider the individual circumstances of each case, taking account of the fact that the purpose of the sponsorship limitation is to prevent abuse of the partner/fiancé migration provisions. PAM3 also identifies the following as relevant when considering waiving the bar on repeat sponsorship:

- the nature of the hardship/detriment that would be suffered (by the sponsor) if the sponsorship were not approved;

- the extent and importance of the ties the sponsor has to Australia, and the consequent hardship/detriment that would be suffered if the sponsorship were not approved and the sponsor were to feel compelled to leave Australia to maintain their relationship with the applicant.[38]

The meaning of 'compelling circumstances' in the context of r.1.20J was considered by the Full Federal Court in *Babicci v MIMIA*.[39] The Court held that 'on any view of the meaning of [compelling], the circumstances must be so powerful that they lead the decision-maker to make a positive finding that the [provision] should be waived'.[40]

In *Nagaki v MIBP* the Court identified particular circumstances which *of themselves* could not constitute compelling circumstances in the context of r.1.20J:

- The genuineness of the relationship between the applicant and sponsor could not, in and of itself, constitute a compelling circumstance affecting a sponsor. The Court commented that, were it otherwise, every applicant who demonstrated that they were a spouse for the purposes of cl.820.211(2)(a) would fall within the exception in r.1.20J(2).[41]

- An applicant's entitlement to fast-track the process of obtaining a Partner (Residence) visa on the basis of being in a partner relationship for three years or longer within the definition of 'long-term partner relationship in r.1.03, cannot amount to a compelling circumstance affecting the sponsor for r.1.20J(2). The definition of long-term partner relationship in r.1.03 has no statutory relevance or application for the purposes of r.1.20J(2).[42]

However, this is not to say that the existence of a genuine long term relationship could not form part of the circumstances which the decision-maker may find amount to compelling circumstances affecting the sponsor. The obligation upon the Tribunal is to consider the claims put forward by the applicant and whether it is satisfied that those circumstances are compelling circumstances affecting the sponsor.

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definition of 'long-term partner relationship' in r.1.03, which is included in cll.100.221(5) and 801.221(6A). It refers to a spouse or de facto relationship of not less than 3 years, or not less than 2 years if there is a child (other than a step-child) of both parties.

[37] PAM3 - Migration Regulations - Div 1.4B - Limitation on certain sponsorships under Division 1.4 – Sponsorship Limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas - Assessing Reg. 1.20J at [7.2] (re-issue date: 18/11/2016).

[38] PAM3 - Migration Regulations - Div 1.4B - Limitation on certain sponsorships under Division 1.4 – Sponsorship Limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas - Assessing Reg. 1.20J at [7.2] (re-issue date: 18/11/2016).

[39] *Babicci v MIMIA* (2005) 141 FCR 285.

[40] *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. The Court found no error in the approach taken by the Tribunal in considering whether each of the circumstances, alone or together, 'compelled' the exercise of the discretion or that it was 'forced or driven to waive the prohibition'. Contrast *Babicci v MIMIA* [2004] FCA 1645 (Moore J, 16 December 2004) at [16]-[17].

[41] *Nagaki v MIBP* [2016] FCCA 1070 (Judge Jarrett, 6 May 2016) at [58].

[42] *Nagaki v MIBP* [2016] FCCA 1070 (Judge Jarrett, 6 May 2016) at [69].

Regulation 1.20KA - Limitation on 'split applications'

Regulation 1.20KA prevents persons who have been granted contributory parent or aged contributory parent visas from sponsoring a pre-existing spouse or de facto partner for a partner or prospective marriage visa for 5 years after the day when the person was granted the contributory parent visa.[43]

However, the sponsorship may be approved:

- if the visa applicant had *compelling reasons*, other than his or her financial circumstances, for not applying for a contributory parent visa at the same time as their spouse or de facto partner; or

- if the visa applicant applied for a contributory parent visa at the same time as the sponsor and withdrew the application before it was granted, the visa applicant had *compelling reasons*, other than his or her financial circumstances, for withdrawing the application for a contributory parent visa.

The purpose of this regulation is to prevent the practice known as 'split applications'. That is, where one member of a married or de facto couple applies for a contributory parent visa claiming that their partner is not migrating, and once he or she is granted a permanent contributory parent visa, he or she sponsors their partner for a partner or prospective marriage visa. The effect of this practice is that the person who migrates on a partner or prospective marriage visa avoids paying the higher visa application charge for a contributory parent visa.[44]

The explanatory statement and Departmental Guidelines set out that *compelling reasons* may include where the visa applicant was unable to migrate with the proposed sponsor due to family illness or other obligations, other than financially-related obligations.[45]

However, consideration should be given to any reasons which are claimed to be compelling and whether the *applicant* was *compelled* to not apply or withdraw their application at the relevant time. It is for the Tribunal to make a judgment as to whether the applicant's reasons were compelling in all the circumstances, as opposed to *the Tribunal* having to be *compelled*.

To achieve the stated purpose, the wording of the regulation specifically excludes the possibility of waiving the limitation on the basis that the applicant's financial circumstances presented a compelling reason not to apply or to withdraw at the relevant time. Consideration of the applicant's inability to pay the fee may therefore be construed as an irrelevant consideration when considering whether to waive the limitation.[46]

For further detail on the operation of this sponsorship limitation, see MRD Legal Services Commentary: Limitation on Sponsorships.

[43] Introduced by Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009, No.116), Schedule 2. It applies to a partner visa application made on or after 1 July 2009.
[44] Explanatory Statement to Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009, No.116), Schedule 2.
[45] Explanatory Statement to Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009, No.116), Schedule 2; PAM 3 Migration Regulations - Divisions - Div 1.4B - Limitation on Certain Sponsorships under Division 1.4 - Sponsorship Limitations - Partner (Provisional / Temporary) and Prospective Marriage Visas at [12.2] (re-issue date: 18/11/2016).
[46] While having regard to the sponsor's circumstances has not been specifically excluded, it will depend on the facts of the case whether the applicant and the spouse had intertwined their finances to the extent that regard to the sponsor's finances is inseparable from regard to the applicant's finances.

Regulation 1.20KB – Restrictions on sponsorship where 'sponsor of concern'

Regulation 1.20KB prevents persons[47] who have been charged or convicted of a child sex offence or similar serious offences from sponsoring a spouse or child[48] where any of the applicants are under 18 years at the time of the decision on the application for approval of the sponsorship.[49] The limitation applies to visa applications made on or after 27 March 2010.

The sponsorship limitation does not apply where:

- none of the applicants is under 18 years at the time of the decision for approval of the sponsorship; or
- the sponsor or their spouse or de facto partner was charged with a registrable offence, and that charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction; or
- the sponsor or their spouse or de facto partner was convicted of a registrable offence, and the conviction has been quashed or otherwise set aside.[50]

If the limitation does apply, the Minister, or the Tribunal on review, nevertheless retains discretion to approve the sponsorship if:

- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the sponsorship, and they have not been subsequently charged with a registrable offence, and there are *compelling circumstances* affecting the sponsor or the applicant;[51] or
- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the sponsorship, has subsequently been charged with a registrable offence but such charge has been withdrawn, dismissed or otherwise disposed of without the recording of the conviction, and there are *compelling circumstances* affecting the sponsor or the applicant.[52]

Compelling circumstances are not defined for the purpose of r.1.20KB. The Explanatory Statement accompanying the regulations introducing the provision does not provide any situations or examples which may be considered as compelling circumstances. Similarly, PAM3 indicates that compelling should be given its ordinary dictionary meaning, and does not provide examples or guidance, other than that it is for the sponsor or applicant to demonstrate compelling circumstances.[53] One important factor to note is that the compelling circumstances may affect the sponsor *or* the applicant for the visa. Other than this, the discussion above under General Principles may assist.

[47] For child visa applications only, this includes the sponsor or the sponsor's spouse or de facto partner.
[48] Specifically r.1.20KB applies to sponsorships for the purposes of Child (Migrant) (Class AH), Child (Residence) (Class BT), Extended Eligibility (Temporary) (Class TK), Partner (Temporary) (Class UK), Prospective Marriage (Temporary) (Class TO) visas, and Partner (Provisional) (Class UF) visas.
[49] Introduced by Migration Legislation Amendment Regulations 2010 (No.2) (SLI 2009, No.116), Schedule 1.
[50] r.1.20KB(2), (7) and (8).
[51] r.1.20KB(4) and (9). Note the wording of r.1.20KB(9)(b) – which appears to refer to *the sponsor* having completed the sentence, rather than the spouse or de facto partner of the sponsor.
[52] r.1.20KB(5) and (10).
[53] See PAM3 – Migration Regulations - Div 1.4 - Form 40 sponsorship – Protection of children – Sponsors of concern – Assessing Sponsorship Applications against reg.1.20KB - Approving sponsorships under reg.1.20KB waiver provisions, at [29] (re-issue date: 9/5/2014).

For further information on the operation of this sponsorship restriction, see MRD Legal Services Commentary: Limitation on Sponsorships.

Compelling reasons for absence from Australia for resident return visas

Eligibility for a Subclass 155 Resident Return visa[54] is tied to specific criteria requiring an applicant to not have been absent for a continuous period of, and/or periods that total, more than 5 years since the applicant last departed Australia, unless there are compelling reasons for that absence.[55]

PAM3 provides the following examples of compelling reasons for any continuous or cumulative absence of 5 years or more since last departing Australia:

- severe illness or death of an overseas family member;
- work or study commitments by the applicant or their partner that are of a professional nature, in circumstances where the acquired experience results in a benefit to Australia;
- the applicant is living overseas in an ongoing relationship with an Australian citizen partner;
- the applicant or the applicant's accompanying family members have been receiving complex or lengthy medical treatment preventing travel;
- the applicant has been involved in legal proceedings such as sale of property, custody, or contractual obligations and the timing was beyond the applicant's control;
- the applicant has been caught up in a natural disaster, political uprising or other similar event preventing them from travel; or
- the applicant can demonstrate they have been waiting for a significant personal event to occur that has prevented them from relocating to or returning to Australia.[56]

However, care must be taken in following these examples. In *Paduano v MIMIA*[57] the Court held that the expression 'compelling reasons for the absence' refers to the applicant's absence and it is the *applicant* who must have been 'compelled' by the reasons for his absence.[58] It is for the Tribunal, therefore, to make a judgment as to whether the reasons for the absence are forceful (and therefore convincing) by reference to some standard of reasonableness such as a reasonable person in the same circumstances as the applicant (as opposed to the Tribunal having to 'be compelled' by the compelling reasons).[59]

[54] Subclass 155 (Five Year Resident Return) is part of the Return (Residence) Visa Class (Class BB). See item 1128, Schedule 1 to the Regulations.
[55] cl.155.212(3)(a) and (b) for applicants outside of Australia; cl.155.212(3A)(b) for applicants in Australia. For further detail about the applicable criteria, see MRD Legal Services Commentary: Resident Return Visas.
[56] PAM3 – Migration Regulations - Sch2 RRV - Resident return visas (RRVs) - BB-155 – Five Year Resident Return – Absence for more than 5 years – compelling reasons for absence (re-issue date: 19/11/2016). In respect of this last dot point PAM3 goes further and suggests that the period of time for any such event would have to be reasonable in its context. For example, a 12 month delay while waiting for a dependent child to complete their schooling or a tertiary qualification is likely to be a decision that a reasonable person, facing the same set of circumstances would make, however waiting to relocate to Australia for several years would not generally be considered to be a decision a reasonable person would make.
[57] *Paduano v MIMIA* (2005) 143 FCR 204.
[58] *Paduano v MIMIA* (2005) 143 FCR 204.
[59] *Paduano v MIMIA* (2005) 143 FCR 204 at [41]. See also *Cirillo v MIBP* [2015] FCCA 2137 (Judge Neville, 14 August 2015). In *Cirillo*, the applicant claimed that he was compelled to remain in Italy for 17 years due to strong family and cultural ties and various events involving close family members. The Court held that the Tribunal erred by finding that *it* was not satisfied the

In considering the meaning of 'compelling' the Court in *Paduano* held that it should not be read narrowly so as to exclude forceful reasons which raise moral necessity.[60] Equally, there is nothing which confines it to reasons incorporating an involuntary element, involving circumstances beyond the applicant's control as suggested by the examples in PAM3.[61]

Additional criteria applicable to unlawful non-citizens and certain bridging visa holders (Schedule 3)

Consideration of 'compelling reasons' also arises in the context of additional criteria which are applicable to unlawful non-citizens and certain bridging visa holders in Schedule 3 to the Regulations:

- For an applicant who has not, on or after 1 September 1994, been the holder of a substantive visa and, on 31 August 1994, was either an illegal entrant or the holder of an entry permit that was not valid beyond 31 August 1994, the Tribunal must be satisfied that, among other matters, there are 'compelling reasons for granting the visa'.[62]

- For an applicant who ceased to hold a substantive or criminal justice visa on or after 1 September 1994, or who entered Australia unlawfully on or after 1 September 1994 and had not subsequently been granted a substantive visa, then the Tribunal must be satisfied that, among other matters, there are 'compelling reasons for granting the visa'.[63]

PAM3 states that 'compelling' in this context should be given its normal dictionary definition and then refers to that definition as 'brought about by moral necessity'.[64] However, restricting it to such situations which involve 'moral necessity' arguably imposes a more restrictive test than the ordinary meaning of 'compelling' otherwise does. Accordingly, the Tribunal should consider reasons which are forceful, are convincing as well as those reasons which involve moral necessity in determining if they are compelling or otherwise.

PAM3 also notes that compelling reasons may stem from compassionate factors, the applicant's circumstances or those of another and circumstances beyond the applicant's control (such as serious accident or illness depending upon the circumstances).[65] However, again, the Tribunal should be mindful that the word 'compelling' does not, by itself, necessarily require any of these factors (such as an involuntary element involving circumstances beyond a person's control).[66] The guidelines suggest that all the circumstances of the case, individually and cumulatively, should be considered.

Once compelling reasons have been found to exist, there must be a link between their existence and the granting of the visa insofar as there must be 'compelling reasons for granting the visa. In

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reasons for the applicant's absence from Australia were compelling, when it was *the applicant* who must be compelled. Further, the Tribunal erred in not applying the relevant standard of reasonableness as set out in *Paduano*.

[60] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].

[61] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].

[62] Criterion 3003(d). Additional matters include factors beyond the applicant's control, substantial compliance and an intention to comply with visa conditions.

[63] Criterion 3004(d). Additional matters include factors beyond the applicant's control, substantial compliance and an intention to comply with visa conditions. In *Su v MIMIA* [2005] FMCA 107 (Lloyd-Jones FM, 24 February 2005), the Court rejected an argument that the Tribunal should have considered and explored the difficult recent birth of the applicants' son as a 'compelling circumstance' for cl.3004(d) in circumstances where the Tribunal had found the applicant did not satisfy cl.3004(c) relating to factors beyond the applicant's control.

[64] PAM3 - Sch3 - Additional criteria applicable to unlawful non-citizens and certain bridging visa holders – Criteria 3003 & 3004 - Compelling reasons to grant the visa must exist (re-issue date: 19/5/2016)

[65] PAM3 - Sch3 - Additional criteria applicable to unlawful non-citizens and certain bridging visa holders – Criteria 3003 & 3004 - Compelling reasons to grant the visa must exist (re-issue date: 19/5/2016).

[66] *Paduano v MIMIA* (2005) 143 FCR 204 at [37].

considering this, PAM3 recommends that considering the likely consequences of not granting the visa might assist in this process.[67]

Waiver of Public Interest Criterion 4020

The requirements of cl.4020(1) and (2) may be waived if the decision maker is satisfied that there are:

- compelling circumstances that affect the interests of Australia;[68] or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen[69]

that justify the granting of the visa. However, the waiver provisions do not apply to the identity requirements in PIC 4020(2A) and PIC 4020(2B).[70]

The waiver is a two-staged inquiry:

1) first, the decision-maker needs to consider whether there are compelling circumstances within the meaning of PIC4020(4)(a) or (b), and, if so,
2) the decision-maker must then consider whether to exercise the discretion to waive the requirements of PIC4020, having regard to those circumstances.[71]

The following case law provides guidance as to the operation of the waiver and how the phrases 'compelling' and 'compassionate' operate in the PIC4020 context:

- *Kaur v MIBP* – the Full Court confirmed that the Tribunal is not obliged to apply international treaty obligations, such as the United Nations Convention on the Rights of the Child.[72]
- *Singh v MIBP* - the Court comprehensively examined the elements of PIC4020(4)(b). It held that 'interests' refers to any present or future state of affairs that is or may be of benefit or to the advantage of the relevant person, and that 'circumstances that affect' requires a comparison between the position the relevant person will be in if the visa applicant is granted a visa, with the position the relevant person will be in if the visa applicant is not granted a visa.[73] The word 'compassionate' implies the existence of a person or persons suffering or being distressed, such that circumstances would be compassionate where they induce a decision maker to alleviate the suffering that will be brought about by the visa applicant not being granted by granting the visa, whereas circumstances will be 'compelling' where the position the person will be in if the visa is not granted compared to that they would be in if it were granted are such as to irresistibly urge, force, or oblige the decision-maker to grant the visa.[74] However, the notion that the decision-maker was required to waive PIC4020 once satisfied there were compelling or compassionate circumstances is not correct in light of *Kaur v MIBP* [2017] FCAFC 184.

[67] PAM3 - Sch3 - Additional criteria applicable to unlawful non-citizens and certain bridging visa holders – Criteria 3003 & 3004 - Compelling reasons to grant the visa must exist (re-issue date: 19/5/2016).
[68] cl.4020(4)(a).
[69] cl.4020(4)(b).
[70] These provisions were inserted by Migration Amendment (2014 Measures No.1) Regulation 2014, SLI2014 No.32, schedule 1, item [1].
[71] *Kaur v MIBP* [2017] FCAFC 184 (Dowsett, Pagone and Burley JJ, 27 November 2017) at [26].
[72] *Kaur v MIBP* [2017] FCAFC 184 (Dowsett, Pagone and Burley JJ, 27 November 2017) at [22].
[73] *Singh v MIBP* [2017] FCCA 2461 (Judge Manousaridis, 12 October 2017) at [29]-[32].
[74] *Singh v MIBP* [2017] FCCA 2461 (Judge Manousaridis, 12 October 2017) at [34]-[35].

- *Bi v MIBP* – the failure by the Tribunal to set out any authorities on the meaning of compelling, nor spell out its understanding of the word, did not demonstrate any misunderstanding of its meaning.[75] In addition, the Tribunal was required to engage in an active intellectual process in relation to the matters put forward by the applicant as justifying waiver, and it did so by weighing those matters and accepting they made a contribution to Australia, but concluding they did not reach the standard or level of compelling circumstances in PIC4020(4)(a).[76]

- *Singh v MIBP* - referred to general case law on the meaning of compelling circumstances that might assist decision-making in this context.[77] The review applicant had provided a letter of support from the director of a business, referring to damage to the company that may result from not being able to employ him. The Court noted that the evidence did not address disadvantage to the director personally, or establish that he would suffer any detriment if the appellant were not employed, and the company was not an Australian citizen and found it was open to the Tribunal to conclude that the consequences to the company were speculative and not compelling. The Court commented that 'compelling circumstances' are limited to those which have a special or strong persuasive force,[78] and relied on earlier authorities referring to circumstances 'evoking interest, attention … in a powerfully irresistible way', that 'must be so powerful',[79] or force or drive the decision-maker 'irresistibly' to be satisfied.[80]

- *Vyas v MIMAC* - the Court found no error in the Tribunal's findings that, whilst accepting that it would be disadvantageous to an Australian business to lose the applicant as an employee, it was not a compelling or compassionate circumstance as the cost to the business of recruiting, training and replacing a staff member was an ordinary aspect of the operation of almost all business which occurred on an ongoing basis.[81] The Court also found no error in the Tribunal's finding that, whilst it would be distressing for the applicant and her husband to be separated from their family members in Australia who would be saddened by their departure, it would not have such a 'deleterious' effect such that family members would 'totally break down'.[82]

- *Sharma v MIBP* - the Court found no error in the Tribunal's consideration of 'compassionate or compelling circumstances' in PIC 4020(4)(b).[83] An elderly Australian couple had provided a statement regarding support received from the applicant that they would have to endure physical and emotional hardship if the applicant were to leave Australia. The Tribunal accepted the bond existed but found that the circumstances did not amount to compassionate or compelling circumstances, referring among other things to the judgment in *Vyas* and the circumstances identified in the Explanatory Statement to SLI 2011, No.13, which introduced PIC 4020. The Court found the Tribunal was entitled to have regard to the matters it did.[84]

[75] *Bi v MIBP* [2017] FCCA 2652 (Judge Riley, 1 November 2017) at [22].
[76] *Bi v MIBP* [2017] FCCA 2652 (Judge Riley, 1 November 2017) at [37], distinguishing *Sharma v MIBP* [2015] FCCA 2669 (Judge Emmett, 6 October 2015), where the Court held the Tribunal had failed to actively engage with the claimed circumstances and give reasons for its failure to be satisfied that PIC4020(1) should be waived. The Court did not consider whether *Sharma* was wrongly decided.
[77] *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [21]-[24].
[78] *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [20].
[79] *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [21]-[22], citing *Babicci v MIMIA* [2014] FCA 1645 *and Babicci v MIMIA* (2005) 141 FCR 285.
[80] *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [23]-[24], citing *Plaintiff M64/2015 v MIBP* [2015] HCA 50.
[81] *Vyas v MIMAC* [2013] FCCA 1226 (Judge Raphael, 2 September 2013).
[82] *Vyas v MIMAC* [2013] FCCA 1226 (Judge Raphael, 2 September 2013).
[83] *Sharma v MIBP* [2016] FCCA 961 (Judge Emmett, 4 May 2016).
[84] *Sharma v MIBP* [2016] FCCA 961 (Judge Emmett, 4 May 2016) at [53].

- *Mudiyanselage v MIAC* - the Court found no error in the Tribunal's acceptance of the applicant's claims to have worked unpaid for over a year and to have been a victim of fraud and noted her position as a graphic pre-press tradesperson at Australia Post but, having regard to the ordinary meaning of the terms 'compassionate' and 'compelling' and relevant departmental policy, found these factors did not constitute compelling and compassionate circumstances that affected the interests of Australia or of an Australian citizen, permanent resident or eligible New Zealand citizen.[85]

- *Ibrahim v MIBP* – the Court found no error in the in the Tribunal's finding that meeting one of the primary criteria for the grant of the visa will not, of itself, be sufficient to demonstrate compelling or compassionate circumstances that justify waiver of PIC 4020(1).[86] While the Tribunal accepted that the review applicant wanted the visa applicants to join him in Australia where he could care for them, the Tribunal found that this reason did not go beyond the requirements for the grant of the visa, which required that the visa applicants be the orphan relatives of the review applicant. The Tribunal should, however, be wary of making statements that a certain circumstance could never be a compelling or compassionate circumstance.[87]

Further guidance on circumstances that may amount to compelling or compassionate circumstances may be found in Department policy and in the Explanatory Statement to SLI 2011, No.13. Although not binding, the Tribunal may have regard to the Department's interpretation and examples of what may constitute compelling or compassionate circumstances.[88] Additional information on the Departmental Policy and the Explanatory Statement can be found in the MRD Legal Services Commentary on '[PIC 4020 and bogus documents/false or misleading information]'.

Ultimately, whether a circumstance or reason is compelling and/or compassionate is a question of fact and degree for the Tribunal.[89] In making such an assessment, the scope of the meaning of the relevant phrase must be referenced by both the context in which it appears and the purpose of the relevant provision. The considerations that may be relevant to each of the provisions in PIC 4020(4) will differ as one relates to the interests of Australia and the other relates to the interests of an Australian citizen/permanent resident/eligible New Zealand citizen. The Tribunal is obliged to consider all the circumstances of the case including *any* matters put forward by an applicant, engage in an active intellectual process in relation to these matters, and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances. If satisfied that there are compelling and/or compassionate circumstances, only then can the Tribunal consider those circumstances in the application of the discretion to waive the requirements of PIC4020(1) and (2) as the case may be.

[85] *Mudiyanselage v MIAC* [2012] FMCA 887 (Emmett FM, 21 September 2012 at [38]–[50]), upheld on appeal in *Mudiyanselage v MIAC* (2013) 211 FCR 27, though the Court on appeal did not consider exceptional circumstances in the waiver provisions.
[86] *Ibrahim v MIBP* [2017] FCCA 882 (Judge Jarrett, 3 May 2017) at [86] and [98].
[87] In *Singh v MIBP* [2017] FCCA 2461 (Judge Manousaridis, 12 October 2017), the Court found the Tribunal had erred by incorrectly construing PIC4020(4)(b) as excluding from the notion of compassionate or compelling circumstances the emotional bonds and support the partner visa applicant and sponsor each other because it regarded these matters to be the hallmarks or usual incidents of a genuine partner relationship: at [56].
[88] *Mudiyanselage v MIAC* [2012] FMCA 887 (Emmett FM, 21 September 2012 at [43]) where the Court noted it was open for the Tribunal to be guided by Department policy. This was upheld on appeal in *Mudiyanselage v MIAC* (2013) 211 FCR 27, though the Court in this case did not have regard to the question of exceptional circumstances in the waiver provisions. See PAM3 - Migration Regulations - Schedules - Sch4 - 4020 - The integrity PIC - Discretion to Waive - PIC 4020(4) (re-issue date: 19/5/2016).
[89] See e.g. the comments in *Singh v MIBP* [2016] FCA 156 (North J, 22 February 2016) at [18] to the effect that the PIC 4020 waiver depends on the satisfaction of the Tribunal and the assessment of the facts is a matter for the Tribunal.

Compelling Reasons for Refugee and Humanitarian Visa Grant

Although not reviewable by the Tribunal, 'compelling reasons' has been the subject of judicial consideration in the context of the criterion in cl.202.222 for Refugee and Humanitarian (Class XB) (Subclass 202) visas. This consideration provides some guidance in relation to the 'compelling reasons' requirement in similar statutory contexts.

In *Plaintiff M64/2015 v MIBP*[90] the High Court was asked to consider the proper construction and operation of cl.202.222(2) and in particular, the role of the consideration of subparagraphs 202.222(a)-(d). Specifically, cl.202.222 requires that 'there are compelling reasons for giving special consideration to granting' the visa having regard to the four factors in cl.202.222(2)(a)-(d). The majority of the Court drew a distinction between the nature of the decision entrusted to the Minister as not being a 'determination' but, rather, 'satisfaction'. They held that state of satisfaction must be informed by the factors mentioned in pars (a) to (d), to which the Minister must have regard in making the single evaluation required in order to grant a Subclass 202 visa.[91] However, the state of mind required must be one reached by reference to 'reasons' that are 'compelling'. In outlining what this meant, the Court held that those reasons must 'force or drive the decision-maker' 'irresistibly' to be satisfied that 'special consideration' should be given to granting the particular application.[92]

Public Interest Criterion 4013

Applicants for certain visas must meet PIC 4013. In general terms, PIC 4013 cannot be satisfied by a visa applicant who has had a visa cancelled less than 3 years before the date of application, unless the Minister is satisfied that, in the particular case:

- compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa within 3 years of the cancellation.

There has been limited consideration of compelling circumstances affecting the interests of Australia in this context.[93] In *Anupama v MIAC* [94] the Court held that the Tribunal should have considered whether the Department had committed a civil wrong by giving negligent advice to the applicant and, if so, whether it was a compelling circumstance affecting the interests of Australia to remedy that wrong.[95] In contrast in *Wang v MIAC*[96] the Court found no error in the Tribunal's conclusion that applicant's claims to suffer mental illness and to have contributed an economic benefit to Australia in the form of school fees and future taxes, did not constitute compelling circumstances or affect the

[90] *Plaintiff M64/2015 v MIBP* [2015] HCA 50 (French CJ, Bell, Keane and Gordon JJ; and with Gageler J delivering a separate judgment, 17 December 2015).
[91] *Plaintiff M64/2015 v MIBP* [2015] HCA 50; French CJ, Bell, Keane and Gordon JJ at [30].
[92] *Plaintiff M64/2015 v MIBP* [2015] HCA 50; French CJ, Bell, Keane and Gordon JJ at [31], citing *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 141 FCR 285 at 289 [21] ('force or drive the decision-maker') and *Paduano v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 204 at 211 [32], 213 [37] ('irresistibly').
[93] See *Anupama v MIAC* [2009] FMCA 817 (Driver FM, 10 September 2009) at [31]. The Court held that the exercise of the discretion miscarried because the Tribunal asked itself the wrong question. In the circumstances of that case, the applicant had claimed to the Tribunal that she had been incorrectly advised by the Department, and the Tribunal's findings were open to be interpreted as an acceptance of that account.
[94] [2009] FMCA 817 (Driver FM, 10 September 2009)
[95] *Anupama v MIAC* [2009] FMCA 817 (Driver FM, 10 September 2009) at [31].
[96] [2009] FMCA 865 (Turner FM, 16 September 2009).

interests of Australia.[97] For a more detailed discussion, see MRD Legal Services commentary: Public Interest Criterion 4013.

Other references to 'compelling and/or compassionate'

Most consideration of 'compelling and/or compassionate' circumstances is based on express provisions in the Act or the Regulations However, there are circumstances where these considerations are implied in the Regulations, for example, in the proper approach to the exercise of some discretions. These include the discretion to waive the health criterion[98] (implied by case law), and the discretion to cancel a visa (implied by reference to case law and policy).[99]

Public Interest Criterion 4007 – Health Waiver

Public Interest Criterion 4007 (health requirements) may be waived if the Minister is satisfied that the granting of the visa would be unlikely to result in '**undue cost to the Australian community or undue prejudice to access to health care or community services**'.

The Full Federal Court has held that 'over and above the consideration of the likelihood that cost or prejudice will be "undue" there is the discretionary element of the ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed "compelling circumstances" may properly have a part to play.'[100]

PAM3 reflects that in assessing whether there is a basis to waive the 4007 health criteria, decision-makers should take into account any compelling and compassionate circumstances of the applicants, for example, close family links to Australia and/or reasons why the family would find it difficult to return to their home country.[101] For further information in relation to the health waiver, see MRD Legal Services Commentary: Health Criteria.

Cancellation of visas under s.116

The discretion to cancel a visa under s.116 of the Act arises if certain grounds for cancellation are found to exist. In some cases the grounds incorporate legislative considerations of 'compelling reasons', for example, s.116(1)(fa) permits the cancellation of a student visa if the visa holder is not or is likely not to be, a genuine student or is engaging in conduct not contemplated by the visa and the regulations provide that the decision-maker, in considering whether this ground exists, may have

[97] *Wang v MIAC* [2009] FMCA 865 (Turner FM, 16 September 2009) at [31]. The Court also held that there was no substance in the applicant's argument that the risk factors in PIC 4013(2) did not apply because his previous visa was cancelled after he made an application for a new visa. In this regard it held that it was open for the Tribunal to find that the overlap of visa application and visa cancellation did not amount to compelling or compassionate circumstances that would impact on any other institution or person beyond the applicant himself.

[98] PIC 4007(2)(b)(i)-(ii).

[99] For further detail on considerations relevant to the discretion to cancel a visa see MRD Legal Service commentaries: Cancellation under s.109 and Cancellation under s.116.

[100] *Bui v MIMA (*1999) 85 FCR 134 at [47]:'The evaluative judgment whether the cost to the Australian community or prejudice to others, if the visa is granted, is 'undue' may import consideration of compassionate or other circumstances. It may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person will make some significant calls upon health or community services. There may be circumstances of a "compelling" character, not included in the "compassionate" category that mandates such an outcome. But over and above the consideration of the likelihood that the cost or prejudice will be "undue" there is the discretionary element of the Ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed "compelling circumstances" may properly have a part to play'.

[101] PAM3 – Migration Regulations - Sch4/4005-4007 – The health requirement - Health waivers – The PIC 4007 health waiver – what does 'undue' mean? (re-issue date 14/10/2016).

regard to matters including where the education-provider deferred enrolment because of compelling or compassionate circumstances and the Minister is satisfied those circumstances have ceased to exist.[102]

In other cases, there are no legislative provisions referring to compelling or compassionate reasons/circumstances, but there are references to compelling and/or compassionate circumstances in PAM3 policy relating to the exercise of the discretion to cancel a visa on specified grounds. For further information about the various policy considerations, in particular whether policy is to consider 'compelling', 'compassionate', 'compelling *and* compassionate' or 'compelling *or* compassionate' reasons/circumstances, refer to the current PAM3 policy for the applicable ground of cancellation. See also MRD Legal Services commentary: Cancellation under s.116.

Relevant Case Law

Al Souhmarani v MIBP [2016] FCCA 2866	Summary
Anani v MIMAC [2013] FCCA 1140	
Antipova v MIMIA [2006] FCA 584; (2006) 151 FCR 480	Summary
Anupama v MIAC [2009] FMCA 817; (2009) 112 ALD 564	Summary
Babicci v MIMIA [2005] FCAFC 77; (2005) 141 FCR 285	Summary
Babicci v MIMIA [2004] FCA 1645;	Summary
Bi v MIBP [2017] FCCA 2652	
Boakye-Danquah v MIMIA [2002] FCA 438; (2002) 116 FCR 557	Summary
Bojanovic v MIMIA [2002] FCA 113; (2002) 124 FCR 416	Summary
Bozanich v MIMIA [2002] FCA 81	Summary
Bui v MIMA [1999] FCA 118; (1999) 85 FCR 134	
Chan v MIBP [2015] FCCA 47	Summary
Chan v MIBP [2017] FCCA 2893	
Cirillo v MIBP [2015] FCCA 2137	Summary
MIMA v Dunne [1999] FCA 204; (1999) 94 FCR 72	
Gayudan v MIAC [2010] FMCA 233	
Graham v MIMIA [2003] FCA 1287	Summary
Hamoud v MIBP [2015] FCCA 1087	
Ho v MIMIA [2005] FMCA 1104	
Ibrahim v MIBP [2017] FCCA 882	Summary
Kaur v MIBP [2017] FCAFC 184	Summary
Khanfer v MIMIA [2003] FMCA 238	Summary
Liu v MIAC [2010] FMCA 60	Summary
Liu v MIBP [2015] FCA 1368	
Mala v MIMIA [2005] FMCA 556; (2005) 189 FLR 341	

[102] s.116(1A) and r.2.43(1C) and (1D).

Mao v MIMIA [2005] FMCA 89	
McNamara v MIMIA [2004] FCA 1096	
Monakova v MIMIA [2006] FMCA 849	Summary
Mudiyanselage v MIAC [2012] FMCA 887	Summary
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MZYPZ v MIAC [2012] FCA 478	Summary
MZYPZ v MIAC [2011] FMCA 531	Summary
Nagaki v MIBP [2016] FCCA 1070	Summary
Neofotistou v MIMIA [2005] FCA 919; (2005) 144 FCR 478	Summary
Paduano v MIMIA [2005] FCA 211; (2005) 143 FCR 204	Summary
Phan v MIAC [2007] FMCA 88	Summary
Plaintiff M64/2015 v MIBP [2015] HCA 50	
Schaap v MIMIA [2000] FCA 1408; (2000) 63 ALD 65	
Sharma v MIBP [2016] FCCA 961	Summary
Sidhu v MIBP [2014] FCCA 167	
Singh v MIBP [2016] FCA 156	
Singh v MIBP [2017] FCCA 2461	Summary
Su v MIMIA [2005] FMCA 107	Summary
Thongpraphai v MIMIA [2000] FCA 1590	
Terera v MIMIA [2003] FCA 1570; (2003) 135 FCR 335	
Waensila v MIBP [2016] FCAFC 32	Summary
Wang v MIAC [2009] FMCA 865	

Last updated / reviewed: **12 December 2017**

Partner Visas
Exceptions to Relationship Requirement – Death/Child

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Overview

The Partner visa scheme requires an assessment of the partner relationship at three distinct points in time:

1. to be granted a provisional (temporary) visa, which is required in order to be granted a permanent visa, the visa holder must be in a spouse or de facto relationship;[1]
2. the parties must continue to be in this relationship at the time of decision on the provisional visa; and
3. for the grant of a permanent visa, the applicant must continue to be in a spouse or de facto relationship at the time of decision on the permanent visa application, which is usually a period of at least two years after the application is made.

There are limited exceptions to the requirement of a continuing relationship. A Subclass 100, 801 or 820 Partner visa may still be granted despite the relationship ceasing in circumstances where:

- the relationship has ceased because the sponsoring partner has died;
- the sponsoring partner has committed domestic/family violence against the applicant or a member of the family unit of the applicant; or
- both the applicant and the sponsoring partner have an ongoing connection to a child.

This commentary discusses the requirements for the 'death of sponsor' and 'child' exceptions for Partner visas, including distinctions in the requirements for the exceptions for onshore and offshore temporary and permanent visa subclasses. The 'domestic/family violence' exception is discussed in detail in a separate MRD Legal Services Commentary: Domestic/family Violence.

In this commentary, reference is made to the post 1 July 2009 Partner visa criteria that refer to 'spouse' or 'de facto partner' as defined in s.5F of the *Migration Act 1958* (the Act) (spouse), and in s.5CB (de facto partner). For further guidance see the MRD Legal Services Commentaries: Spouse and de facto partner.

Child exception

The 'child' exception is available in the Partner visa Subclasses 820, 801 and 100 and is available only as a time of decision criterion. The exception is in identical terms for each of these visa subclasses.[2]

The key requirements for the 'child' exception are discussed below.

Partner relationship has ceased

The requirement in each of the Partner visa classes containing the child exception is that the applicant would meet the requirement that they are the spouse or de facto partner of the sponsoring

[1] An applicant for a Subclass 309 Partner (Provisional) visa who is not in a spouse or de facto relationship may alternatively meet time of application criteria on the basis of an intention to marry: cl.309.211(3).
[2] cl.820.221(3), cl.801.221(6) and cl.100.221(4). Note that 100.221(4)(c) adds that the child exception applies only after the applicant first entered Australia.

partner, except that the relationship has ceased[3] *and* they meet the other requirements in relation to a child. This means there is a threshold requirement that a genuine partner relationship as relevantly defined in the Act must have existed and that relationship has ceased. If the relevant spousal or de facto relationship never existed, the child exception cannot be made out.

Legal obligations in respect of a child

Where a spousal or de facto relationship has ceased and both the visa applicant and the sponsoring partner have ongoing legal rights or obligations in respect of a child, the visa applicant may be eligible for the Partner visa despite the relationship having ceased.[4] This exception is only available for the Partner visa Subclasses 820, 801 and 100, and only at time of decision.

To meet the requirements for this exception, the visa applicant must:

(A) have custody, joint custody of, *or* access to; *or*

(B) have a residence *or* contact order made under the *Family Law Act 1975* relating to:

at least one child, in respect of whom the sponsoring partner has:

(C) been granted joint custody or access by a court, *or*

(D) a residence *or* contact order made under the *Family Law Act 1975*, *or*

(E) a child maintenance order made under the *Family Law Act 1975 or* any formal maintenance obligation.

The terminology used in paragraphs (A) and (C) relate to the *Family Law Act 1975* as it was before 11 June 1996, while the terminology used in paragraphs (B) and (D) relate to the *Family Law Act 1975* after 11 June 1996.[5]

Custody is defined in r.1.03 as '(a) the right to have the daily care and control of the child; and (b) the right and responsibility to make decisions concerning the daily care and control of the child.'

Biological and adoptive parents

There appears to be no requirement for formal court orders as evidence of 'custody or joint custody, or access to' the child where the applicant is the biological parent of the child.[6]

In relation to the child exception, a visa applicant can have a right to custody as an incident of the statutory imposition of parental responsibility by operation of the *Family Law Act 1975* in relation to a biological child and the sponsoring partner can have a formal maintenance obligation (though by

[3] cl.820.221(3)(a), 801.221(6)(b), 100.221(4)(b).
[4] cl.820.221(3)(b)(ii), 801.221(6)(c)(ii), 100.221(4)(c)(ii).
[5] The dates here reflect changes to the *Family Law Act 1975* when it was amended by the *Family Law Reform Act 1995.*
[6] The case of *Srour v MIMA* [2006] FCA 1228 (Moore J, 15 September 2006) is arguably the leading authority for this proposition. In *Srour*, Moore J reviewed the conflicting judgments of *Yazbeck v MIMA* [2002] FCA 980, in which Sundberg J found that the failure to include a reference to court orders in Item (A) was the result of bad drafting, and *Fitch v MRT* [2004] FCA 1673, where Dowsett J found the absence of reference to court orders in Item (A) to be deliberate. His Honour considered that because item (B) applied to orders under the *Family Law Act,* item (A) must have been intended to deal with custody and access arrangements not arising under that Act (at [36]). Moore J in *Srour* found Dowsett J's judgment in *Fitch* more recent and marginally more compelling (at [56]). In *Ortiz v MIAC* [2011] FMCA 432 (Burnett FM, 9 June 2011) at [20] the Court summarised the principles arising from *Yazbeck, Fitch and Srour* as including that a party has a right to custody as an incident of the statutory imposition for parental responsibility by operation of the *Family Law Act* and accordingly an applicant who is the biological parent of the child may satisfy item (A) even where there is no court ordered custody or maintenance arrangement. Burnett FM held that, when determining whether a person is the biological father of a child for this purpose, the Tribunal is not bound to take into account the legal presumption of paternity in s.69Q of the *Family Law Act 1975* (at [45]). An appeal from this judgment was successful, but this issue was not considered in detail on appeal, both Courts proceeded on an assumption that if paternity was established, the 'child exception' would apply (see [2011] FMCA 432 at [48] and (2011) 224 FCR 583 at [33]): *Ortiz v MIAC* (2011) 224 FCR 583, at [41] and [55].

operation of the *Child Support (Assessment) Act 1989* rather than the *Family Law Act*).[7] Consequently, the applicant can meet the requirement in (A) to have custody of the child and the sponsoring partner can meet the requirement in (E) of having a 'formal maintenance obligation' in respect of the child by virtue of the general law obligations of a biological parent to his/her child, provided there is no Court order granting sole custody to the other parent.

On current authority, subparagraphs (A) and (E) of the child exception will be satisfied where the visa applicant and sponsoring partner are the biological parents of a child (provided there is no Court order which contradicts their relevant general law obligations). The same applies where the visa applicant and sponsoring partner are the adopted parents of the child, since adoption, in general terms, extinguishes the parental obligations and rights of the biological parents and vests them in the adopter(s). (See 'The effect of adoption on existing familial relationships' in the MRD Legal Services Commentary: Definition of Adoption). As such an applicant who is recognised as a biological or adoptive parent will meet the criteria even without the Tribunal having to be satisfied that the visa applicant has any current ongoing interest in or relationship with the child.

Where there is no evidence of court-ordered 'access' rights for the purpose of Item (A), Dowsett J's judgment in *Fitch* provides some guidance as to what may constitute 'access.' His Honour's *obiter* comments suggest that 'access' was traditionally used to describe *contact arrangements* between a non-custodial parent and his or her child.[8] Further, 'access' in Item (A) contemplated some form of continuing access, rather than one previous incident of contact.[9]

Non-biological and non-adoptive parents

There is no requirement in the visa criteria that the child be the biological or adopted child of the visa applicant and/or sponsor. Australian family law does not limit custody/access and obligations to the biological parents or adopted parents only.[10] The applicant and/or sponsoring partner may be non-parents (under family law).

However, where the applicant is not the biological (or adopted) parent of the child, formal court orders or custody/access arrangements will be necessary to satisfy the criteria for the child exception. If an applicant seeks to satisfy the custody/access element of the child exception as a non-biological parent, he or she will need to demonstrate that they have either custody or joint custody of, or access to the child (under the *Family Law Act 1975*);[11] or a residence order or contact order made under *the Family Law Act 1975.*[12]

For example, if the visa applicant is the step-parent, he/she can satisfy the custody/access element of the child exception if there is evidence of 'access arrangements' made under the *Family Law Act 1975* and the sponsor, as the biological parent, satisfies sub-paragraph (E) on the basis of his/her legal obligation to maintain the child as the biological parent (which does not require court orders).[13]

[7] *Srour v MIMIA* [2006] FCA 1228 at [57]. Justice Moore in *Srour* was considering cl.100.221(4)(c)(ii) and the conflicting Federal Court decisions of *Fitch v MRT* [2004] FCA 1673 (Dowsett J, 21 December 2004) and the earlier decision in *Yazbeck v MIMA* (2002) 124 FCR 458.
[8] *Fitch v MRT* [2004] FCA 1673 (Dowsett J, 21 December 2004) *per* Dowsett J at [30].
[9] *Fitch v MRT* [2004] FCA 1673 (Dowsett J, 21 December 2004) *per* Dowsett J at [31].
[10] See, for example, *Family Law Act 1975*, s.65C.
[11] cl.801.221(6)(c)(ii)(A). In *Le v MIAC* (2009) 111 ALD 460, Turner FM found the comments made in *Srour v MIMIA* [2006] FCA 1228 and *Fitch v MRT* [2004] FCA 1673 (see FN 14 above) that to meet Item (A) no court order is required, to be obiter in regard to 'access' as those cases turned on the question of 'custody'. The Court went on to find that the Tribunal was correct in saying that 'access' required there to be orders made under that Act, unless the applicant is a biological parent of the child, in which case custody is assumed by operation of the Family Law Act. This construction requires the relevant clause to be read with a semi-colon after the word 'made' in cl.801.221(6)(c)(ii)(B) so that both paragraphs (A) and (B) must be 'under the Family Law Act *1975*'.
[12] cl.801.221(6)(c)(ii)(B).
[13] See *Fitch v MRT* [2004] FCA 1673 (Dowsett J, 21 December 2004) at [32] and [38].

Where the visa applicant is the biological parent and the sponsoring partner is the step-parent, then the sponsoring partner would require court orders to meet either of sub-paragraphs (C) or (D).

For sub-paragraph (E), it would appear that in some circumstances, a step-parent could have a formal maintenance obligation under the *Child Support (Assessment) Act 1989*, and therefore satisfy the second of the two alternate requirements in paragraph (E).[14]

Orders under the Family Law Act 1975

The terms 'custody', 'access' 'residence order' and 'contact order' are used in the Regulations with reference to the *Family Law Act 1975*, however, they are no longer used in the *Family Law Act* itself.

'Parenting orders' replaced 'custody' and 'access' orders following major reforms to the *Family Law Act 1975* in 1996. From 1996 until 2006, parenting orders included residence orders, which dealt with the person or persons with whom a child is to live,[15] and contact orders, which dealt with contact between a child and another person or other persons.[16]

Further changes to the *Family Law Act 1975* came into effect on 1 July 2006 which removed references to 'residence' and 'contact'.[17] Today, a parenting order is an order dealing with any aspect of parental responsibility for a child and can be applied for by any person concerned with the care, welfare and development of a child. Section 64B(2) now sets out matters with which parenting orders may deal, including the person or persons with whom a child is to live, the time a child is to spend with another person or persons, and the communication a child is to have with another person or other persons.[18] These terminology changes do not make any change of substance.; However, to date, the Migration Regulations have not been amended to reflect the change in terminology. Orders made under the *Family Law Act 1975* post 1 July 2006, using the new terminology can be accepted as meeting the requirements of this criterion as the reference in the criterion is to 'a residence order or a contact order made under the *Family Law Act 1975*' and it is reasonably open to the Tribunal to find that a parenting order or a parenting plan[19] that deals with whom a child lives or spends time or has communication with is 'a residence order' or 'contact order' respectively.[20]

To the extent that a parenting order deals with the maintenance of a child, it is a child maintenance order.[21] A child maintenance order includes arrangements regarding who is to provide financial support for the child. Maintenance obligations can be formalised in forms other than a parenting order,

[14] See, for example, *Srour v.MIMA* (2006)155 FCR 441, at [29], [52], [57]. *Srour* did not consider the obligations of step-parents specifically, but parents generally, and considered the judgment in *Fitch v MRT* [2004] FCA 1673, in which Dowsett J held that a biological parent had a 'formal maintenance obligation' to their child by virtue of s.66C of the *Family Law Act,* under common law and Queensland legislation. Dowsett J commented in *obiter* that the terms of s.66D (s.66D(1) states: 'The step-parent of a child has, subject to this Division, the duty of maintaining a child if, and only if, a court, by order under section 66M, determines that it is proper for the step-parent to have that duty.') suggested that the word 'parents' in s.66C excluded step-parents and, inferentially, all but biological or adoptive parents. Addressing the custody or access requirement in paragraph (A), Dowsett J relied on s.61C of the *Family Law Act* (s.61C(1) states: 'Each of the parents of a child who is not 18 has parental responsibility for the child'). In *Srour,* the sponsoring spouse was the mother of the visa applicant's child. Counsel for Mr Srour submitted that the sponsoring spouse had a 'formal maintenance obligation' by operation of s.3(1) of the *Child Support (Assessment) Act 1989*. The Court agreed that the sponsor had a formal maintenance obligation through operation of the Assessment Act rather than the *Family Law Act.* Although not spelt out in the judgment in *Srour*, the argument appears to rely on s.111CS(2) of the *Family Law Act*, which states: 'The circumstances in which parental responsibility for a child is attributed to a person, or extinguished, by operation of law (without the intervention of a court or appropriate authority) are governed by the law that applies in the country of the child's habitual residence.'

[15] (repealed) s.64B(2)(a), (3), *Family Law Act 1975.*

[16] (repealed) s.64B(2)(b), (4), *Family Law Act 1975.*

[17] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (No.46, 2006).

[18] s.64B(2)(a),(b) and (e), *Family Law Act 1975.*

[19] Section 63C(6) provides that a registered parenting plan is a parenting plan that was registered in a court under s.63E as in force any time before the commencement of the *Family Law Amendment Act 2003* and that continued to be registered immediately before the commencement of that Act. The *Family Law Amendment Act 2003* relevantly commenced on 14 January 2004.

[20] This is because these terms are not specifically defined for the purposes of the Migration Regulations.

[21] s.64B(2)(f), (5), *Family Law Act 1975.*

for instance a private child support agreement which is registered with the Child Support Agency or a child support agreement, registered and administered by the Child Support Agency. The existence of maintenance obligations in determining if the requirements for the child exception are met is only relevant to the extent that the sponsoring partner has such obligations.

Generally, only the Family Court of Australia or the Federal Circuit Court under the *Family Law Act 1975* can make orders which affect the rights relating to 'custody' as defined in r.1.03 of the Regulations.[22] If there are any orders made under the *Family Law Act 1975*, the effect of those orders in relation to both the applicant and the sponsoring partner and to what extent the orders remove or alter the subsisting general law rights/obligations in respect of the child are relevant considerations.[23] Certain State and Territory courts may issue orders (e.g. restraining orders or Apprehended Violence Orders, which affect or restrict access to children, known as 'family violence orders' in Division 11 of the *Family Law Act 1975*). An order in relation to *access* does not, of itself, affect the parental rights referred to in the definition of custody in r.1.03, although it may make those rights very difficult to exercise in practice.

Death of sponsor exception

Onshore – Subclasses 820 and 801

The key requirements for the 'death of the sponsor' exception for the onshore Partner visas are that the applicant:

- would continue to meet the spouse or de facto partner requirement except that the sponsoring partner has died;
- satisfies the decision-maker that he/she would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died; and
- has developed close business, cultural or personal ties in Australia.[24]

Offshore – Subclass 100

For the offshore permanent Partner visa the key requirements for the 'death of sponsor' exception are that the applicant:

- would continue to meet the relevant spouse or de facto partner requirement except that, *after the applicant first entered Australia as the holder of the temporary visa*, the sponsoring partner has died;[25] and
- satisfies the decision-maker that the applicant would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died.[26]

[22] Legislative and judicial powers in relation to the adoption of children, child protection and child welfare remain with the States/Territories. It may, therefore, be possible that a State Court make a custody or maintenance order using those powers. Such orders may be enough to fulfil the requirements of Item (A) and Item (E). For an example see *Fitch v MRT* [2004] FCA 1673.
[23] See, for example, *Ortiz v MIBP* [2014] FCCA 2994 (Judge Howard, 23 December 2014). The Court found that the visa applicant could not establish that he came within the exception outlined in cl.820.221(3)(b)(ii), given the existence of a Family Court of Australia order that the applicant was only permitted to communicate with the child by cards and letters addressed to the child care of the mother. This judgment was upheld on appeal in *Ortiz v MIBP* [2015] FCA 427 (White J, 7 May 2015).
[24] cl.820.221(2), cl.801.221(5).
[25] cl.100.221(3)(b).
[26] cl.100.221(3)(c).

The 'death of a sponsor' exception is therefore significantly different in the case of the offshore Partner visa Subclass 100 (compared to the onshore subclasses) in the following respects:

- the exception only applies if the sponsoring partner has died *after the applicant first entered Australia*;
- it is not a requirement that the spouse or de facto partner of the sponsoring partner have close business, cultural or personal ties in Australia.

Threshold assessment of spouse or de facto relationship

In the context of the 'death of a sponsor' exception there is a specific requirement in the clause containing the exception that the Minister (or Tribunal on review) be satisfied that the applicant would have continued to be the spouse or de facto partner (as relevant) of the sponsor if the sponsoring partner had not died.[27] This means that the applicant must satisfy the decision-maker that the relationship was, until the death of the sponsoring partner, a spousal or de facto relationship as defined in the Act and Regulations as they stood at the relevant time.[28]

Generally the death exception is a time of decision criterion only, with the exception of the Subclass 820 Spouse visa. For the holder or former holder of a Subclass 300 (Prospective Marriage) visa, where the applicant has married the sponsoring partner, the death of sponsoring partner provision can be invoked at time of application.[29] Clause 820.211(7)(d) requires that the applicant satisfy the Minister that he/she would have continued to be the spouse of the sponsoring partner if the sponsoring partner had not died. Therefore, the Tribunal must still assess the relationship in that context at the time of application.

Close business, cultural or personal ties

The 'close ties' requirement only applies to onshore provisional and permanent Partner visa Subclasses 820 and 801,[30] and, except for Subclass 820 visa applications where the applicant is the holder of a Subclass 300 visa,[31] only as a time of decision criterion. The requirement is that the applicant 'has developed close business, cultural or personal ties in Australia'. There is no specific case law that has considered this phrase in this context.

Department guidelines include an opinion on the meaning of this requirement.[32] While the Tribunal may consider Departmental guidelines regarding the interpretation of a legislative provision, it should not treat the Department's opinion as determinative in such matters.[33] The guidelines suggest that in assessing whether an applicant has *developed* close ties, officers should consider the extent to which ties have *formed* and/or *strengthened* over time. However, it is important to note that nothing in the words of the regulation suggests any specific temporal requirement, or degree of strength of the tie beyond the requirement that it be 'close', and it would be an error of law to impose more stringent standards than the language of the Regulations requires. As it is a time of decision criterion, it is

[27] cl.100.221(3)(c), 801.221(5)(c), 820.211(7)(d) and 820.221(2)(b) – although note the slightly different language between the offshore and onshore visa subclasses discussed above.
[28] Generally speaking, the time of application. For further discussion on which definition is relevant to a particular matter, see the MRD Legal Services Commentary: Spouse and de facto partner.
[29] cl.820.211(7).
[30] cl.820.221(2)(c), cl.801.221(5)(d). [31] cl.820.211(7)(e).
[31] cl.820.211(7)(e).
[32] Procedural Instruction - Sch2 Visa 820 - Partner – The UK-820 primary applicant - 19.5 Must have developed close ties (re-issue date 19/11/16).
[33] For further information and relevant case law, see MRD Legal Services Application of Policy commentary, "Use of Policy and Interpretative Guidelines in Exercise of Non-Discretionary Power"

sufficient if the applicant has satisfactory evidence of relevant ties as at the date of the Tribunal's decision.

Common law presumption of death

There may be cases where the applicant alleges his or her sponsoring partner is dead, but cannot produce evidence of the death. In these circumstances the common law presumption of death may be relevant in determining if the sponsoring partner has died or is in fact still alive. However, care should be taken not to apply the presumption too strictly as s.353 of the Act provides that, in reviewing a decision, the Tribunal is not bound by technicalities, legal forms or rules of evidence.[34]

The common law presumption of death is commonly expressed as follows:

> *If, at the time when the issue whether a man is alive or dead must be judicially determined, at least seven years have elapsed since he was last seen or heard of, by those who in the circumstances of the case would according to the common course of affairs be likely to have received communication from him or have learned of his whereabouts, were he living then, in the absence of evidence to the contrary, it should be found that he is dead.*[35]

When having regard to the presumption, all of the surrounding circumstances of the case and the respective probabilities that life has ceased or is continuing need to be balanced accordingly.

Where the circumstances in which the person (who is claiming that the relevant relative is presumed to be dead) last saw that relative were such that it could be concluded that there would be no expectation that he or she would 'naturally hear' from that relative, the common law presumption would not apply in favour of that applicant.[36]

The common law presumption of death is discussed in detail in the MRD Legal Services Commentary: Remaining Relative.

Relevant case law

Judgment	Judgment Summary
Axon v Axon (1937) 59 CLR 395	
Fitch v MRT [2004] FCA 1673	Summary
Gitau v MIMA [2006] FMCA 1243	
Goodreau v MIAC [2009] FMCA 35	Summary
Le v MIAC [2009] FMCA 948; (2009) 111 ALD 460	Summary
Ortiz v MIAC [2011] FMCA 432	Summary
Ortiz v MIAC [2011] FCA1498; (2011) 224 FCR 583	Summary
Ortiz v MIBP [2014] FCCA 2994	Summary
Ortiz v MIBP [2015] FCA 427	
Srour v MIMA [2006] FCA 1228; (2006) 155 FCR 441	Summary

[34] The Court's approach in *Ortiz v MIAC* [2011] FMCA 432 (Burnett FM, 9 June 2011), where it held that the presumption of paternity in the *Family Law Act* did not bind the Tribunal, would appear equally applicable to other legal presumptions, such that while it would be open to the Tribunal to have regard to the common law presumption of death, it would not be required to apply that presumption. An appeal against this judgment was successful, but on procedural grounds: *Ortiz v MIAC* (2011) 224 FCR 583.

[35] *Axon v Axon* (1937) 59 CLR 395 at 405.

[36] *Goodreau v MIAC* [2009] FMCA 35 at [28] citing *Axon v Axon* (1937) 59 CLR 395 at 401. The circumstances in that case in which the applicant last saw her father involved a physical and verbal altercation, such that, in the Court's opinion clearly led to the conclusion that there would be no expectation that she would 'naturally hear' from her father after that incident.

Yazbeck v MIMA [2002] FCA 980; (2002) 124 FCR 458	Summary

Available decision templates/precedents

Optional standard paragraphs for the child and death of sponsoring partner exceptions are available on the intranet.

Last updated/reviewed: 6 June 2019

Domestic / Family Violence Amendments Table

Primary Visa Application Date	Was the claim of family violence made to DIBP on or after 9/11/09, OR to Tribunal on or after 1/07/11?	Was a statutory declaration under r.1.25 1st lodged on or after 24/11/12?	Applicable version of Division 1.5, Migration Regulations 1994
On or after 22/03/14	N/A	N/A	Version 8[1]
24/11/12 – 21/03/14	N/A	N/A	Version 7[2]
9/11/09 – 23/11/12	N/A	Yes	Version 7[3]
	N/A	No	Version 6[4]
1/07/09 – 8/11/09	Yes	Yes	Version 7[5]
	Yes	No	Version 6[6]
	No	Yes	Application uncertain[7]
	No	No	Version 5[8]
15/10/07 – 30/06/09	Yes	Yes	Version 4[9]
	Yes	No	Version 3[10]
	No	Yes	Application uncertain[11]
	No	No	Version 2[12]
Before 15/10/07	N/A	Yes	Version 1[13]
	N/A	No	Version 1[14]

[1] Division 1.5 of Part 1 as amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument and removal of pre 1 January 1998 exception). Applies to visa applications on or after 22 March 2014. Incorporates Migration Legislation Amendment Regulation 2012 (No. 5) (evidentiary changes), Migration Amendment Regulations 2009 (No. 12) amendments (renumbering, FV must be during relationship), Migration Amendment Regulations 2009 (No. 7) amendments (same-sex), and Migration Amendment Regulations 2007 (No. 13) amendments (family violence) and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments.

[2] Division 1.5 of Part 1 as amended by Migration Legislation Amendment Regulation 2012 (No. 5) (evidentiary changes). Applies to visa applications on or after 24 November 2012, or (generally speaking) where r.1.25 statutory declaration first provided on/after 24/11/12. Incorporates Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument), Migration Amendment Regulations 2009 (No. 12) (renumbering, FV must be during relationship), Migration Amendment Regulations 2009 (No. 7) (same-sex), Migration Amendment Regulations 2007 (No. 13) (family violence) and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments.

[3] Division 1.5 of Part 1 as amended by Migration Legislation Amendment Regulation 2012 (No. 5) (evidentiary changes). Applies to visa applications on or after 24 November 2012, or (generally speaking) where r.1.25 statutory declaration first provided on/after 24/11/12. Incorporates Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument), Migration Amendment Regulations 2009 (No. 12) (renumbering, FV must be during relationship), Migration Amendment Regulations 2009 (No. 7) (same-sex), Migration Amendment Regulations 2007 (No. 13) (family violence) and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments.

[4] Division 1.5 of Part 1 as amended by Migration Amendment Regulations 2009 (No. 12) (renumbering, FV must be during relationship) if the applicant claimed family violence to Immigration on/after 9/11/09, or (by Migration Legislation Amendment Regulations 2011 (No. 1)) to the Tribunal on/after 1/7/11). Incorporates Tribunals Amalgamation Act 2015 (No.60, 2015) (tribunals amalgamation), Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument), Migration Amendment Regulations 2009 (No. 7) (same-sex), Migration Amendment Regulations 2007 (No. 13) (family violence), and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments.

[5] Division 1.5 of Part 1 as amended by Migration Legislation Amendment Regulation 2012 (No. 5) (evidentiary changes). Applies to visa applications on or after 24 November 2012, or (generally speaking) where r.1.25 statutory declaration first provided on/after 24/11/12. Incorporates Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument), Migration Amendment Regulations 2009 (No. 12) (renumbering, FV must be during relationship), Migration Amendment Regulations 2009 (No. 7) (same-sex), Migration Amendment Regulations 2007 (No. 13) (family violence) and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments.

[6] Division 1.5 of Part 1 as amended by Migration Amendment Regulations 2009 (No. 12) (renumbering, FV must be during relationship) if the applicant claimed family violence to Immigration on/after 9/11/09, or (by Migration Legislation Amendment Regulations 2011 (No. 1)) to the Tribunal on/after 1/7/11). Incorporates Tribunals Amalgamation Act 2015 (No.60, 2015) (tribunals amalgamation), Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument), Migration Amendment Regulations 2009 (No. 7) (same-sex), Migration Amendment Regulations 2007 (No. 13) (family violence), and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments.

[7] Migration Amendment Regulation 2012 (No. 5) (evidentiary changes) amendments purport to insert new r.1.24 which refers to evidence mentioned in r.1.23(9)(c) and remove definition of ‘competent person’. As these applications are not affected by the Migration Amendment Regulations 2009 (No. 12) renumbering amendments, there is no r.1.23(9)(c) and the pre 24/11/12 version of r.1.24, referring to competent persons, is unchanged. The definition of “competent person”, however, is purportedly omitted by Migration Amendment Regulation 2012 (No. 5) (evidentiary changes).

[8] Division 1.5 of Part 1 as amended by Migration Amendment Regulations 2009 (No. 7) (same-sex). Incorporates Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument), Migration Amendment Regulations 2007 (No. 13) (family violence) and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments.

[9] Division 1.5 of Part 1 as amended by Migration Legislation Amendment Regulation 2012 (No. 5) (evidentiary changes). Applies to visa applications on or after 24 November 2012, or (generally speaking) where r.1.25 statutory declaration first provided on/after 24/11/12. Incorporates Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument), Migration Amendment Regulations 2009 (No. 12) (renumbering, FV must be during relationship), Migration Amendment Regulation 2007 (No. 13) (family violence) and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments. Does not include 1/7/09 same-sex amendments.

[10] Division 1.5 of Part 1 as amended by Migration Amendment Regulations 2009 (No. 12) (renumbering, FV must be during relationship) **if** the applicant claimed family violence to Immigration on/after 9/11/09, or (by Migration Legislation Amendment Regulations 2011 (No. 1)) to the Tribunal on/after 1/7/11). Incorporates Tribunals Amalgamation Act 2015 (No.60, 2015) (tribunals amalgamation), Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument), Migration Amendment Regulations 2007 (No. 13) (family violence) and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments.

[11] Migration Amendment Regulation 2012 (No. 5) amendments purport to insert new r.1.24 which refers to evidence mentioned in r.1.23(9)(c) and remove definition of 'competent person'. As these applications are not affected by the Migration Amendment Regulations 2009 (No. 12) renumbering amendments, there is no r.1.23(9)(c) and the pre 24/11/12 version of r.1.24, referring to competent persons, is unchanged. The definition of 'competent person", however, is purportedly omitted by Migration Amendment Regulation 2012 (No. 5).

[12] Division 1.5 of Part 1 as amended by Migration Amendment Regulation 2007 (No. 13) (family violence). Incorporates Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument) and Migration Amendment Regulations (2005) (No. 4) (independent expert) amendments.

[13] The transitional provisions in Migration Legislation Amendment Regulation 2012 (No. 5) are not expressed to apply only to 'family violence' (rather than 'domestic violence' claims), but the relevant amendments are titled 'Amendments of *Migration Regulations 1994* relating to evidentiary requirements for family violence claims'. The amendments purport to insert new r.1.24 which refers to evidence mentioned in r.1.23(9)(c) and remove definition of "competent person". As these applications are not affected by the MAR 2009 (No. 12) renumbering amendments, there is no r.1.23(9)(c) and the pre 24/11/12 version of r.1.24, referring to competent persons, is unchanged. The definition of "competent person", however, is purportedly omitted by Migration Amendment Regulation 2012 (No. 5) (evidentiary changes). In the circumstances, to give effect to the amendments, the better view is that they do not apply to visa applications made before 15 October 2007.

[14] Division 1.5 of Part 1 as amended by Migration Amendment Regulations (2005) (No. 4) (independent expert). Applies to visa applications made on or after 15/10/07 and visa applications not finally determined at that date. Incorporates Migration Amendment (Redundant and Other Provisions) Regulation 2014 (legislative instrument) amendment.

Version 8

Division 1.5—Special provisions relating to family violence

1.21 Interpretation

In this Division:

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

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.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

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.

Note: Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken

to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed—injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

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) the 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—conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
   (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or
   (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt 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

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:
   (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
   (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.

(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant 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.

(11) 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 satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), 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.

(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.

1.24 Evidence

The evidence mentioned in paragraph 1.23(9)(c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims); and

(b) the type and number of items of evidence specified by the Minister by instrument in writing for this paragraph.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by the spouse or de facto partner of the alleged perpetrator.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25(1) who alleges that he or she is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25(1) who alleges that another person is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.27 Documents not admissible in evidence

A document mentioned in the table is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(b) an application for merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(c) a prosecution of a maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Item	Document
1	A statutory declaration that is a type of evidence specified by the Minister under paragraph 1.24(b)
2	A statutory declaration under regulation 1.25
3	An opinion of an independent expert mentioned in subparagraph 1.23(10)(c)(i)

Division 1.5—Special provisions relating to family violence

1.21 Interpretation

In this Division:

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

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.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

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.

Note: Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed—injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

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—conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:

(a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

(b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt 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

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.

(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant 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.

(11) 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 satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), 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.

(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.

1.24 Evidence

The evidence mentioned in paragraph 1.23(9)(c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims); and

(b) the type and number of items of evidence specified by the Minister by instrument in writing for this paragraph.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by the spouse or de facto partner of the alleged perpetrator.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25(1) who alleges that he or she is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25(1) who alleges that another person is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.27 Documents not admissible in evidence

A document mentioned in the table is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(b) an application for merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(c) a prosecution of a maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Item	Document
1	A statutory declaration that is a type of evidence specified by the Minister under paragraph 1.24(b)
2	A statutory declaration under regulation 1.25
3	An opinion of an independent expert mentioned in subparagraph 1.23(10)(c)(i)

Division 1.5 Special provisions relating to family violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to family violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a family consultant under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to family violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23 (8) and (9).

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.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in family violence; or

(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in family violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning family violence within the operations of that refuge or crisis and counselling service.

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.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

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 — conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:

(a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

(b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt 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

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.

(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant 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.

(11) 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 satisfied under paragraph (10) (b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), 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.

(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.

1.24 Evidence

(1) The evidence referred to in paragraph 1.23 (9) (c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault, allegedly committed by the alleged perpetrator, on:

(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;

that is a record kept by a police service of a State or Territory (other than a statement by the alleged victim or by the person allegedly assaulted); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by the spouse or de facto partner of the alleged perpetrator.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of subregulation 1.21 (1)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of subregulation 1.21 (1)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant family violence (within the meaning of subregulation 1.21 (1)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant family violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant family violence; and

(f) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) must name the person whom the conduct of the alleged perpetrator was towards; and

(ii) must identify the relationship between the alleged victim and the person whom the conduct was towards; and

(g) must set out the evidence on which the competent person's opinion is based.

1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in subparagraph 1.23 (10) (c) (i), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Division 1.5 Special provisions relating to family violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to family violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a family consultant under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to family violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulation 1.23 (1A).

relevant family violence has the meaning given by paragraph 1.23 (2) (b).

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in family violence; or

(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in family violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning family violence within the operations of that refuge or crisis and counselling service.

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 the purposes of these Regulations:

(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;

if:

(c) on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator; or

(d) 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, 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; or

(e) a court has convicted the alleged perpetrator of, or has recorded a finding of guilt against the alleged perpetrator in respect of, an offence of violence against the alleged victim; or

(f) the Minister is satisfied, for paragraph (1B) (a), that the alleged victim has suffered relevant family violence; or

(g) the Minister is required by subregulation (1C) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

(1A) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) either of the following circumstances exists:

(i) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim;

(ii) for an alleged victim who is a person referred to in subregulation (2) — the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(A) the alleged victim has suffered relevant family violence; and

(B) the alleged perpetrator has committed that relevant family violence.

(1B) If an application for a visa includes a non-judicially determined claim of family violence, the Minister must consider whether the alleged victim has suffered relevant family violence (whichever of the circumstances mentioned in paragraph (1A) (b) exists) and:

(a) if satisfied that the alleged victim has suffered relevant family violence — consider the application on that basis; or

(b) if not satisfied that the alleged victim has suffered relevant family violence — seek the opinion of an independent expert about whether the alleged victim has suffered relevant family violence.

(1C) 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 family violence.

(2) In subparagraph (1A) (b) (ii):

(a) the persons referred to are the following:

(i) a spouse or de facto partner of the alleged perpetrator;

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner;

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(b) a reference to relevant family violence is a reference to conduct, whether actual or threatened, towards:

(i) the alleged victim; or

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

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

(iv) the property of the alleged victim; or

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

(vi) 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.

1.24 Evidence

(1) The evidence referred to in subparagraph 1.23 (1A) (b) (ii) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault, allegedly committed by the alleged perpetrator, on:

(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;

that is a record kept by a police service of a State or Territory (other than a statement by the alleged victim or by the person allegedly assaulted); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by the spouse or de facto partner of the alleged perpetrator.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant family violence (within the meaning of paragraph 1.23 (2) (b)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant family violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant family violence; and

(f) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) must name the person whom the conduct of the alleged perpetrator was towards; and

(ii) must identify the relationship between the alleged victim and the person whom the conduct was towards; and

(g) must set out the evidence on which the competent person's opinion is based.

1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in paragraph 1.23 (1B) (b), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Division 1.5 Special provisions relating to family violence

1.21 Interpretation

In this Division:

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23 (8) and (9).

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.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

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.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

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 — conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:

(a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

(b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt 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

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.

(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant 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.

(11) 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 satisfied under paragraph (10) (b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), 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.

(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.

1.24 Evidence

The evidence mentioned in paragraph 1.23 (9) (c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims); and

(b) the type and number of items of evidence specified by the Minister by instrument in writing for this paragraph.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by:

(a) the spouse of the alleged perpetrator; or

(b) if the alleged perpetrator is in an interdependent relationship with a person — that person.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.27 Documents not admissible in evidence

A document mentioned in the table is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(b) an application for merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(c) a prosecution of a maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Item	Document
1	A statutory declaration that is a type of evidence specified by the Minister under paragraph 1.24(b)
2	A statutory declaration under regulation 1.25
3	An opinion of an independent expert mentioned in subparagraph 1.23(10)(c)(i)

Division 1.5 Special provisions relating to family violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to family violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a family consultant under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to family violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23 (8) and (9).

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.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in family violence; or

(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in family violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning family violence within the operations of that refuge or crisis and counselling service.

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.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

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 — conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:

(a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

(b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt 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

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.

(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant 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.

(11) 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 satisfied under paragraph (10) (b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), 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.

(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.

1.24 Evidence

(1) The evidence referred to in paragraph 1.23 (9) (c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault, allegedly committed by the alleged perpetrator, on:

(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;

that is a record kept by a police service of a State or Territory (other than a statement by the alleged victim or by the person allegedly assaulted); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by:

(a) the spouse of the alleged perpetrator; or

(b) if the alleged perpetrator is in an interdependent relationship with a person — that person.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of subregulation 1.21 (1)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of subregulation 1.21 (1)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant family violence (within the meaning of subregulation 1.21 (1)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant family violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant family violence; and

(f) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) must name the person whom the conduct of the alleged perpetrator was towards; and

(ii) must identify the relationship between the alleged victim and the person whom the conduct was towards; and

(g) must set out the evidence on which the competent person's opinion is based.

1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in paragraph 1.23 (10) (c) (i), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Division 1.5 Special provisions relating to family violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to family violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a family consultant under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to family violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulation 1.23 (1A).

relevant family violence has the meaning given by paragraph 1.23 (2) (b).

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in family violence; or

(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in family violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning family violence within the operations of that refuge or crisis and counselling service.

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 the purposes of these Regulations:

(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;

if:

(c) on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator; or

(d) 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, 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; or

(e) a court has convicted the alleged perpetrator of, or has recorded a finding of guilt against the alleged perpetrator in respect of, an offence of violence against the alleged victim; or

(f) the Minister is satisfied, for paragraph (1B) (a), that the alleged victim has suffered relevant family violence; or

(g) the Minister is required by subregulation (1C) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

(1A) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) either of the following circumstances exists:

(i) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim;

(ii) for an alleged victim who is a person referred to in subregulation (2) — the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(A) the alleged victim has suffered relevant family violence; and

(B) the alleged perpetrator has committed that relevant family violence.

(1B) If an application for a visa includes a non-judicially determined claim of family violence, the Minister must consider whether the alleged victim has suffered relevant family violence (whichever of the circumstances mentioned in paragraph (1A) (b) exists) and:

(a) if satisfied that the alleged victim has suffered relevant family violence — consider the application on that basis; or

(b) if not satisfied that the alleged victim has suffered relevant family violence — seek the opinion of an independent expert about whether the alleged victim has suffered relevant family violence.

(1C) 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 family violence.

(2) In subparagraph (1A) (b) (ii):

(a) the persons referred to are the following:

(i) a spouse of the alleged perpetrator;

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse; or

(D) a person in an interdependent relationship with the alleged perpetrator;

(iii) a member of the family unit of a spouse of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse);

(iv) a person who is in an interdependent relationship with the alleged perpetrator; and

(b) a reference to relevant family violence is a reference to conduct, whether actual or threatened, towards:

(i) the alleged victim; or

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

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

(iv) the property of the alleged victim; or

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

(vi) 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.

1.24 Evidence

(1) The evidence referred to in subparagraph 1.23 (1A) (b) (ii) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault, allegedly committed by the alleged perpetrator, on:

(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;

that is a record kept by a police service of a State or Territory (other than a statement by the alleged victim or by the person allegedly assaulted); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by:

(a) the spouse of the alleged perpetrator; or

(b) if the alleged perpetrator is in an interdependent relationship with a person — that person.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant family violence (within the meaning of paragraph 1.23 (2) (b)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant family violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant family violence; and

(f) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) must name the person whom the conduct of the alleged perpetrator was towards; and

(ii) must identify the relationship between the alleged victim and the person whom the conduct was towards; and

(g) must set out the evidence on which the competent person's opinion is based.

1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in paragraph 1.23 (1B) (b), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Division 1.5 Special provisions relating to domestic violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to domestic violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a court counsellor under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to domestic violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of domestic violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of domestic violence.

non-judicially determined claim of domestic violence has the meaning given by subregulation 1.23 (1A).

relevant domestic violence has the meaning given by paragraph 1.23 (2) (b).

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in domestic violence; or

(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in domestic violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning domestic violence within the operations of that refuge or crisis and counselling service.

1.22 References to person having suffered or committed domestic violence

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

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

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

(1) For the purposes of these Regulations:

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

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

if:

(c) on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator; or

(d) 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, 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; or

(e) a court has convicted the alleged perpetrator of, or has recorded a finding of guilt against the alleged perpetrator in respect of, an offence of violence against the alleged victim; or

(f) the Minister is satisfied, for paragraph (1B) (a), that the alleged victim has suffered relevant domestic violence; or

(g) the Minister is required by subregulation (1C) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant domestic violence.

(1A) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of domestic violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered domestic violence; and

(b) either of the following circumstances exists:

(i) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that

the alleged perpetrator has committed an act of violence against the alleged victim;

(ii) for an alleged victim who is a person referred to in subregulation (2) — the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(A) the alleged victim has suffered relevant domestic violence; and

(B) the alleged perpetrator has committed that relevant domestic violence.

(1B) If 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 (whichever of the circumstances mentioned in paragraph (1A) (b) exists) and:

(a) if satisfied that the alleged victim has suffered relevant domestic violence — consider the application on that basis; or

(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.

(1C) 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.

(2) In subparagraph (1A) (b) (ii):

(a) the persons referred to are the following:

(i) a spouse of the alleged perpetrator;

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse; or

(D) a person in an interdependent relationship with the alleged perpetrator;

(iii) a member of the family unit of a spouse of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse);

(iv) a person who is in an interdependent relationship with the alleged perpetrator; and

(b) a reference to relevant domestic violence is a reference to violence against the alleged victim or his or her property that causes the alleged victim, or a member of the alleged victim's family, to fear for, or to be apprehensive about, the alleged victim's personal well-being or safety.

1.24 Evidence

(1) The evidence referred to in subparagraph 1.23 (1A) (b) (ii) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault on the alleged victim allegedly committed by the alleged perpetrator, being a record kept by a police service of a State or Territory (other than a statement by the alleged victim); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by:

(a) the spouse of the alleged perpetrator; or

(b) if the alleged perpetrator is in an interdependent relationship with a person — that person.

(2) A statutory declaration under this regulation that is made by a person who alleges that he or she is the victim of relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant domestic violence.

(3) A statutory declaration under this regulation that is made by a person who alleges that another person is the victim of relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant domestic violence; and

(e) set out the evidence on which the allegation is based.

1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant domestic violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant domestic violence; and

(f) must set out the evidence on which the competent person's opinion is based.

1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in paragraph 1.23 (1B) (b), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of domestic violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Family Violence

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Appendix A – Family Violence – review process flowchart

Overview

A number of visa subclasses include criteria in which evidence of family violence can provide a basis for an exception to a requirement of a continuing spouse or de facto partner relationship between the visa applicant (or a family member) and another person.[1]

This issue usually arises in the context of partner visa applications. All Partner visa classes and subclasses involve assessment of the partner relationship at specified points in time, including at the time of application and/or at the time of decision. However, there are limited exceptions to the requirement of a continuing relationship. A visa may still be granted despite the relationship ceasing in certain circumstances including where the sponsoring partner has committed family violence against the applicant or a member of the family unit of the applicant.

The family violence provisions have undergone a number of key changes over time. The applicable law differs in some instances depending upon when the visa application was made or when a claim of family violence was first made.[2] This commentary focusses on the provisions in effect from 9 November 2009.

The 'Special Provisions Relating to Family Violence' in Division 1.5 of the Regulations specify what constitutes family violence, how claims are to be made and assessed, and who can decide whether family violence has occurred.

Regulation 1.22 provides that a reference to a person having suffered or committed family violence is a reference to a person being taken, under r.1.23, to have suffered or committed family violence.

Regulation 1.23 provides for two broad circumstances in which a person is taken to have suffered or committed family violence:

1. 'Judicially determined' family violence, where there is a relevant court injunction, order, conviction, or finding of guilt.

2. 'Non-judicially determined claim' of family violence, where a person presents non-judicially determined evidence as specified in r.1.23(8) or r.1.23(9).[3] In these cases the Minister (or the Tribunal on review) is *either* satisfied that the alleged victim has suffered relevant family violence *or* is required to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

Where a non-judicially determined claim of family violence is made the Minister (or the Tribunal on review) must consider whether the alleged victim has suffered relevant family violence, as defined in r.1.21(1). [4] If the Tribunal is not satisfied on the materials before it that the alleged victim has suffered

[1] Specifically, partner/spouse Subclasses 100, 801, 820; Dependent Child Subclass 445; Resolution of Status Subclass 851; and Distinguished Talent Subclass 858.
[2] See also Legislative History.
[3] Formerly r.1.23(1A)(B) and r.1.24. R.1.23 was repealed and replaced with new r.1.23 on 9 November 2009. The amended version applies to visa applications made on or after 9 November 2009, as well as those made before, but not finally determined as at 9 November 2009 but only if the claim of family violence was made to Immigration on or after that date or to the Tribunal on or after 1 July 2011: Migration Amendment Regulations 2009 (No.12) (SLI 2009, No.273) r.6, Schedule 4 and Migration Legislation Amendment Regulations 2011 (No.1) (SLI 2011, No.105) r.12 and Schedule 10. Item 15AC, Schedule 9 of the *Tribunals Amalgamation Act 2015* (No.60, 2015) effectively preserves the validity of the SLI 2011, No.105 amendments as it applies to the Tribunal from 1 July 2015 after the tribunals amalgamation.
[4] r.1.23(10)(a). See also Relevant Family Violence. For visa applications made on or after 9 November 2009, as well as those made before, but not finally determined as at 9 November where the claim of family violence was only made to Immigration on

relevant family violence, the Tribunal must invite the applicant to a hearing. If still not satisfied following a hearing, the Tribunal must seek an opinion of an independent expert, and the opinion of the independent expert about whether the alleged victim suffered family violence must be taken as correct.[5]

The violence must have occurred when the married or de facto relationship was still in existence.[6]

As the issue arises most often in the context of Partner visa applications, that context will be the focus of much of the following discussion. However, the provisions of Division 1.5 apply equally to all visa Subclasses in which family violence is a criterion.

For a flowchart of the process where a family violence claim is made, click here.

Legislative history

There have been a number of key legislative changes affecting the family violence provisions.
A table summarising the amendments and containing links to the applicable version of Division 1.5 according to the date of visa application, date of family violence claim, and date of provision of first statutory declaration, is available at Domestic/Family Violence – Table of Amendments.

15 October 2007 amendments – 'family violence'

Division 1.5 originally introduced special provisions relating to 'domestic violence'.[7] The provisions relating to domestic violence were amended on 15 October 2007 to reflect changes to the *Family Law Act 1975*. For visa applications made on or after this date, the term 'domestic violence' was replaced with 'family violence'.[8]

9 November 2009 amendments – family violence must have occurred during relationship

Further amendments were made with effect from 9 November 2009 that restructured and renumbered a number of key family violence provisions. Substantive amendments were also made to Division 1.5 to make clear that the family violence must have occurred when the married or de facto relationship was in existence.[9] These changes only apply to (i) visa applications made on or after 9 November 2009,[10] and (ii) applications made before 9 November 2009 that were not finally determined at that date[11] *but only if* the applicant made the claim of violence either to Immigration on or after 9

or after that date or to the Tribunal on or after 1 July 2011, the definition is found in r.1.21(1) itself. For other visa applications, the term is defined in r.1.21(1) to mean that contained in r.1.23(2)(b).
[5] Current r.1.23(10)(c), and former r.1.23(1C).
[6] rr.1.23(3), (5), (7), (12) and (14): for applications made on or after 9 November 2009 and those applications made between 15 October 2007 and 9 November 2009 but not finally determined at that date, where the applicant claimed to Immigration on or after 9 November 2009, or to the Tribunal on or after 1 July 2011 that family violence has been committed. The amendments made by SLI 2009, No.273, SLI 2011, No.105 and *Tribunals Amalgamation Act 2015* (No. 60, 2015) do not appear to extend to visa applications lodged before 15 October 2007 (i.e. cases involving 'domestic violence' claims). For applications made before 9 November 2009 and the application for family violence was made to Immigration before 9 November 2009, there is no requirement that the family violence have occurred before the spousal relationship ended: *Muliyana v MIAC* (2010) 183 FCR 170 at [36].
[7] Migration Regulations (Amendment) 1995 No.117.
[8] SLI 2007, No.315.
[9] SLI 2009, No.273.
[10] SLI 2009, No.273: r.6.
[11] Although not free from doubt, it would appear that these amendments do not extend to visa applications lodged before 15 October 2007 (i.e. cases involving 'domestic violence' claims). See further the Domestic/Family Violence – Table of Amendments.

November 2009[12] or to the Tribunal on or after 1 July 2011.[13]

24 November 2012 – evidence of non-judicially determined claim specified in instrument

On 24 November 2012, the evidentiary requirements for establishing a non-judicially determined claim of family violence were amended to make it easier for visa applicants who have suffered family violence to provide evidence of a 'non-judicially determined claim of family violence' when they apply for a visa.[14] The amendments apply to (i) visa applications made on or after 24 November 2012; and (ii) visa applications made on or after 15 October 2007, but not finally determined by 24 November 2012*, if* a statutory declaration under r.1.25 was first lodged on or after 24 November 2012.[15]

22 March 2014 – minor technical changes

An exemption which applied to pre-1998 claims was removed for visa applications made on or after 22 March 2014[16] and the reference to Gazette Notice in the definition of independent expert was replaced by the term 'legislative instrument'.[17] Otherwise, the changes were technical in nature and did not substantively change the operation of the family violence provisions. It applies to all live visa applications.

What is 'relevant family violence'?

The term 'relevant family violence' means:

…. conduct, whether actual or threatened, towards:

(i) the alleged victim; or

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

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

(iv) the property of the alleged victim; or

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

(vi) 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.[18]

[12] SLI 2009, No. 273, r.6. 'Immigration' is defined in r.1.03 of the Regulations as the Department administered by the Minister administering the *Migration Act 1958*.

[13] SLI 2011, No.105, r.12 and Schedule 10. 'Claim' in this context should, consistently with the terms of the legislation, be taken to mean a claim which satisfied the evidentiary requirements. While the Court in *Singh v MIBP* [2014] FCCA 2670 (Judge Lloyd-Jones, 26 November 2014), appears to have suggested in *obiter (*at [17] and [23]) that a 'claim' made in a letter from a migration agent would be sufficient for r.6 of SLI 2009 No. 273 to apply, it did not expressly consider whether such claim satisfied, or was required to satisfy the evidentiary requirements for those purposes.

[14] Explanatory Statement to SLI 2012, No.256, at 2.

[15] SLI 2012, No.256: Schedules 6 and 7. The transitional provisions in SLI 2012, No.256 are not expressed to apply only to 'family violence' (rather than 'domestic violence') claims, but the relevant amendments are titled 'Amendments of *Migration Regulations 1994* relating to evidentiary requirements for family violence claims'. The amendments insert new r.1.24 which refers to evidence mentioned in r.1.23(9)(c) and remove the definition of 'competent person'. As pre 15 October 2007 visa applications are not affected by SLI 2009, No.273 renumbering amendments, there is no r.1.23(9)(c) and the pre 24 November 2012 version of r.1.24, requiring statutory declarations by competent persons, is unchanged. The definition of 'competent person', however, is omitted by Migration Amendment Regulation 2012 (No. 5). In the circumstances, to give effect to the amendments, the better view is that they do not apply to visa applications made before 15 October 2007.

[16] r.1.23(4)(b), amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30). This was an exemption from a court order needing to be made after the alleged perpetrator had the opportunity to be heard.

[17] r.1.21, amended by SLI 2014, No.30.

[18] For visa applications made before 9 November 2009 (where the claim of violence was made to Immigration before that date) r.1.21(1) states that the term 'relevant family violence' has the meaning given by r.1.23(2)(b). For visa applications made on or

This definition refers to conduct, rather than 'violence', which may be directed towards the alleged victim or a member of the alleged victim's family unit, or a member of the alleged perpetrator's family unit or the property of any of those persons.[19] This allows for a person to be found to have suffered relevant family violence even if the alleged perpetrator has not acted against the alleged victim directly. The conduct, whether directed at the alleged victim directly or at one of the other specified persons (or their property) must bring about the relevant state of mind in the alleged victim, namely a fear or apprehension about his or her wellbeing or safety. The definition has the added requirement that such fear or apprehension must be reasonable.[20]

The focus in the definition is not on any particular kind of conduct, but rather on its effect on the alleged victim.[21] The conduct may be in the form of actual or threatened physical violence, economic or psychological harm. This definition is expressed in similar terms to the definition of 'family violence' in s.4(1) of the *Family Law Act 1975* but the latter is not relevant for the purposes of the Tribunal's role.[22]

Who can be an alleged victim of family violence?

The criteria for the relevant visa Subclass will identify who must have suffered family violence as defined, i.e. who is a relevant 'alleged victim' within the meaning of Division 1.5 of the Regulations. For example, in relation to the onshore permanent Partner visa, cl.100.221(4)(c) of Schedule 2 refers to either the applicant, or a member of the family unit of the sponsoring partner, or a member of the family unit of the applicant (or of the sponsoring partner and applicant) having suffered family violence committed by the sponsoring partner. For the purposes of r.1.23, this means the alleged victim can be the applicant, and/or a member of the family unit of the applicant, and/or a member of the family unit of the sponsoring partner.

Who can be an alleged perpetrator?

The criteria for the relevant visa Subclass will also identify who must have committed family violence as defined (i.e. who is a relevant 'alleged perpetrator' within the meaning of Division 1.5 of the Regulations). For example, in relation to the Partner visa Subclasses, the applicable Schedule 2 'family violence' criterion refers to the applicant, or a member of the applicant's family unit, or a dependent child of the applicant and/or sponsoring partner, having suffered family violence '*committed by the sponsoring partner*' or '*committed by the sponsor*'.[23] For the purposes of r.1.23, this means the alleged perpetrator must be the sponsoring partner.

Using Subclass 100 as an example, the combined effect of the visa criterion referring to family violence 'committed by the sponsoring partner' and the provisions of r.1.23(1)(a) and (b), r.1.21(1),

after 9 November 2009, and visa applications made between 15 October 2007 and 9 November 2009 where the applicant only claims to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011 that family violence has occurred, 'relevant family violence' is defined in r.1.21(1): SLI 2009 No. 273, r.6 and Schedule 4. In either case, the definition is the same.

[19] 'Member of the family unit' is defined in r.1.12.

[20] In *KC v MIBP* [2015] FCCA 2349 (Judge Howard, 28 August 2015), the Court observed that the 'reasonableness' requirement provided an objective element to the test for family violence, and found no error in the independent expert's opinion that even if it was the case that the applicant felt subjectively fearful, such concerns were 'unrealistic' ([38]; [40]-[41]).

[21] In *KC v MIBP* [2015] FCCA 2349 (Judge Howard, 28 August 2015), the independent expert noted that there was no evidence that the applicant's willingness to complete all of the home duties was from force or threat of violence. The Court rejected the argument that the independent expert worked on the basis that the applicant was obliged to prove some sort of physical violence, or threat of physical violence or intimidation: at [19]-[22].

[22] For a discussion of the distinction between these definitions see *Al-Momani v MIAC* [2011] FMCA 453 (Driver FM, 31 August 2011).

[23] For example, cl.820.211(8)(d); cl.820.211(9)(d); cl.820.221(3)(b); cl.801.221(6)(c); cl.100.221(4)(c).

and r.1.25(1) is that the provisions are directed at violence committed or perpetrated by a sponsoring partner on his or her spouse and other family members.

The 'perpetrator' is usually understood to be the actor; that is, its meaning is narrower than acting by or through an agent.[24] However, as 'relevant family violence' is not restricted to physical violence, and the definition of 'relevant family violence' refers to 'conduct', a person's threats towards their partner where the direct *physical* harm may be carried out by a third party, could amount to 'relevant family violence'. In these circumstances, the conduct of the sponsoring partner would still need to be such as to have created the relevant fear or apprehension about the alleged victim's 'personal well being or safety' in order for the partner to have committed family violence.[25]

Must the family violence occur during, or cause the end of, the relationship?

There is no express requirement in the Regulations that the family violence must cause the end of the relationship. The Schedule 2 visa subclass criteria relating to family violence require only that the relevant spouse or de facto partner relationship has ceased *and* that the relevant person has suffered family violence committed by the sponsor. The only reference in Schedule 2 criteria as to when family violence has to occur is in relation to the Subclass 100 visa where it must have occurred after the visa applicant's entry into Australia as the holder of the relevant temporary visa.[26]

The Regulations explicitly require the family violence or part of it to have occurred while the spouse or de facto relationship was still in existence.[27] This applies to both judicially determined and non-judicially determined claims of violence, and means that violence experienced after the relationship has ended will not meet the criteria.[28] This assessment appears to require only that the family violence, or part of the violence, took place before the end of the relationship, not that the relationship ended because of the violence.[29]

There is no requirement that the visa applicant continue to suffer family violence up to the time of decision. The use of the perfect tense 'has suffered' in the relevant regulations clearly indicates that it

[24] *Cakmak v MIMIA* [2003] FCAFC 257 at [16]. This point was not disturbed in *Sok v MIMIA* [2005] FCAFC 56.
[25] See, for example, *Bhalla v MIBP* [2015] FCCA 2381 (Judge Street, 1 September 2015), where the Court found no error in the independent expert's opinion that the sponsor's failure to act protectively was not the same as encouraging his brother to abuse the applicant, or enlisting him to do so. It was held that the independent expert did take into account the conduct of the sponsor and did evaluate that passivity in determining whether there was the relevant family violence: [19] and [22] upheld on appeal in *Bhalla v MIBP* [2016] FCA 395 at [47].
[26] cl.100.221(4)(c).
[27] See rr.1.23(3), (5), (7), (12) and (14), introduced by SLI 2009, No.273, as amended by SLI 2011, No.105. This requirement applies to visa applications made on or after 9 November 2009, or applications made between 15 October 2007 and 9 November 2009 where the claim of family violence was made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011. As noted above, while not free from doubt, it would appear that these amendments do not extend to visa applications lodged before 15 October 2007 (i.e. cases involving 'domestic violence' claims). Accordingly, for visa applications made before 15 October 2007, it will be immaterial that the violence occurred before or after 9 November 2009. In either case, pre 15 October 2007 visa applications should still be considered against the law in place at the time of application.
[28] See e.g. *Salonga v MIBP* [2014] FCCA 1173 (Judge Burnett, 12 March 2014). Although this was not an issue before the court, the Tribunal's finding that the applicant did not satisfy the requirement in r.1.23(12) because the relevant family violence occurred one week after the spousal relationship ceased between the parties was not disturbed by the Court; see also *Parvin v MIBP* [2015] FCCA 302 (Judge Driver, 12 February 2015) at [27].
[29] Even if the criteria didn't require that the family violence occurred during the existence of the relationship, it appears that there would be a point at which any violence between former spouse or de facto partners would not be considered as "domestic violence". See the judgment of *Muliyana v MIAC* [2010] FCAFC 24 (15 March 2010) where Justices Siopis and Edmonds noted "…there will be cases where the violence occurs between former spouses in circumstances, for example, many years after the relationship has ended, such that it would not qualify as "domestic violence" within the broader concept of a 'non-judicially determined claim for domestic violence'" at [35].

is sufficient that the applicant has, at some point after the relevant violence was committed, feared for, or been apprehensive about, his or her personal well-being or safety.[30]

Assessment of whether there was ever a partner relationship

Before considering the claimed incidence of family violence, the decision maker may need to consider whether the required partner relationship existed before the claimed family violence. This is because all partner visa family violence criteria contain a requirement that 'the relationship between the applicant and the sponsoring partner has ceased'. The relevant partner relationship (i.e. spouse or de facto, as defined in the legislation) must therefore have existed before it can be determined that the relationship 'has ceased'.[31] Where the delegate has made a decision on the basis of family violence, the Tribunal, if it arises on the facts before it, may still need to satisfy itself of the existence of the relationship before the claimed family violence. If it is not so satisfied, the family violence exception to the continuing relationship requirement will not be available.

This may be explained by reference to the actual legislative provisions. For example, the family violence exception in subclause 100.221(4) appears as follows:

> *(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 [subclass 309 visa] ..- 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 spouse or of the applicant or of both of them;*
>
> *has suffered family violence committed by the sponsoring spouse*

Subclauses (2) and (2A) in cl.100.221 each include the requirement that the applicant 'is the spouse or de facto partner of the sponsoring partner'.[32] Therefore, when read as a whole, the requirement is that the applicant would have met the requirement of being the partner of the sponsoring partner, except that the relationship has ceased and the applicant or relevant person has suffered family violence. This means that, the relationship which has ceased must be one which would have (but for ceasing) met the requirements of the relevant legislation.[33] This structure of subclause precedes all family violence exceptions in time of decision criteria for the partner visas. For guidance on assessing a partner (spouse/de facto) relationship see the commentary: "Spouse and De facto Partner".

When assessing whether or not a partner relationship ever existed, the decision-maker may need to consider family violence evidence where the evidence goes to the circumstances of the relationship.[34]

[30] *Baylouneh v MIMIA* [2005] FCA 360 (Ryan J, 7 April 2005) at [31]. The Court was considering provisions referring to 'domestic violence' but the reasoning is not affected by the amendments changing the terminology to 'family violence'.
[31] *Hanna v MIBP* [2016] FCA 282 at [23] per Jagot J, upholding *Hanna v MIBP* [2015] FCCA 2856 at [52]-[55] per Judge Emmet; *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1251 at [43]-[44] per Murphy J, upholding *Kaur v MIBP* [2014] FCCA 1282 (Judge Lucev, 19 June 2014), at [35]; *MIAC v Zaouk* [2007] FCAFC 47 at [15]..
[32] cl.100.221(2)(b) and cl.100.221(2A)(b) respectively.
[33] i.e. for visa applications made on or after 1 July 2009, s.5F and r.1.15A for spousal (married) relationships, and s.5CB and rr.1.09A and 2.03A for de facto relationships.
[34] *Singh v MIBP & Anor* [2016] FCCA 114 (Judge Riley, 1 February 2016) in which the court stated in obiter that the statutory declarations about family violence tend to support a claim that there was a relationship between the parties, albeit one that ended badly at [45]. *Xing v MIBP* [2018]FCCA 208 (17 January 2018) is another example of the Federal Circuit Court finding

If a de facto relationship is claimed, the question of whether r.2.03A is met is not relevant in deciding whether the relationship existed as the definition of 'de facto partner' is contained wholly within s.5CB. Accordingly, a person who was not in a de facto relationship for 12 months before the application could meet the relevant family violence criterion. However, in the absence of compelling and compassionate circumstances that person might not meet the additional criteria in r.2.03A, and in those circumstances would not be entitled to the visa.

Role of the Tribunal in relation to family violence

In deciding whether a person has suffered family violence in the relevant sense, r.1.22 provides that in respect of both judicially and non-judicially determined claims of family violence, a reference to an applicant having suffered family violence is a reference to a person being taken, under r.1.23, to have suffered family violence. Upon review, this becomes a question for the Tribunal and the Tribunal may exercise all of the powers and discretions conferred by Division 1.5 of the Regulations on the Minister.[35]

In relation to **judicially determined** family violence, the question for the Tribunal is whether there is a court determination of the kind specified in r.1.23(2), (4) or (6),[36] whenever made, in respect of the persons specified in the relevant provisions of Schedule 2.

In relation to **non-judicially determined claims** of family violence, the Tribunal must assess whether the evidence adduced for the purpose of satisfying rr.1.23(8) or (9) meets the statutory requirements, in particular r.1.25 and, where relevant, r.1.26 in respect of statutory declarations. It is irrelevant whether or not the claim was made first to the Department or the Tribunal in accordance with the Regulations. The provisions of Division 1.5 and the frequent references made in the Division to the Minister do not confine the relevant family violence criteria to those cases in which the visa applicant has made a claim of family violence *before* the initial consideration of the visa application.[37]

Evidentiary deficiencies

There is no general obligation on the Tribunal to point out what evidence is required to meet the family violence provisions, or to disclose its thought processes in advance of its decision as to why or whether evidence provided is deficient.[38]

As with other statutory discretions, whether it is reasonable to refuse additional time to provide the required evidence will depend on the circumstances.[39]

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no error for not considering evidence of family violence as also evidence of a genuine relationship as it accepted the Tribunal implicitly had. However see *Chao v MIBP* [2018] FCA 858 (Allsop CJ, 8 June 2018) where in obiter the court said that evidence of violence in a relationship does not establish the existence of a de facto relationship. Going on to say: "depending upon its nature, evidence of domestic violence may indicate that a relationship existed, but it does not go towards showing that the relationship was a de facto one under s 5CB of the Act, in particular at any given time" at [29].

[35] *Sok v MIAC* [2008] HCA 50 at [28].

[36] Regulations 1.23(2), (4) and (6) apply to visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011.

[37] See *Sok v MIAC* ([2008] HCA 50 at [28], which while referring to cl.100.221 most likely extends to criteria for other relevant visa subclasses including cl.820.211(8)(d); cl.820.211(9)(d); cl.820.221(3)(b); cl.801.221(6)(c); cl.100.221(4)(c).

[38] See *MIAC v Pham* [2008] FCA 320 (Siopis J, 12 March 2008) at [51] - [54], *Lawani v MIAC* [2013] FCCA 114 (Judge Whelan, 3 May 2013), at [53] – [55]. In *Karsten v MIBP* [2015] FCCA 534 (Judge Street, 5 March 2015) the Court rejected any suggestion that the Tribunal is required to notify or inform the applicant of the legislative effect of r.1.23(1B) and found that a failure to do so where it is not satisfied the alleged victim has suffered the relevant domestic violence and has sought the opinion of an independent expert would not breach its obligations under s.359A, at [8], [15]-[16].

[39] In *Manga v Minister for Immigration* [2015] FCCA 501 (Judge Turner, 18 March 2015), the applicant was given 22 days from the hearing to provide the required evidence. Sixteen days later, the Tribunal received a r.1.25 statutory declaration and a

Judicially determined family violence

An applicant is taken to have suffered family violence if there is a judicial determination of a specified kind. The relevant determination may be made at any time, including during Tribunal review, and there is no restriction on the Tribunal's power to consider evidence of a judicial determination, whether provided to the Department during the primary decision making process, or to the Tribunal during the review. Where there is evidence pointing to judicially determined family violence, the questions for the Tribunal include whether the evidence satisfies the applicable provision of r.1.23(1), in respect of the persons specified in the relevant provisions of Schedule 2.

Where an applicant provides any of the below forms of acceptable evidence, the alleged victim must be taken to have suffered family violence and the alleged perpetrator must be taken to have committed family violence, regardless of any other evidence that is before the Tribunal, provided the violence occurred during the relationship.[40]

Acceptable evidence of a judicial determination

There are 3 kinds of acceptable evidence of a judicial determination of family violence that may be provided:

- **an injunction** under s.114(1)(a), (b) or (c) of the *Family Law Act 1975* granted on application by the alleged victim, against the alleged perpetrator.[41] These are injunctions for personal protection, or restraining parties from entering or remaining in a specified area, home, or workplace; *or*
- **a conviction** of the alleged perpetrator, or finding of guilt against the alleged perpetrator, in respect of an offence of violence against the alleged victim;[42] *or*
- **a court order** under State or Territory law against the alleged perpetrator for the protection of the alleged victim from violence, made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise make submissions.[43]

  The following are the types of Court Orders you would expect from each State and Territory:

  - ACT – Protection Order[44]
  - NSW – Apprehended Domestic Violence Order[45]

request for a further 12 weeks so a psychologist could make a total assessment in regards to the applicant's stress and anxiety and depression and produce a full report. The Tribunal denied the request, noting that a psychologist's report was not required. The Court found that the applicant was given a reasonable amount of time to present evidence, noting that only one statutory declaration had been supplied, notwithstanding an extension of 22 days, and there was no indication that the psychologist's report would be about family violence. The Court distinguished *MIAC v Li* [2013] HCA 18 (18 May 2013) and *NBMB v MIAC* [2008] FCA 149 (26 February 2008), finding that in the circumstances of this case, where the applicant was aware of the issues and had had a reasonable time to provide the evidence, the Tribunal's exercise of the discretion in s.363(1)(b) to refuse the adjournment request was reasonable.

[40] r.1.23(3), (5), (7).

[41] r.1.23(2).

[42] r.1.23(6).

[43] r.1.23(4) Note that r.1.24(4) and r.1.23(1)(d) (for visa applications made before 22 March 2014) do not require the order to be made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise make submissions, where the alleged victim had claimed to Immigration to have suffered domestic violence before 1 January 1998.

[44] *Domestic Violence and Protection Orders Act 2008* (ACT). There are three types of protection orders: domestic violence , personal protection, and workplace orders: s.7(1). Orders may be interim, final, consent, or emergency. A final domestic violence order remains in force for 2 years, or a shorter period if stated, or for longer than 2 years if there are special or exceptional circumstances: s.55. An interim order can only be made on an application for final order, and end when revoked, or the application on which it is made is dismissed, or the final order is made or served on the respondent: ss.30,38. A court may order an interim order to become final after allowing the respondent an opportunity to object to its doing so (s.36) or otherwise considering the respondent's circumstances (s.47).

- Northern Territory – Domestic Violence Order[46]
- Queensland – Domestic Violence Order[47]
- South Australia – Intervention Order[48]
- Tasmania – Family Violence Order[49]
- Victoria – Family Violence Intervention Order[50]
- Western Australia - Violence Restraining Order (Domestic and Family Violence)[51]

For such an order to be acceptable evidence of a judicial determination of family violence under r.1.23(4), the order must have been made after the alleged perpetrator has had an opportunity to be heard or make submissions.[52] While there is nothing in the legislation which requires that the order be a final order, interim orders granted in the absence of the defendant may not meet the requirements of r.1.23(4). [53] The decision maker (including the Tribunal on review) needs to consider whether there is evidence that the alleged perpetrator had the opportunity to be heard or make relevant submissions. The Tribunal should clearly identify any evidence that indicates the alleged perpetrator had such an opportunity (even if the perpetrator did not take up such opportunity) before finding that the evidence provided meets the requirements of r.1.23(4).

Unacceptable evidence of a judicial determination

The phrase 'finding of guilt' in r.1.23(6) is a reference to a curial determination of guilt when a person has been charged with a criminal offence involving family violence and has been brought before a

[45] *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Apprehended violence orders comprise 2 types of Court Orders, namely apprehended domestic violence orders (Part 4), and apprehended personal violence orders (Part 5). Apprehended violence orders may be either final or interim (including provisional orders). An interim court order may be made whether or not a defendant is present at or has been given notice of the proceedings: s.22. Before a final order is made, the court must notify the defendant of the date, time, and place of the hearing: s.57.

[46] *Domestic and Family Violence Act 2007* (NT). A domestic violence order (DVO) (other than an interim DVO) is in force for the period stated in it: s.27. A Court may make an interim DVO even if the defendant does not appear at the hearing, or before hearing the defendant's evidence, or even if the defendant objects to it being made: s.35. A DVO (other than an interim DVO): may be varied or revoked: s.47.

[47] *Domestic and Family Violence Protection Act 2012* (QLD). A domestic violence order means a protection order, or a temporary protection order. s.23. A court may make a temporary protection order despite the respondent not having been served with the application: s.47.

[48] *Intervention Orders (Prevention of Abuse) Act 2009* (SA). Section 21 allows the court to make an interim intervention order without summoning the defendant to appear, but the issuing of the interim intervention order requires the defendant to be summoned to appear before the court within 8 days in relation to the final intervention order. Section 23(2) allows the court to make a final intervention order in the absence of the defendant if he fails to appear after being summoned or in relation to a bail agreement. Section 26 allows for variation or revocation of intervention orders, including on application of the defendant. .

[49] *Family Violence Act 2004* (TAS). Family violence orders (FVOs) can be made after reasonable attempts have been made to serve a copy of the application to the respondent: s.31. An interim FVO may be made, varied or extended in the absence of the person against whom it is made: s.23.

[50] *Family Violence Protection Act 2008* (VIC). Final family violence intervention orders may be made with the consent of the respondent, or after the respondent has had an opportunity to attend court on a mention date which is fair and just to all the parties: s.61. A hearing is not necessary for an interim intervention order, but in making an interim order, the court must ensure the hearing is listed for a decision about the final hearing as soon as practicable: ss.53-60.

[51] *Restraining Orders Act 1997* (WA). Orders may either be in the form of violence restraining orders or misconduct restraining orders. Misconduct restraining orders are should not be made where the person seeking to be protected and the person bound by the order are in a family and domestic relationship with each other: s.35A. A violence restraining order lasting 72 hours or less may be made without the respondent having had an opportunity to attend court: ss.26, 29. A violence restraining order of more than 72 hours duration is an interim order: s.29. Interim and final violence restraining orders may not be made unless the respondent has had an opportunity to object: Part 4.

[52] Note that r.1.24(4), for visa applications made before 22 March 2014, does not require the order to be made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise make submissions, where the alleged victim had claimed to Immigration to have suffered domestic violence before 1 January 1998.

[53] In *Alam v MIAC* [2012] FMCA 616 (Smith FM, 9 July 2012) at [49], the Court commented in *obiter* that the former r.1.23(1)(d) (current r.1.23(4)) seeks to identify an order made after, not before, the defendant has in fact enjoyed procedural fairness by way of an 'opportunity to be heard' by providing rebutting evidence or mitigating submissions. A visa applicant seeking to satisfy this criterion must satisfy the Minister (or the Tribunal on review) that a court making an order would afford the defendant an opportunity to present a defence in a manner which procedural fairness would require under well understood principles of Australian justice, whether the resultant order was labelled as an 'interim' or 'final' order. The judgment was upheld in *Alam v MIAC* [2012] FCA 1371 (Mansfield J, 4 December 2012).

court to answer that charge. A statement made in the course of civil law proceedings for a family violence order does not suffice.[54]

Normally the court orders made would be provided as evidence of the making of the orders.[55] Protection orders in which the alleged perpetrator was *not* given an opportunity to be heard or make submissions, such as an order granted *ex parte* without the alleged perpetrator being offered the opportunity to attend or otherwise give evidence, may not comply with r.1.23(4).[56]

Non - Judicially determined family violence

A person can only be determined to have claimed or suffered family violence where the claims and assessments satisfy the requirements of Division 1.5.[57]

Regulation 1.23(10) provides that, where there is a non-judicially determined claim of family violence, the Minister (or the Tribunal on review) must consider whether the alleged victim 'has suffered relevant family violence' and then, if not satisfied that the alleged victim has suffered relevant family violence, seek the opinion of an independent expert.

Is there a non-judicially determined claim of family violence?

Whether there is a non-judicially determined claim of family violence requires consideration as to whether the evidence before the decision maker meets the statutory requirements contained in Division 1.5, in particular r.1.25 and r.1.26 (where relevant) in respect of statutory declarations.[58]

For a claim of non-judicially determined family violence to be taken to be made under both the pre and post 24 November 2012 regulations, there must be either:

1. a joint undertaking as specified in r.1.23(8); **or**

2. a r.1.25 statutory declaration by the visa applicant.

Where there is a joint undertaking, no additional evidence is required.

[54] *Russell v MIMIA* [2006] FCA 327 at [31]. In this case the applicant relied on the following statement by a Magistrate given in the context of *declining* to make a domestic violence order pursuant to the *Domestic Violence Family Protection Act 1989* (Qld): '*On the evidence I have accepted, I find that the actions by [the sponsor] towards [the applicant] during which I have referred to as the glass incident on 19th December 2003, was an act of domestic violence against [the applicant].'* The applicant unsuccessfully argued that the statement constituted a 'finding of guilt' for the purposes of r.1.23(1)(e) (now r.1.23(6)).

[55] In *Alam v MIAC* [2012] FMCA 616 (Smith FM, 9 July 2012), the applicant provided statutory declaration evidence that three directions hearings were held in Apprehended Violence Order (AVO) proceedings, at which the alleged perpetrator was present, and that 'interim orders were continued' until the full hearing. The Court held at [46] that the statutory declarations did not provide evidence of the making of any court order at the directions hearings, and the Tribunal's conclusion that there was no evidence of relevant court orders for r.1.23(1)(d) (or the current r.1.23(4)) was correct.

[56] In *Alam v MIAC* [2012] FMCA 616 (Smith FM, 9 July 2012) at [49], the Court commented in *obiter* that the former r.1.23(1)(d) (or the current r.1.23(4)) seeks to identify an order made after, not before, the defendant has in fact enjoyed procedural fairness by way of an 'opportunity to be heard' by providing rebutting evidence or mitigating submissions. A visa applicant seeking to satisfy this criterion must satisfy the Minister (or the Tribunal on review) that a court making and order would afford the defendant an opportunity to present a defence in a manner which procedural fairness would require under well understood principles of Australian justice, whether the resultant order was labelled as an 'interim' or 'final' order.

[57] See, e.g. *Alam v MIAC* [2012] FCA 1371 (Mansfield J, 4 December 2012), at [26] – [27].

[58] In *Pham v MIBP* [2018] FCCA 3272 (Judge Riley, 22 December 2017) the Court confirmed that the assessment of whether material falls within the prescribed evidence requirements for making a non-judicially determined claim of family violence is a jurisdictional fact that it can determine for itself.

Where a r.1.25 statutory declaration is made:

- for visa applications made on or after 24 November 2012, or those made before that date where a statutory declaration under r.1.25 was first provided *on or after* 24 November 2012, the applicant must also provide the type and number of items of evidence specified in an instrument.[59]
- for visa applications made before 24 November 2012 where a statutory declaration under r.1.25 was first provided before that date, the applicant must also provide evidence in accordance with r.1.24 as specified in r.1.23(9). This can include either:
  - a statutory declaration from the alleged victim and a statutory declaration from a competent person with a copy of a record of an assault from a police service;[60] or
  - a statutory declaration from the alleged victim together with 2 statutory declarations from competent persons (who must hold different qualifications from each other)[61]

Requirements for a valid statutory declaration

For all versions of the family violence provisions, a statutory declaration is defined to mean a statutory declaration under the *Statutory Declarations Act 1959* (Cth).[62] That Act sets out specific requirements as to the prescribed form of the declaration and prescribed persons before whom it must be made. For a statutory declaration to meet the definition of r.1.21, it must have been properly made by the declarant and witnessed.[63]

Statutory declarations are required for r.1.25 statements by or on behalf of the alleged victim; r.1.26 competent persons' statements under the pre 24 November 2012 regulations, and for certain types of evidence specified by instrument under the post 24 November 2012 regulations.

Statutory declaration under r.1.25 ('victim stat dec')

The statutory declaration under r.1.25 may be made by the alleged victim, **or** by a person on behalf of the alleged victim. However, in either case the author must be the spouse or de facto partner of the alleged perpetrator.[64]

Statutory Declaration by the alleged victim

A statutory declaration made by the alleged victim must:

- set out the allegation of relevant family violence (that is, there must be an allegation of conduct against the relevant persons or their property that causes the alleged victim to reasonably fear for or reasonably be apprehensive about his or her wellbeing or safety[65]);

[59] r.1.24. For the relevant instrument, see the MRD Legal Services Register of Instruments – Partner visas.
[60] r.1.25, r.1.26 and see r.1.24(1)(a)(ii).
[61] Complying with r.1.25 and r.1.26 respectively.
[62] r.1.21. For example in *Morgan v MIMIA* [1999] FCA 1059 (Hill J, 29 July 1999) the applicant's statutory declaration was sworn under the *Oaths Act* 1900 (NSW) and not the *Statutory Declarations Act 1959* (Cth) as required by r.1.24. While conceding that the claim of domestic violence must accordingly fail, Hill J stated that '*This is the sort of matter which tends to bring the law into some disrepute*'. However, this approach has been followed in subsequent cases with relevantly identical circumstances, the most recent being *Mohamed v MIMIA* [2007] FMCA 30 (O'Dwyer FM, 25 January 2007), which was upheld on appeal *Mohamed v MIA*C [2007] FCA 1004 confirming that a statutory declaration made under State legislation is not a statutory declaration 'under' the Commonwealth Act.
[63] For example in *McGuire v MIMIA* [2004] FMCA 1014 (Raphael FM, 22 December 2004) the Tribunal had treated a statutory declaration as valid even though it was signed on one day but witnessed on another. The Court held at [24] that this amounted to jurisdictional error stating that where a statutory declaration is invalid, and has been treated by the Tribunal as being valid, then the effect is fundamental to the applicant's case as the applicant would no longer have the correct number of valid statutory declarations and without that number the Tribunal has no jurisdiction to make a decision favourable to the applicant.
[64] r.1.25(1).
[65] r.1.21. In *Cakmak v MIMIA* (2003) 135 FCR 183 the appeal failed because the Full Federal Court held that Mr Cakmak's declaration did not present evidence of such fear or apprehension for his well-being or safety by reason of violence or threat of

- name the person they allege has committed the family violence; and
- if the conduct of the person alleged to have committed the family violence was not towards the alleged victim:
  - name the person to whom the conduct was towards; and
  - identify the relationship between the statutory declarant and the person whom the conduct was towards.[66]

See also above, 'Requirements for a valid statutory declaration'.

Statutory Declaration by person on the alleged victim's behalf

If the declaration under r.1.25 was made by the spouse or de facto partner of the alleged perpetrator on behalf of the alleged victim, it must:

- name the alleged victim;
- set out the allegation of relevant family violence;[67]
- identify the relationship of the maker of the statutory declaration to the alleged victim;
- name the person alleged to have committed the relevant family violence; and
- set out the evidence on which the allegation is based; and
- if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim the statutory declaration must also:
  - name the person whom the conduct was towards;
  - identify the relationship between the alleged victim and the person whom the conduct was towards; and
  - identify the relationship between the statutory declarant and the person whom the conduct was towards.[68]

Visa application made or victim stat dec first provided after 24 November 2012

For visa applications made on or after 24 November 2012, or those made between 15 October 2007 and 23 November 2012 and not finally determined at 24 November 2012, where a statutory declaration under r.1.25 was first provided on or after 24 November 2012, the applicant must either provide a joint undertaking to a court or a statutory declaration and a specified type of evidence.

Joint undertaking

A non-judicially determined claim of family violence is taken to be made where the Minister (or the Tribunal on review) has been provided with a joint undertaking to a court made by the alleged victim

violence from his spouse. The Full Federal Court decision in *Sok* overruled the aspect of the *Cakmak* decision relating to the meaning of violence, however, this did not affect/overrule the reasoning on the assessment of compliance with the requirements of r.1.23.

[66] r.1.25(2).

[67] As defined in r.1.21. For example in *Cakmak v MIMIA* [2003] FCAFC 257 the appeal failed because the Full Federal Court held that Mr Cakmak's declaration did not present evidence of such fear or apprehension for his well-being or safety by reason of violence or threat of violence from his spouse. The Full Federal Court decision in *Sok* overruled the aspect of the *Cakmak* decision relating to the meaning of violence, however, this did not affect/overrule the reasoning on the assessment of compliance with the requirements of r.1.23.

[68] r.1.25(3).

and alleged perpetrator in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.[69]

Statutory declaration of the alleged victim and evidence specified in instrument

A non-judicially determined claim of family violence is taken to be made where the Minister (or the Tribunal on review) has been provided with a statutory declaration under r.1.25 *and* the type and number of items of evidence specified in the relevant instrument.[70]

Evidence specified in the applicable legislative instrument

The current instrument, IMMI12/116 specifies that a minimum of two different types of the following be given:[71]

- a medical report, hospital reports, discharge summary or statutory declaration made by a registered medical practitioner or nurse,[72] acting in that capacity; [73]
- a report, record of assault, witness statement or statutory declaration made by a police officer;
- a witness statement made by someone other than the alleged victim or a police officer during the course of a police investigation;
- a report or a statutory declaration by a child welfare authority officer or a child protection authority officer;
- a letter or assessment report (on letterhead) from a women's refuge or a family violence crisis centre;[74]
- a statutory declaration made by a member, or person eligible to be a member of the Australian Association of Social Workers who has provided counselling in that role to alleged victim;[75]
- a statutory declaration made by the alleged victim's treating registered psychologist;
- a statutory declaration made by a family consultant appointed under the *Family Law Act 1975* or a family relationship counsellor who works at a Family Relationship Centre listed on the Australian Government Family Relationships website;
- a statutory declaration or letter (on letterhead) made by a school counsellor or principal acting in that capacity.

[69] r.1.23(8) for visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011.
[70] r.1.24, amended by SLI 2012, No.256. The relevant instrument is available on the 'Evidentiary tab' of the MRD Legal Services Register of Instruments – Partner visas.
[71] See the MRD Legal Services Register of Instruments – Partner visas to access the instrument.
[72] 'Registered nurse' within the meaning of s.3 of the *Health insurance Act 1973*.
[73] To satisfy IMMI12/116, a medical report which expresses an assessment of mood and an opinion that an applicant is not psychotic is enough to be considered a "medical opinion" and therefore a medical report. However, the requirement in the right hand column of Schedule 1 of IMMI 12/116 that the medical report details "treatment" requires details of what remedies were given. Remedies for mental health problems include such things as counselling, psychotherapy and psychoactive drugs. If the report does not detail any remedy or treatment it will not satisfy IMMI12/116. See *Pham v MIBP* [2018] FCCA 3272 (Judge Riley, 22 December 2017) at [23]-[24] and [33]-[34].
[74] The letter must specify that the person was subjected to family violence, rather than merely record the allegations made: see *Sagwal v MIBP* [2014] FCCA 1794 (Judge Lucev, 15 August 2014), at [41].
[75] These must be in form and substance a statutory declaration; and must indicate that the persons involved in providing the counselling or assistance were persons who were members of the Australian Association of Social Workers, or eligible to be so, and that whilst providing the counselling or assistance they were performing the duties of a social worker: see *Sagwal v MIBP* [2014] FCCA 1794 (Judge Lucev, 15 August 2014), at [41].

For each type of evidence, the instrument specifies the information that must be included. Where a statutory declaration is required, it must be a statutory declaration under the *Statutory Declarations Act 1959* (Cth) (see above, "Requirements for a valid statutory declaration").

The social worker must have 'provided counselling or assistance to the alleged victim while performing the duties of a social worker', and the psychologist must have 'treated the alleged victim while performing the duties of a psychologist' in the context of a therapeutic relationship.[76] The assistance or treatment must be more than the provision of the statutory declaration.

Visa application made and statutory declaration first provided before 24 November 2012

For visa applications made before 24 November 2012, where a statutory declaration under r.1.25 was first provided before that date, a non-judicially determined claim of family violence is taken to be made if the applicant provides:

- a joint undertaking (see above, "Joint Undertaking"); or
- a police record of assault and 2 statutory declarations; or
- 3 statutory declarations.[77]

Police record of assault and 2 statutory declarations (alleged victim and competent person)

The two statutory declarations required with the police record of assault are:

1. a statutory declaration made under r.1.25, usually a statutory declaration by the alleged victim, and
2. a statutory declaration of a competent person made pursuant to r.1.26.

For further detail regarding the particular requirements of these statutory declarations see below.

Police record of assault

Regulation 1.24(1)(a)(ii) provides that a copy of a record of an assault kept by a State or Territory police service can be submitted where the assault is allegedly committed by the alleged perpetrator on:

- the alleged victim; or
- a member of the family unit of the alleged victim; or
- a member of the family unit *of the alleged perpetrator*.

However, the record kept must be something other than a statement by the alleged victim or by the person allegedly assaulted.

3 Statutory declarations (alleged victim and 2 competent persons)

A statutory declaration must be a statutory declaration under the *Statutory Declarations Act 1959*.

[76] *Dang v MIBP* [2016] FCCA 1426 (Judge McNab, 30 June 2016) at [29]-[32].
[77] The evidentiary requirements in r.1.24 were amended by SLI 2012, No. 256. Consequential amendments were made to r.1.21, 1.25 and 1.26 to remove the redundant definition of 'competent person' and requirements specific to a competent person's statutory declaration.

Victim statutory declaration under r.1.25

The statutory declaration under r.1.25 may be made by the alleged victim, or by a person on behalf of the alleged victim. However, in either case the author must be the spouse or de facto partner of the alleged perpetrator.[78] The requirements are discussed in more detail above.

The statutory declaration of a competent person – r.1.26

With limited exceptions for visa applications made before 24 November 2012 the statutory declaration/s must: [79]

- be a statutory declaration under the *Statutory Declaration Act 1959* (Cth) (see above, "Requirements for a valid statutory declaration");
- be made by a 'competent person';[80]
- set out the basis of the competent person's claim to be a competent person;[81]
- state that, in the competent person's opinion, relevant family violence has been suffered by a person;
- name the person who, in the opinion of the competent person, has suffered that relevant family violence;
- name the person who, in the opinion of the competent person, committed that relevant family violence; and
- set out the evidence on which the competent person's opinion is based.

Conduct that falls within the 'relevant family violence' definition may be towards a person other than the alleged victim.[82] In these circumstances, in addition to the above requirements, the competent person's statement must:

- name the person whom the conduct of the alleged perpetrator was towards; and
- identify the relationship between the alleged victim and the person whom the conduct was towards.[83]

To meet the statutory requirements, the evidence in the statutory declaration must:[84]

- state the competent person's opinion that relevant family violence has been suffered by a person as required by r.1.26(c), that is, an opinion which reflects an assessment of the state of mind of the alleged victim by reference to the correct definition. [85] If such an opinion is not

[78] r.1.25(1). Broadly speaking, the content requirements of a r.1.25 statutory declaration under the pre and post 24 November 2012 family violence provisions are the same in substance, except for those visa applications made before 15 October 2007. Otherwise the only variations relate to renumbered references to the definition of relevant family violence, and references to 'de facto partner' rather than 'interdependent'

[79] r.1.26 (a)-(g).

[80] As defined in r.1.21.

[81] This must be more than ticking the box on the form indicating a person is a competent person – the person must set out the basis for their claim to be a competent person: *Safatli v MIAC* [2009] FMCA 1191 (Riley FM, 15 December 2009) at [14]. In the case of a psychologist, for example, this could include them stating they are a psychologist registered under a law of a State or Territory for the registration of psychologists, or by indicating the State or Territory law under which they are registered: *Safatli v MIAC* [2009] FMCA 1191 (Riley FM, 15 December 2009) at [10].

[82] r.1.23(2)(b) for visa applications made on or after 15 October 2007 but before 24 November 2012, where a statutory declaration was first provided before 24 November 2012. As amended by SLI 2007, No.315.

[83] r.1.26(f) as amended by SLI 2007, No.315for visa applications made on or after 15 October 2007.

[84] See *Cakmak v MIMIA* [2003] FCAFC 257 where the Full Federal Court held that the correct test for the decision maker to ask itself in applying the domestic violence provisions is: 'has evidence called for by rr.1.23(1)(g), 1.23(2)(b), 1.24, 1.25 and 1.26 (as in force for visa applications made before 15 October 2007) been presented?'

[85] It is not sufficient for the competent person to state that the victim's presentation is consistent with the claim of domestic/family violence, nor is it sufficient to state that the alleged victim may have, or appears to have, suffered domestic/family violence: see *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34]. Where it is not clear that the competent person has

made expressly in those terms, the opinion may be implied, but it must be apparent from the declaration that the competent person attributes the same meaning to 'domestic violence' or 'family violence' (whichever is applicable) as in r.1.21(1) although it is not necessary for the declarant to expressly refer to that definition.[86] It is not sufficient for the competent person to state that the victim's presentation is consistent with the claim of family violence.[87] It is not sufficient for the competent person to state that the alleged victim may have, or appears to have, suffered family violence.[88] Where the description of the nature of the violence or the statement of opinion (whether explicit or implicit) reveals that the competent person misconceived what the definition required for the formation of the requisite opinion, the statutory declaration will not be sufficient for the purposes of r.1.26;[89]

- name the person who, in his or her opinion, committed the relevant family violence;[90]
- set out the evidence on which the competent person's opinion is based.[91] It is not sufficient for the competent person to simply recite the possession of an opinion that the alleged victim has suffered family violence.[92] This does not require the competent person to specifically identify which parts of a body of evidence are relied upon by them in forming the opinion that an applicant had suffered family violence.[93] However, if the competent person refers to 'evidence' which is unrelated to the issue of whether relevant family violence has been suffered by the applicant, the alleged victim cannot be 'taken' pursuant to r.1.23 to have suffered family violence (in effect, leading to the inference that the competent person was not considering the relevant definition of family violence).[94]
- be made by a 'competent person' (as specified in r.1.21).[95]

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stated that, in their opinion, relevant domestic/family violence has occurred, completion of a standard form directed to that question may support an inference that s/he has done so: *Alam v. MIBP* [2015] FCCA 702. In *Safatli v MIAC* [2009] FMCA 1191 (Riley FM, 15 December 2009), however, the Court found, despite the use of the standard form, that there was nothing in the declaration that amounted to an express or implied opinion that the applicant suffered relevant domestic/family violence: at [20] - [25].

[86] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34]. In *Meroka v MIMA* [2002] FCA 482 Ryan J held that where the declaration is on Form 1040, the opinion may be implied from the way in which the form directs the attention of the competent person to the definition of domestic violence. However, even if the declaration is on Form 1040, *Ejueyitsi* states at [33] that it must be clear from the declaration itself that the declarant is expressing his or her opinion that the visa applicant has suffered domestic violence within the meaning of r.1.23(2)(b). The Court's reasoning appears equally applicable in relation to the amended definition of 'relevant family violence'.

[87] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34].

[88] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34], citing with approval *Alin v MIMA* [2002] FCA 979 (Sundberg J, 2 August 2002) at [12]; *Lawani v MIAC* [2013] FCCA 114 (Judge Whelan, 3 May 2013), at [38] – [44].

[89] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [33]-[34]. See also *Meroka v MIMA* [2002] FCA 482, per Ryan J at [35].

[90] r.1.26(e). Where more than one person has been named in the statutory declaration as having committed domestic violence, in order to establish the relevant causal connection between the violence and the alleged perpetrator/sponsor, the statutory declaration must identify who has done what: *Theunissen v MIMIA* [2005] FCA 1097. This judgment was based on legislation before the introduction of the process of referral to an independent expert and before judgments in relation to the ability to imply the relevant opinions in terms of the statutory declaration requirements and before the amended provisions introducing the definition of 'relevant family violence'.

[91] For example, see *MIAC v Ejueyitsi* [2007] FCAFC 289 at [35]-[36], citing the example of *Ibrahim v MIMIA* [2002] FCA 1279 at [43] where Wilcox J found that the statement by a doctor in the following terms 'Based on my full clinical assessment, I am of the opinion that Mr [Ibrahim] has most likely suffered from domestic violence', was no more than a 'trust me' statement which did not meet r.1.26(f). For visa applications made on or after 15 October 2007, the requirement to set out the evidence is in r.1.26(g).

[92] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34], citing with approval *Meroka v MIMA* [2002] FCA 482 at [32].

[93] *Kozel v MIMIA* [2004] FCA 658 at [14]. The Court was considering 'domestic violence' provisions. The reasoning appears equally applicable in relation to the 'family violence' provisions.

[94] *Meroka v MIMA* [2002] FCA 482 at [33], 'Operation can be denied to Reg 1.23 only if the description of the nature of the violence experienced or the evidence set out by the competent person is incapable, as a matter of law, of affording a basis for an opinion that relevant domestic violence has been suffered by an applicant and has been committed by the person identified by the competent person as the perpetrator'. *Meroka* was considering the domestic violence provisions before the introduction of the process for referral to the independent expert.

[95] In relation to a person within a women's refuge or a crisis and counselling service that specialises in domestic/family violence, the 'competent person' must identify their decision-making capacity with some specificity in order to satisfy the requirements of r.1.21(2)(a) or (b): *MIAC v Pham* [2008] FCA 320 (Siopis J, 12 March 2008) at [33] to [39]. In this case the claimed 'competent person' was a social worker employed by a crisis and counselling service who claimed to have decision-making responsibilities for *case management* in her organisation. The Court found that the term 'Manager or coordinator' in

Who is a 'competent person'?

A 'competent person' for the purposes of these applications, is defined in r.1.21.[96] Who a competent person is differs slightly depending on whether the alleged victim is an adult or a child. The applicant must supply 2 statutory declarations by competent persons from 2 differently qualified competent people.[97]

Determining if the alleged victim has suffered relevant family violence

If the application is taken to include a non-judicially determined claim of family violence the Minister, or the Tribunal on review, must consider *whether the alleged victim has suffered relevant family violence.*[98] This involves making a subjective assessment having regard to all of the evidence before the Tribunal. This evidence includes the statutory declarations or judicial undertaking provided by the applicant and any other evidence provided by the applicant or anyone else (including the former sponsor) and any evidence obtained at the hearing or during the review process. If satisfied that relevant family violence has been suffered, the Tribunal must consider the application on that basis,[99] and, if the Tribunal is satisfied that part of the relevant family violence occurred while the claimed partner relationship existed,[100] the alleged victim is taken to have suffered family violence.[101]

If the Tribunal is not satisfied on the material before it that it should decide the review in the applicant's favour, it must invite the applicant to the hearing required by s.360(1).[102]

If, after inviting the applicant to attend a hearing under s.360(1) and considering any evidence provided at that hearing,[103] the Tribunal is still **not** satisfied that the alleged victim has suffered family violence, the Tribunal **must** seek the opinion of an independent expert.[104] This process involves the Tribunal referring the matter to the independent expert. Once the matter has been referred, the independent expert assesses the case based on the material provided and interviews with the alleged victim, and then provides an opinion. The Tribunal must then take this opinion to be correct.[105] If the expert's opinion is favourable, the alleged victim is taken to have suffered family violence under r.1.23(13).

r.1.21(2) meant that the person 'must hold a management position in respect of the general operations or direction of the women's refuge or the crisis and counselling service as an institution' – at [35], and that the person had not claimed, nor could it be implied from their statements that the service had a collective decision-making structure.

[96] The definition of 'competent person' in r.1.21 was omitted by SLI 2012, No. 256 for (i) visa applications made on or after 24 November 2012; and (ii) visa applications made on or after 15 October 2007, but not finally determined by 24 November 2012, *if* a statutory declaration under r.1.25 was first lodged on or after 24 November 2012.

[97] r.1.24(2).

[98] r.1.23(10).

[99] r.1.23(10).

[100] r.1.23(12).

[101] r.1.23(11).

[102] *Sok v MIAC* [2008] HCA 50 at [38].

[103] Requests for further time to provide additional evidence of family violence must be considered in a procedurally fair manner: see *Zhoory v MIBP* [2015] FCCA 2699 (Judge Driver, 13 October 2015).

[104] r.1.23(10)(c)(i) applies to visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011. In *Bhalla v MIBP* [2016] FCA 395 (Gilmour J, 22 April 2016) the Court endorsed the views in *Maman* and *Sok* that the 'powers and discretions' in r.1.23 are exercisable by the Tribunal including to obtain an independent expert report: [38]-[39]. In *MIAC v Maman* [2012] FCAFC 13, the Full Federal Court queried in *obiter* whether the Tribunal was required or empowered to take this step where a valid opinion had already been obtained by the delegate. The High Court's reasons in *Sok v MIAC* [2008] HCA 50 suggest that it may be required but that judgment was concerned with circumstances in which no opinion was obtained by the delegate as the domestic violence claim was raised for the first time before the Tribunal.

[105] rr.1.23(10)(c)(ii) and 1.23(13) for visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011.

There is no explicit requirement that the Tribunal provide reasons for why it is not satisfied and is referring the matter to an independent expert.[106]

Opinion of the Independent Expert

'Independent expert' (often called an 'IE') is defined in r.1.21 to mean a person who is suitably qualified to make independent assessments of non-judicially determined claims of family violence and is employed by, or contracted to provide services to, an organisation that is specified in a relevant legislative instrument, for the purpose of making independent assessments of non-judicially determined claims of family violence. The instruments specifying the relevant organisations are available at MRD Legal Services Register of Instruments - Partner visas.

Referral to an independent expert

There is little judicial guidance in relation to what is required for referral to the independent expert. In *Victorino v MIAC,* Riethmuller FM commented that the referral could only form a basis for jurisdictional error if the request of the expert was so deficient that it could be said that it was an effective failure to properly request an opinion.[107] His Honour stated that the power to seek an opinion must contain implied terms requiring the request to:

- identify the matter upon which the opinion is sought;
- provide details of the claim; and
- provide reasonable details of the evidence before the Tribunal that appears relevant to the issue.[108]

Separate procedures, guidelines and letter templates have been developed relating to the process of referral of an applicant to an independent expert. See the National Registry Procedures - Investigations.

Dealing with the opinion of the independent expert

Regulation 1.23(10)(c)(ii)[109] provides that the Minister (or the Tribunal on review) must take an independent expert's opinion on whether the alleged victim has suffered relevant family violence as 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.[110] Once the Tribunal has determined that the expert's opinion was properly made it is bound to accept it and find in accordance with it.[111]

Where the independent expert opinion concludes that the applicant has suffered relevant family violence, and the Tribunal is satisfied that part of the violence occurred while the claimed partner

[106] See *Kocakaya v MIAC* [2013] FCA 55 (Dodds-Streeton J, 6 February 2013) at [29] following *Hadchity v MIAC* [2010] FCA 144 at [20].
[107] *Victorino v MIAC* [2007] FMCA 1294 (Riethmuller FM, 21 September 2007) at [55]. Whilst this decision was given before the decision of the Full Federal Court in *MIAC v Sok*, and related to a referral by the Tribunal to an independent expert, the views expressed may form useful guidance on the proper referral by a delegate.
[108] *Victorino v MIAC* [2007] FMCA 1294 (Riethmuller FM, 21 September 2007) at [57]. The Court commented that '[j]ust as it is clear that not every piece of evidence before a Tribunal member must be referred to in the reasons for decision, nor would it be necessary to burden the expert with every item of evidence before the Tribunal'.
[109] r.1.23(10)(c)(ii) applies to visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011. Repealed r.1.23(1C) applies to visa applications made before 9 November 2009 where the claim of domestic/family violence was made before 9 November 2009.
[110] Validity of r.1.23 upheld on the basis of s.505 of the *Migration Act 1958* in *Sok v MIAC* [2007] FMCA 1525 (Riley FM, 7 September 2007) at [9]. This was not disturbed on appeal.
[111] *Alameddine v MIAC* [2010] FMCA 313 (Raphael FM, 23 June 2010) at [25].

relationship existed,[112] the alleged victim is taken to have suffered relevant family violence.[113] Where the independent expert opinion concludes that the applicant has not suffered relevant family violence, the Tribunal must invite the applicant under s.359A to comment or respond to the opinion. In sending such an invitation to an applicant, the Tribunal is not required to put anything more than the independent expert's opinion itself.[114] However, in order for that opportunity to be meaningful, s.359A may require the Tribunal refer an applicant's comments back to the independent expert if the independent expert's report is based upon material or assertions which the applicant has not seen and which he or she contests.[115]

If the validity of the report is contested, this will be a new determinative issue and requires inviting the applicant to another hearing.[116]

The Tribunal's reliance on an independent expert opinion which is not made in accordance with the law may be jurisdictional error. Recent authority suggests that there is an obligation on the Tribunal to consider the legal validity of the expert's opinion, including the process of making that opinion, in circumstances where there is material before the Tribunal to suggest that the report may not have been properly made.[117] However, if no issue as to the validity of the report has been raised, the Tribunal may not be in error for failing to consider if the report was properly made.[118]

Was the independent expert's opinion properly made?

A valid independent expert's opinion must be taken as correct, and once the Tribunal has determined that the expert's opinion was properly made it is bound to accept it and find in accordance with it.[119] In considering the issue of validity of an independent expert opinion, Courts have applied authority which is applicable to assessing an expert opinion in matters involving opinions of Medical Officers of the Commonwealth (MOCs) in the context of the health criteria, holding that only an independent expert's opinion which is 'authorised by the Regulations' must be taken as correct.[120] In general terms, a MOC

[112] r.1.23(14). For visa applications made on or after 9 November 2009 and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011.
[113] r.1.23(13), for visa applications made on or after 9 November 2009 and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011.
[114] In *Wu v MIAC* [2011] FMCA 14 (Cameron FM, 28 January 2011) at [44]-[48] the Court held that in the context of domestic/family violence referrals to an independent expert under r.1.23(1B)(b), the Tribunal will not fall foul of s.359A for not providing to an applicant the information that was given to the expert, because the information underpinning the expert's opinion could not be a reason for affirming the decision. While the Court was not asked to consider whether a failure to provide such information could constitute a breach of the hearing obligation, it found no error in the Tribunal's procedures.
[115] *Al-Momani v MIAC* [2011] FMCA 453 (Driver FM, 31 August 2011) at [50] and [57].
[116] s.360 *Migration Act 1958* (Cth) and see *Haque v Minister for Immigration and Border Protection* [2015] FCCA 1765 (Judge Smith, 2 July 2015) at [34].
[117] Although the Court's reasoning in *Karsten v MIBP* [2015] FCCA 534 (Judge Street, 5 March 2015) at [11], that 'some non-compliance in relation to the family violence [opinion or assessment process] by that expert,' would be an error within jurisdiction and would not be jurisdictional error by the Tribunal, as it must apply r.1.23(1C), is not entirely clear, these *obiter* comments do not displace authority that reliance by the Tribunal on a report that is not made in accordance with the law for the purposes of r.1.23(1C) may lead to jurisdictional error. In *Martinaj v MIBP* [2016] FCCA 217(Judge McGuire, 16 March 2016) the Court held that as the Tribunal's reasons demonstrated it had considered the material before indicating possible bias on the part of the independent expert, the Court would not consider the merits of the Tribunal's decision that the independent expert report was not affected by bias. In *Martinaj v MIBP* [2016] FCA 868 (Kenny J, 2 August 2016) the Court rejected the appellant's argument that the independent expert misapplied the test by assuming that family violence could not be established unless the applicant perceived 'during the course of the relationship', that the sponsor's conduct had 'a deleterious effect on his well-being', as it did not infer such an assumption arose on the face of the independent expert report.
[118] *Wu v MIAC* [2011] FMCA 14 (Cameron FM, 28 January 2011) at [78] where the Court held that although a consideration of the legal validity of the expert's opinion may be of some practical benefit to the Tribunal's decision-making, the ultimate decision on the question of legal validity of the independent expert opinion is one for a court on review. It went on to state that while the Tribunal will be in error if it relies on an independent expert opinion which is vitiated by bias, it does not err by not considering whether the opinion might be void on that account, If that were to be so, the Tribunal's decision could be vitiated by failing to ask that question in respect of a perfectly valid expert opinion.
[119] *Alameddine v MIAC* [2010] FMCA 313 (Raphael FM, 23 June 2010) at [25].
[120] *Silva v MIAC* [2007] FMCA 1955 (Riethmuller FM, 23 November 2007) at [31] citing *MIMA v Seligman* [1999] FCA 117 (French, North and Merkel JJ, 1 March 1999). See also *Victorino v MIAC* [2007] FMCA 1294 (Riethmuller FM, 21 September 2007) at [25] citing *Seligman* and *Robinson v MIMIA* [2005] FCA 1626.

opinion will not be valid if the expert has asked the wrong question, or has denied an applicant procedural fairness.

In deciding whether the opinion is one that is authorised by the Regulations, the relevant considerations include whether:

- it is 'an opinion';
- of an 'independent expert', i.e. a person who meets the definition in r.1.21(1), being 'suitably qualified' and an 'employee' of, or contracted to provide services to, the agency specified in a legislative instrument; and
- that the alleged victim has suffered 'relevant family violence'.

Who can be an 'independent expert'?

There is little guidance as to what would constitute appropriate qualifications for a person to be 'suitably qualified' to provide an expert opinion in relation to domestic violence. To make a finding as to whether a person was 'suitably qualified' within r.1.21 the Tribunal would need to obtain appropriate information about the author of the opinion, their formal qualifications, experience and position in the specified organisation (or if contracted by that agency to provide such services).[121] The independent expert need not be "independent", in any absolute sense, from the government or anyone else.[122]

Has the independent expert asked the right question?

If the independent expert opinion is not made in relation to the applicable definition of 'relevant family violence', it may not be an opinion 'authorised by the Regulations' and the Tribunal may not be entitled to take that opinion as correct. The fact that an independent expert opinion refers to the definition in r.1.21(1) will not be sufficient to support the conclusion that the opinion is valid if the content of the opinion does not reflect that the independent expert has asked the correct question.[123]

Merely incorrectly referring to 'domestic violence' when required to apply the definition of 'relevant family violence' may not necessarily mean that the report is invalid. The question is whether the independent expert applied the correct relevant 'family violence' definition. However, if this happens, it may be appropriate to seek clarification from the expert.

[121] It appears that the person only needs to meet the definition of 'independent expert': *Ali v MIAC* [2007] FMCA 1405 (Nicholls FM, 23 August 2007) at [27]; *Silva v MIAC* [2007] FMCA 1955 (Riethmuller FM, 23 November 2007) at [35] finding there is no warrant for reading into the definition of 'independent expert' the qualifications of a 'competent person'. Note however the contrary position - *Sok v MIAC* [2007] FMCA 1525 (Riley FM, 7 September 2007) at [14], Federal Magistrate Riley commented that a 'suitably qualified' person within the definition in r.1.21 would be, for example, a person who fell within the definition of a 'competent person', such as a social worker. See also *El Darwich v MIAC* [2007] FMCA 1350 (Turner FM, 4 September 2007) at [14]-[15], where the Court held that the same opinion, expressed by two independent experts, does not prevent the opinion from being the opinion of 'an independent expert' in r.1.23. This judgment was followed on this point in *Bolat v MIAC* [2007] FMCA 1640 (Scarlett FM, 16 October 2007) at [66], an assessment prepared by more than one person will qualify as an independent expert's opinion provided that each of the authors is suitably qualified and the assessment is unanimous and unequivocal.

[122] See *Sok v MIAC* [2007] FMCA 1525 (Riley FM, 7 September 2007) at [14]. Similar claims that the independent expert was not 'independent' of the government and so the opinion was invalid were also rejected in *Victorino v MIAC* [2007] FMCA 1294 (Riethmuller FM, 21 September 2007) at [49]-[50] although the Court in that case was considering whether there was evidence that the expert carried out her task otherwise than with independence.

[123] For example, in *Silva v MIAC* [2007] FMCA 1955, (Riethmuller FM, 23 November 2007) at [28] and [31], the Court found the independent expert opinion was not valid because, in finding the applicant had not suffered relevant domestic violence, the expert only considered whether the applicant was fearful about his well-being or safety and did not consider whether he was apprehensive. In many cases the reference to safety, without mention of apprehension, may be sufficient, but in the case of Silva it was found not to be an opinion authorised by the Regulations (at [30)]. However, in *Al-Momani v MIAC* [2011] FMCA 453 (Driver FM, 31 August 2011) at [43] the Court rejected the applicant's argument that the independent expert had misconstrued the definition of 'relevant family violence' by concluding that situational couple violence between the parties in the absence of a power imbalance did not support the contention that the applicant experienced 'relevant family violence', holding that this may be 'family violence' but it was not 'relevant family violence' within the meaning of the Regulations. See also footnote 147.

The independent expert must consider whether the applicant has suffered relevant family violence and should not exclude consideration of any claimed family violence which may have occurred after the end of the relationship.[124] The question as to when the relationship ended and if the relevant family violence occurred while the relationship existed is for the Tribunal.[125]

An independent expert does not necessarily fail in its task by not making specific findings with respect to certain allegations because of inconsistencies within the allegations.[126] Nor does it necessarily fall into error by making a reference to statements being made 'post separation'.[127]

The Tribunal may need to consider whether the independent expert used an appropriate evidentiary standard in formulating his or her opinion. In *Liu v MIAC*[128] the expert found that she had not been able to 'establish conclusively' that the applicant was the victim of domestic violence. The Court held that the use of the verb 'establish' reflects the appropriate standard in respect of any of the matters being considered by the expert and by using the term 'establish conclusively' the expert erred by applying a higher standard than the applicant was obliged to reach.[129] The Court further held it was a jurisdictional error on the part of the Tribunal to accept this expert's opinion as leading it to conclude that the applicant had not suffered relevant domestic violence.[130]

There is also no general requirement for the independent expert to engage in a clinical analysis of an applicant's alleged psychological disorder.[131]

Has the independent expert afforded procedural fairness?

To satisfy the requirements of r.1.23(1B)(b), an 'opinion' must have been one that was formed in accordance with law, including the common law requirement to comply with the rules of procedural fairness. The Tribunal, having been made aware of a possible failure by the expert to provide procedural fairness, is required to assess whether or not the applicant had received procedural fairness from the independent expert.[132]

The Courts have found that procedural fairness includes:

- putting adverse information considered to be credible, relevant and significant to the applicant for comment[133] and
- referring matters raised by an applicant in response to a s.359A invitation back to an independent expert for consideration.[134]

[124] Perez v MIBP [2017] FCAFC 180 (Besanko, McKerracher and Jagot JJ, 24 November 2017) at [9]. The Full Federal Court found that the Tribunal's decision based upon an independent expert opinion involved jurisdictional error because the opinion was based on the independent expert's incorrect belief that the only relevant family violence to be considered was that which occurred during the relationship when the correct question was whether the appellant had suffered family violence the whole or part of which occurred during the relationship.
[125] r.1.23(14) and r.123(14).
[126] See *KC v MIBP* [2015] FCCA 2349 (Judge Howard, 28 August 2015), at [57].
[127] See *KC v MIBP* [2015] FCCA 2349 (Judge Howard, 28 August 2015), at [62], where the Court found that the independent expert was referring merely to a particular point in time, not dismissing the issue because it was 'post separation'.
[128] [2011] FMCA 601 (Emmett FM, 19 July 2011).
[129] *Liu v MIAC* [2011] FMCA 601 (Emmett FM, 19 July 2011) at [34] and [35].
[130] *Liu v MIAC* [2011] FMCA 601 (Emmett FM, 19 July 2011) at [44].
[131] See *Bhalla v MIBP* [2015] FCCA 2381 (Judge Street, 1 September 2015), at [15].
[132] *MIAC v Maman* [2012] FCAFC 13 at [64]. In *Al-Momani v MIAC* [2011] FMCA 453 (Driver FM, 31 August 2011) at [45]-[47] the Court stated that the obligation on an independent expert to observe procedural fairness would be minimal given the confined nature of the inquiry, the necessity for the independent expert to be free to obtain information in confidence, and given that the Tribunal itself under its procedural code must accord procedural fairness to an applicant. However, to the extent of any inconsistency, the view of the Full Court in *Maman* should be preferred.
[133] *Maman v MIAC* [2011] FMCA 426 (Raphael FM, 8 June 2011) at [46] and upheld by the Full Federal Court on appeal in *MIAC v Maman* [2012] FCAFC 13 at [24]-[27], [88]. The Full Court further held that procedural fairness most probably required the entirety of a confidential letter to be disclosed to the applicant, not just its key points (at [46], [51]-[62]).
[134] *Al-Momani v MIAC* [2011] FMCA 453 (Driver FM, 31 August 2011) at [50] and [57]. The Court, at [51], characterised this obligation as arising from s.359A – where the expert's report is put to the applicant under s.359A, in order for the applicant to

A denial of procedural fairness is not established if the independent expert refuses to permit the applicant to be accompanied by a legal representative or to record the interview.[135]

Further, there is no general obligation for the independent expert to engage in consultation with other experts who have provided information to the independent expert, nor is there necessarily a denial of procedural fairness by reason of the independent expert being a particular gender given the cultural sensitivities of the applicant.[136]

In cases where there is information before the Tribunal to suggest that the independent expert may *not* have afforded the applicant procedural fairness or may not have given a valid opinion, it would be of practical benefit to the Tribunal's decision-making to take any further steps that may be appropriate (for example, referring any concerns back to the expert to consider) and to demonstrate consideration of the legal validity of the opinion in the Tribunal's written reasons. If additional material of sufficient materiality,[137] or any truly new evidence[138] arises the Tribunal may need to refer it back to the independent expert. However, new information in the form of submissions may not need to be referred to the expert, particularly where the submissions relate to an issue of which the applicant was aware and already had an opportunity to make submissions to the expert.[139] Nor is the Tribunal obliged to refer back representations made by the applicant that do no more than seek a further merits review of the independent expert's decision.[140]

Previous independent expert opinions

In conducting a merits review of a case where the matter has already been referred to an independent expert at the primary stage by the delegate, a question that arises for the Tribunal is whether it is bound by the existing independent expert's opinion or is obliged to follow the procedure in Division 1.5 again. Although the High Court did not consider such a situation in *Sok v MIAC,*[141] it held that the Tribunal erred in not having a hearing before it sought an independent expert opinion. It appears to follow that the Tribunal would be in error if it relied on an independent expert opinion obtained before a hearing was conducted and before it has considered for itself whether family violence has occurred.

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have a meaningful opportunity to comment, the Tribunal would need to refer back to the independent expert a challenge to the merits of the opinion that was not available before the independent expert because the independent expert did not disclose relevant material to the applicant. The Court also held at [50] that there may be an obligation on the Tribunal to refer matters back to an independent expert where the matters raised by the applicant cast doubt upon the validity of the report such that the Tribunal could not be satisfied that it was bound by the report.

[135] *Bhalla v MIBP* [2015] FCCA 2381 (Judge Street, 1 September 2015), at [11] and [13], undisturbed on appeal in *Bhalla v MIBP* [2016] FCA 395 (Gilmour J, 22 April 2016).

[136] *Abulibdeh v MIBP* [2015] FCCA 2797 (Judge Street, 14 October 2015), at [22] and [27].

[137] *Armstrong v MIBP (No.2)* [2017] FCCA 2058 (Judge Street, 15 August 2017) at [42]. Photographs of the applicant's injuries supplied in response to a s.359A letter were not provided to the independent expert. The fact that the applicant had the opportunity to provide these photographs at the interview with the expert, was found to be an insufficient answer to why the additional material was not forwarded to the expert. The photographs were of sufficient materiality to give rise to a requirement of procedural fairness to provide the additional material to the independent expert.

[138] *Gungor v MIAC* [2011] FMCA 516 (Raphael FM, 7 July 2011) at [17]-[18]. The Court held that when considering any comments received in response to a s.359A letter putting an independent expert's report to an applicant, the Tribunal is only obliged to act upon two categories of matters: First, the Tribunal should provide any truly new evidence to the independent expert to consider; Secondly, the Tribunal must take into account any submissions that the report was not 'properly made' and either refer the matter back to the independent expert or explain in its reasons why it did not do so. In *Bolat v MIAC* [2007] FMCA 1640 (Scarlett FM, 16 October 2007), the Court held that an opinion from a neuropsychologist provided in response to a s.359A letter was clearly relevant evidence that the independent experts may or may not have considered would alter their opinion. The Tribunal's decision not to refer this evidence to the experts constituted jurisdictional error: at [80]-[83].

[139] In *Alameddine v MIAC* [2010] FMCA 313 (Raphael FM, 23 June 2010) at [19]-[24], the Court rejected the applicant's argument that the Tribunal erred in failing to refer a submission to the expert. The expert's opinion that the applicant had not suffered domestic violence was based in part upon the fact that the applicant had not sought intervention from police or professionals. In response to a s.359A letter, the applicant provided a submission that his reasons for not seeking intervention were related to his cultural background, not the quality of the violence. The Court held that the expert's opinion was valid because the applicant was on notice that his failure to seek police intervention was in issue and had an opportunity throughout the review process to explain this failure, and the expert had considered the case as put to her by the applicant.

[140] *Gungor v MIAC* [2011] FMCA 516 (Raphael FM, 7 July 2011) at [18].

[141] [2008] HCA 50.

Where the Tribunal is reviewing a decision remitted from the Courts in which the provisions of Division 1.5 were previously considered by the Tribunal, there is a question as to whether it is bound by an independent expert's opinion obtained by the previous Tribunal. In *Hadchity v MIAC,*[142] the Tribunal considered itself bound by the independent expert's opinion obtained by the previous Tribunal (constituted by the same Member). Justice Edmonds found that the opinion had been validly obtained by the Tribunal and that, on remittal, '[a]bsent some identified non-compliance in the obtaining of the independent expert's opinion, the existence of that opinion continued to impose an obligation on the Tribunal under r.1.23(1C)'.[143] This suggests that, at least where the same Member constitutes the Tribunal on remittal, the Tribunal would be bound by an expert opinion properly sought under the procedure set out in Division 1.5.

The situation is less clear where the Tribunal is differently constituted,[144] and in this case, or where it appears that there was a defect in the earlier process, or there is additional evidence, the Tribunal may want to consider afresh whether it is satisfied that family violence has occurred, and potentially seek a further opinion.[145] In this case, referral to the same independent expert would not of itself give rise to any reasonable apprehension of bias, nor would it in itself be an error for an independent expert to take into account an earlier independent expert opinion which had been found to be invalid.[146] Where an earlier impugned independent expert is later taken into account, the Tribunal should ensure that any outstanding procedural fairness obligations with the respect to the impugned report have been fulfilled.

Relevant amending legislation

Migration Amendment Regulations 2005 (No.4)	SLI 2005, No.134
Migration Amendment Regulations 2007 (No. 13)	SLI 2007, No.315
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144
Migration Amendment Regulations 2009 (No.12)	SLI 2009, No.273
Migration Legislation Amendment Regulations 2011 (No.1)	SLI 2011, No.105
Migration Legislation Amendment Regulation 2012 (No 5)	SLI 2012, No.256
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Tribunals Amalgamation Act 2015	No.60, 2015

[142] [2010] FCA 144 .
[143] *Hadchity v MIAC* [2010] FCA 144 at [28]. In that case, the Tribunal had referred the matter for assessment by an independent expert; however, following the Full Federal Court's decision in *MIAC v Sok* [2008] FCAFC 18, it had affirmed the delegate's decision finding that the appellant's claim of domestic violence could not be considered. The Tribunal's decision was set aside by consent because in the meantime, the decision in *Sok* had been reversed by the High Court. In those circumstances, the Court in *Hadchity* drew an inference that the Tribunal had reached the requisite state of non-satisfaction for r.1.23(1B)(a).
[144] The decision in *Hadchity v MIAC* did not consider the situation in which the Tribunal is differently constituted following a remittal. It is therefore uncertain whether in such a case the Tribunal could consider itself bound by an opinion obtained by an earlier, differently constituted Tribunal, particularly when considering the procedural requirement to hold another hearing (*SZHKA v MIAC* [2008] FCAFC 138) and that the requisite state of satisfaction can only be reached after a hearing has been conducted (*Sok v MIAC* [2008] FCAFC 18).
[145] In this situation, the earlier opinion may be considered as evidence which the differently constituted Tribunal may take into account.
[146] *Gounder v MIBP* [2015] FCCA 1658 (Judge Smith, 19 June 2015), at [36] – [50], upheld in *Gounder v MIBP* [2015] FCA 1476 (Flick J, 24 December 2015), at [28].

Relevant case law

Abulibdeh v MIBP [2015] FCCA 2797	
Al-Momani v MIAC [2011] FMCA 453	Summary
Alam v MIAC [2012] FMCA 616	Summary
Alam v MIBP [2015] FCCA 702	Summary
Alameddine v MIAC [2010] FMCA 313	Summary
Ali v MIAC [2007] FMCA 1405	
Alin v MIMA [2002] FCA 979	Summary
Armstrong v MIBP (No.2) [2017] FCCA 2058	Summary
Bhalla v MIBP [2015] FCCA 2381	Summary
Bhalla v MIBP [2016] FCA 395	
Baylouneh v MIMIA [2005] FCA 360	Summary
Cakmak v MIMIA [2003] FCA 257	Summary
Chaichian v MIBP [2016] FCA 646	
Chao v MIBP [2018] FCA 858	
Du v MIMIA [2000] FCA 1115	Summary
MIAC v Ejueyitsi [2007] FCAFC 89	Summary
Gungor v MIAC [2011] FMCA 516	Summary
Gounder v MIMIA [2003] FMCA 487	Summary
Gounder v MIBP [2015] FCCA 1658	
Gounder v MIBP [2015] FCA 1476	
Hadchity v MIAC [2010] FCA 144	Summary
Hanna v MIBP [2016] FCA 282	
Hanna v MIBP [2015] FCCA 2856	
Haque v MIBP [2015] FCCA 1765	Summary
Karsten v MIBP [2015] FCCA 534	
Kaur v MIBP [2014] FCCA 1282	
KC v MIBP [2015] FCCA 2349	
Kocakaya v MIAC [2013] FCA 55	
Kozel v MIMIA [2004] FCA 658	Summary
Lawani v MIAC [2013] FCCA 114	Summary
Liu v MIA [2011] FMCA 601	Summary
Manga v MIBP [2015] FCCA 501	
McGuire v MIMIA [2004] FMCA 1014	Summary
Maman v MIAC [2011] FMCA 426	Summary
Martinaj v MIBP[2016] FCA 868	
Martinaj v MIBP [2016] FCCA 271	
MIAC v Maman [2012] FCAFC 13	Summary
Meroka v MIMIA [2002] FCA 482	Summary
Morgan v MIMIA [1999] FCA 1059	
Muliyana v MIAC [2010] FCAFC 24	Summary
Pham v MIBP [2018] FCCA 3272	Summary
Parvin v MIBP [2015] FCCA 302	
Perez v MIBP [2017] FCAFC 180	Summary
MIAC v Pham [2008] FCA 320	Summary
Russell v MIMIA [2006] FCA 327	Summary

Safatli v MIAC [2009] FMCA 1191	Summary
Sagwal v MIBP [2014] FCCA 1794	Summary
Salonga v MIBP [2014] FCCA 1173	Summary
Singh v MIBP [2014] FCCA 2670	
Singh v MIBP [2016] FCCA 114	
Silva v MIAC [2007] FMCA 1955	Summary
Sok v MIAC [2008] HCA 50	Summary
MIAC v Sok [2008] FCAFC 18	Summary
Sok v MIAC [2007] FMCA 1525	Summary
Sok v MIMIA [2005] FCAFC 56	Summary
Theunissen v MIMIA [2005] FCA 1097	
Wu v MIAC [2011] FMCA 14	Summary
Victorino v MIAC [2007] FMCA 1294	Summary
Xing v MIBP [2018] FCCA 208	
MIAC v Zaouk [2007] FCAFC 47	Summary
Zaouk v MIMA [2006] FMCA 1607	Summary
Zhoory v MIBP [2015] FCCA 2699	Summary

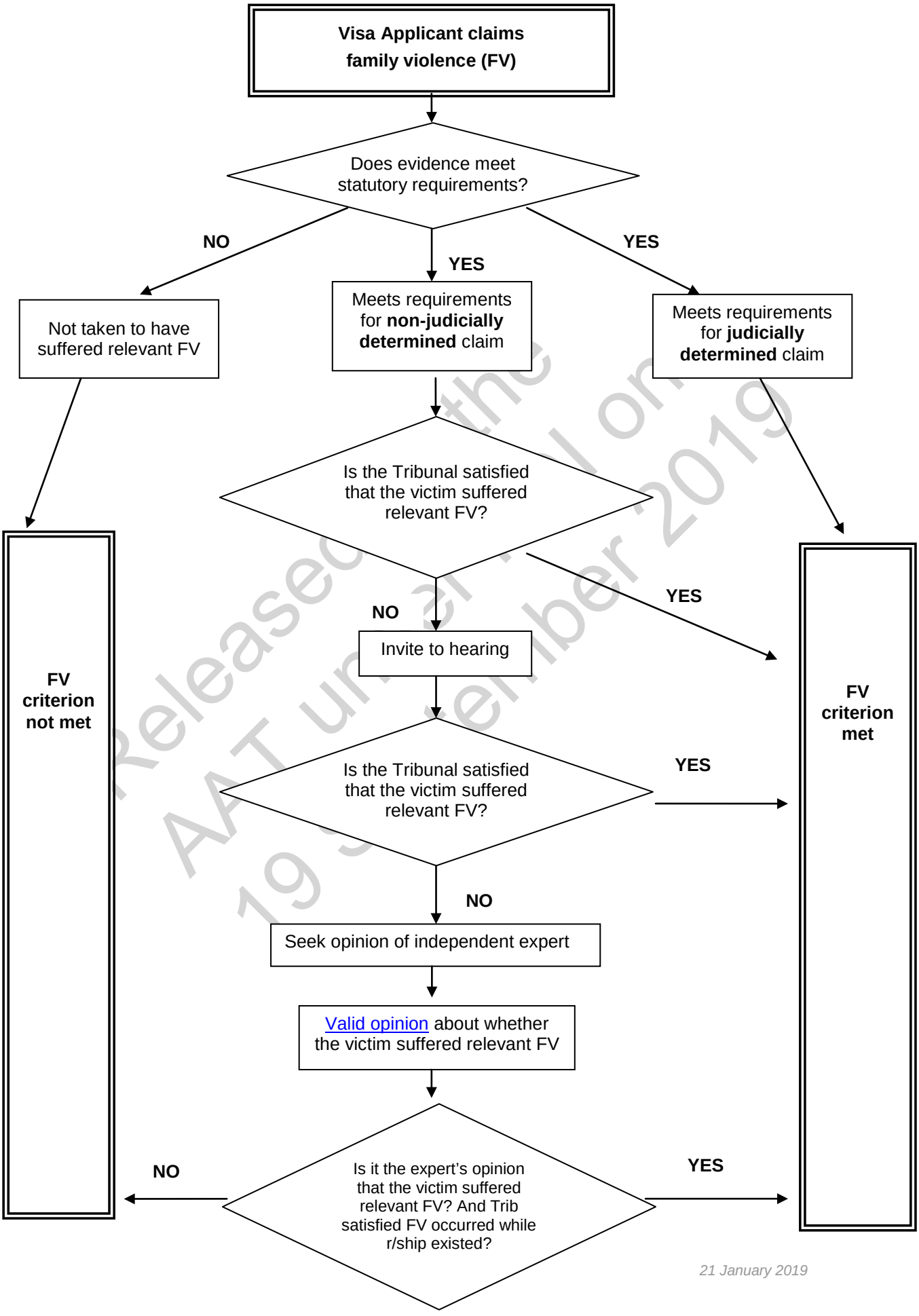
Available decision templates

There is a decision template available on CaseMate for partner cases where the domestic/family violence exception is in issue:

- **Decision - Partner Cases - Family Violence -** this template is suitable for Subclasses 100, 801 or 820 visa applications made on or after 15 October 2007 where the applicant is claiming family violence. The templates set out different evidentiary requirements depending on user input as to dates of visa application, family violence claim, provision of statutory declaration, and types of evidence provided to establish the claim.

Last reviewed/updated: 21 January 2019

Appendix A – Family Violence – review process flowchart



Health Criteria – PIC 4005, 4006A and 4007

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Overview

Health criteria[1] are prescribed in Schedule 2 to the Migration Regulations 1994 ('the Regulations') as criteria for a range of visa subclasses which are required to be met at time of decision. The health criteria are in the form of Public Interest Criteria ('PIC') set out in Schedule 4 of the Regulations. The Schedule 4 PIC are referred to by number in the Schedule 2 criteria for visa subclasses and are therefore effectively criteria under Schedule 2 for the grant of a visa. [2] There are currently 3 different PIC relating to health requirements: PIC 4005, 4006A and 4007. PIC 4006A has been repealed for visa applications made from 18 March 2018 but continues to apply to Subclass 457 (Temporary Work (Skilled)) visa applications made before that date.[3]

Similar to circumstances relating to the determination of certain claims of domestic/family violence, some health criteria requirements are substantively determined by an expert, not by the Minister's delegate or Tribunal. Where the matter arises as an issue, the decision-maker must seek the opinion of a Medical Officer of the Commonwealth (MOC) in relation to whether a person suffers a disease or condition.[4] Where a MOC opinion is properly made, the Tribunal must take that opinion to be correct for the purposes of deciding whether a person meets the requirements or satisfies the criterion for grant of a visa.[5]

There are three main issues arising in cases where meeting the health criteria is the issue in dispute for the visa application. The first is whether a person has undertaken a medical assessment as required by the Regulations or as requested by a MOC. The second issue is, in cases where a MOC opinion has been obtained and identifies that the applicant does not meet the relevant health requirement in the applicable PIC, whether the MOC opinion is properly made and therefore must be taken to be correct. The third issue arises where the PIC provides for waiver of the health requirements in certain circumstances.

There is no provision for waiver in relation to PIC 4005. In these cases, where an adverse MOC opinion has been obtained, the only issue will be the validity of the MOC opinion. The requirements for a valid opinion are discussed below. In PIC 4006A and PIC 4007 there is provision for waiver. The details of the requirements for the waiver are also discussed further below.

[1] This commentary relates to the legislative provisions of Division 2.5A of the Migration Regulations 1994 (the Regulations) and PIC 4005-4007 of the Regulations current as at time of writing.
[2] Regulation 2.03(2) states that if a criterion in Schedule 2 refers to a criterion in Schedule 3, 4 or 5 by number, a criterion so referred must be satisfied by an applicant as if it were set out at length in the Schedule 2 criterion.
[3] PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the closure of Subclass 457 (the only visa to which PIC 4006A applied) from that date: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 & 171 of Schedule 1, Part 1, and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation.
[4] r.2.25A(1) as amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI2014 No. 30), Schedule 1, Part 2, item [11]. For all applications for temporary visas, and for applications for permanent visas made from a specified country, where there is no information known to Immigration to the effect that the person may not meet the health requirements, the decision-maker may determine that the person satisfies health criteria without seeking the opinion of a MOC.
[5] r.2.25A(3), *MIMA v Seligman* (1999) 85 FCR 115.

Key Requirements

The Health Criteria 4005-4007

The following requirements are common to all three health criteria, PIC 4005, 4006A and 4007:

- an applicant who is in a class of persons specified in a written instrument, must undertake any medical assessment specified and be assessed by the person specified;[6]
- the applicant must comply with any request by a MOC to undertake a medical assessment;[7]
- the applicant is free from tuberculosis;[8]
- the applicant is free from a disease/condition that is, or may result in the applicant being, a threat to public health or danger to the Australian community;[9]
- the applicant is free from a disease/condition in relation to which a person who has it would be likely to require health care or community services or meet the medical criteria for provision of a community service during the specified period; and provision of the health care or community services relating to the disease/condition (regardless of whether the health care or services will actually be used in connection with the applicant) would be likely to:
    - result in a significant cost to the Australian community in the areas of health care and community services;[10] or
    - prejudice access of an Australian citizen or permanent resident to health care or community services;[11] and
    - If the MOC has requested a signed undertaking that the applicant present himself/herself to health authorities for a follow-up medical assessment in the place of residence in Australia, the applicant has provided such undertaking.[12]

The specified period to be taken into account in determining whether an applicant must be free of the relevant disease or condition which would require health care/community services is:

- for permanent visas and temporary visas specified in a written instrument - the period commencing when the application is made;
- for all other temporary visas - the period for which the Minister intends to grant the visa.[13]

For visa applications made before 5 November 2011, the requirement that the provision of health care/community services must not result in a 'significant cost' to the Australian community does not apply to applicants who would not be eligible for the provision of health care or community services due to the subclass of temporary visa applied for, where that subclass is not specified in the relevant instrument.[14] The temporary visa subclasses specified are those that form a pathway to potentially

[6] PIC 4005(1)(aa), 4006A(1)(aa), 4007(1)(aa) as inserted by Migration Legislation Amendment Regulations 2011 (No.1) (SLI 2011 No. 105), Schedule 4. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6.
[7] PIC 4005(1)(ab), 4006A(1)(ab), 4007(1)(ab) as inserted by (SLI 2011 No. 105). These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6
[8] PIC 4005(1)(a), 4006A(1)(a), 4007(1)(a).
[9] PIC 4005(1)(b), 4006A(1)(b), 4007(1)(b).
[10] r.1.03 defines "community services" as including provision of an Australian social security benefit, allowance or pension.
[11] PIC 4005(1)(c), 4006A(1)(c), 4007(1)(c) as inserted by SLI 2011 No. 105. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6.
[12] PIC 4005(1)(d), 4006A(1)(d), 4007(1)(d) as inserted by SLI 2011 No. 105. These requirements apply to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6.
[13] PIC 4005(2), 4006A(1A), 4007(1A). For the relevant instrument, see 'VisaSc' tab of the Register of Instruments: Health Criteria
[14] PIC 4005(3), 4006A(1B), 4007(1B). These provisions were repealed and substituted for visa applications made on or after 5 November 2011: Migration Amendment Regulations 2011 (No. 6) (SLI 2011 No. 199). For the relevant instrument, see 'VisaSc' tab of the Register of Instruments: Health Criteria

obtaining a permanent visa, such as a Subclass 309 (Partner (Provisional) visa. In general terms, those applicants for a temporary visa which is not intended by the legislature to be a pathway to permanent residence are exempted from the 'significant cost' requirement.

For visa applications made on or after 5 November 2011, the requirement that the provision of health care/community services not result in a significant cost to the community, *does* apply to those applicants for a temporary visa not specified by the Minister (generally speaking, this means a temporary visa which is not a provisional visa expected to be a pathway to permanent residence) but only in respect of certain services. That is, the health care and community services to be assessed in the 'no significant cost' requirement does not include those specified by instrument, where the application is for a subclass of temporary visa not specified by instrument.[15]

There are provisions for waiver of the health care/community services requirement in PIC 4006A(1)(c) and 4007(1)(c). There is no provision for waiver of this requirement in PIC 4005.

The waiver in PIC 4006A provides that the Minister may waive the requirements of PIC 4006A(1)(c) if the 'relevant nominator' has given the Minister a written undertaking that they will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c).[16]

The waiver in PIC 4007 provides that the Minister may waive the requirements of PIC 4007(1)(c) if the applicant satisfies all other criteria for the grant of the visa and the Minister is satisfied the grant of the visa would be unlikely to result in:

- undue cost to the Australian community; or
- undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

For information relating to considering the waiver, see below 'Waiver of the Health Criterion'.

Special provisions relating to certain health criteria

Regulation 2.25A requires the Tribunal to seek the opinion of a MOC in determining whether a person meets the requirements of PIC 4005(1)(a), 4005(1)(b), 4005(1)(c), 4007(1)(a), 4007(1)(b), or 4007(1)(c).[17] For visa applications made before 18 March 2018, r.2.25A also requires the Tribunal to seek the opinion of a MOC in determining whether a person meets the requirements of PIC 4006A(1)(a), 4006A(1)(b) or 4006A(1)(c).[18] In deciding whether a person meets one of the above mentioned criteria, the Tribunal is to take the opinion of the MOC to be correct.[19]

[15] PIC 4005(3), 4006A(1B), 4007(1B), substituted by SLI 2011 No. 199. For the relevant instruments, see 'Services' and 'Visa Sc' tabs of the Register of Instruments: Health Criteria.
[16] PIC 4006A(2). PIC 4006A only applies to Subclass 457 Temporary Work (Skilled) visas made before 18 March 2018. PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the repeal of Subclass 457 (the only subclass to which it applied) from that date: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 and 171 of Schedule 1, Part 1, and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation.
. The term "relevant employer" was replaced with "relevant nominator" by the Migration Amendment Regulations 2009 (No.13) (SLI 2009 No. 289), and applies to visa applications made on or after 9 November 2009, or those made before, but not finally determined by 9 November 2009: r.3; Schedule 1, Item [2]. The amendment reflects similar changes in Subclass 457 criteria affected by Migration Amendment Regulations 2009 (No.9) (SLI 2009 No. 202) applicable to visa applications not finally determined by 14 September 2009: r.3, Schedule 1.
[17] r.2.25A(1).
[18] PIC 4006A was repealed for visa applications made on or after 18 March 2018: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 and 171 of

However, there is no requirement to seek a MOC opinion if:

- the application is for a temporary visa and there is no information indicating that the person may not meet any of those requirements;[20] or
- the application is for a permanent visa that is made from a country specified by Instrument[21] for these purposes and there is no information indicating that the person may not meet any of those requirements.[22]

Where there is evidence that the applicant may not meet any of the health requirements, in particular, may be suffering from some form of disease or medical condition, it will not be open to the decision-maker to find that the applicant meets the relevant health requirement without seeking a MOC opinion.

Key Issues

Required and requested medical assessments

Under PIC 4005(1)(aa), 4006A(1)(aa), and 4007(1)(aa), an applicant may be required, if they are a member of a class of persons specified in a written instrument to undertake a medical assessment. An applicant may also be required under PIC 4005(1)(ab), 4006A(1)(ab) and 4007(1)(ab), to undertake any medical assessment if requested by a MOC.

Assessment required by written instrument

Unless exempted, an applicant who is in a class of persons specified in a written instrument must undertake any medical assessment specified in the instrument and must be assessed by the person specified in the instrument unless a MOC decides otherwise.[23]

The instrument sets out classes of persons based on countries (grouped according to risk) of which the applicant is a citizen, or where an applicant has recently spent time. The instrument also specifies required medical assessments for each class of person, as well as rules for applying it, e.g. where a person is a class of person in more than one group of countries, the relevant group is the higher risk group.[24]

Within a class of persons, different medical assessments may be required depending on factors including the length of intended stay, type of visa applied for, intended work or education, pregnancy, and likelihood of entering a health care facility.

Schedule 1, Part 1 and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation.

[19] r.2.25A(3).

[20] r.2.25A(1)(a).

[21] For the relevant instrument, see the 'Country' tab of the Register of Instruments: Health Criteria.

[22] r.2.25A(1)(b).

[23] PIC 4005(1)(aa), 4006(1A)(aa), 4007(1)(aa), inserted by SLI 2011 No. 105. The criteria apply to visa applications made before 1 July 2011, but not finally determined at that date, and visa applications made on or after 1 July 2011: r.6. For the relevant instrument see "HealthAssess" tab in the Register of Instruments - Health Criteria. The relevant instrument appears to be the one in place at the time of decision. See *Sarabia v MIBP* [2017] FCCA 2642 (Judge Dowdy, 31 October 2017), where the Court held the Tribunal had incorrectly identified a revoked instrument as the relevant instrument, rather than the instrument which applied at the time of its decision: at [22].

[24] For the relevant instrument, see "HealthAssess" tab in the Register of Instruments - Health Criteria.

The instrument also specifies who must conduct the assessment, depending on whether it is conducted within or outside Australia.

An applicant must undertake any assessment required. An applicant who undertakes some but not all required assessments does not meet the criterion. As health criteria are included in Schedule 2 time of decision criteria, an applicant who has not undergone the required assessment by the time the Tribunal commences its review may still do so by the time the Tribunal makes its decision.

The Explanatory Statement which accompanied the introduction of this requirement explains the intention behind this requirement:

> *[the health criteria do] not currently provide for medical assessments, such as a chest x-ray, which an applicant must undertake. Currently, under the Department of Immigration and Citizenship's policy, most applicants undertake medical assessments by reference to their country of citizenship or residence, intended activities, and their intended stay period in Australia. The policy also provides that the individual circumstances of an applicant may be considered when determining the relevant medical assessments.*
>
> *The purpose of new paragraph (aa) is to clearly provide in the Principal Regulations that, if an applicant is in a class of persons specified by the Minister in an instrument in writing for this paragraph, then they must:*
>
> - *undertake all medical assessments specified by the Minister in an instrument in writing for this paragraph; and*
> - *be assessed by the person specified in the instrument.*
>
> *The effect of this new paragraph is that an applicant must undertake medical assessments by reference to the instrument.*
>
> *The purpose of new paragraph (aa) is also to provide for discretion by a Medical Officer of the Commonwealth to deal with certain circumstances of individual applicants. Personal circumstances of some applicants would mean, for example, that it is more appropriate for them to undertake other medical assessments.* [25]
>
> *Another purpose of the amendment is to address the recent decision by the Migration Review Tribunal (MRT) in* 0901884 *[2010] MRTA 905. Under the Department of Immigration and Citizenship's policy, an applicant was to undertake a chest x-ray to determine whether the applicant had active tuberculosis. In this case, the applicant refused to undertake a chest x-ray and the MRT accepted the applicant's skin test (Mantoux test) for latent tuberculosis as an alternative test. The Department of Immigration and Citizenship's view is that the result of a chest x-ray (as opposed to other tests) should be required as evidence of active tuberculosis status.*
>
> *Therefore, the MRT decision has an implication that if an applicant chooses to undertake a medical assessment other than a chest x-ray regarding their tuberculosis status, then public health in Australia may be exposed to an increased threat of tuberculosis.*
>
> *It is intended that relevant medical assessments such as a chest x-ray would be specified by the Minister in an instrument in writing for new paragraph (aa).*
>
> *More broadly, this same risk applies to all aspects of the health requirement. If it is not addressed through regulation amendments, it could have a serious impact on the operation of the immigration health requirement and, through it, the health of the Australian community.*

[25] Explanatory Statement to F2011L01098, SLI 2011 No.105, p.11.

Exemption from medical assessment

Even if the applicant is in the specified class of persons, a MOC may decide that a particular applicant is not required to undertake a specified medical assessment by a specified person. The purpose of this exemption is:

> *… to provide for a discretion by a Medical Officer of the Commonwealth to deal with certain circumstances of individual applicants. Personal circumstances of some applicants would mean, for example, that it is more appropriate for them to undertake other medical assessments.*[26]

Whether a MOC has decided that an applicant is not required to undergo an assessment by a specified person is a question of fact. The Tribunal has no power to review that determination, or to consider whether it is reasonable.

Assessment requested by MOC

Under PIC 4005(1)(ab), PIC 4006A(1)(ab) and 4007(1)(ab), an applicant must comply with any request by a MOC to undertake a medical assessment.[27]

The Explanatory Statement which accompanied the introduction of this requirement states that the purpose of the requirement to undertake a medical assessment is:

> *… to require the applicant to comply with the Medical Officer of the Commonwealth's request to undertake a medical assessment. This would help:*
> - *protect the Australian community from public health and safety risks;*
> - *contain public expenditure on health care and community services; and*
> - *safeguard the access of Australian citizens and permanent residents to heath care and community services in short supply.*[28]

As health criteria are included in Schedule 2 time of decision criteria, an applicant who has not undergone the requested assessment by the time the Tribunal commences its review may still do so by the time the Tribunal makes its decision.

Free from a disease or condition

PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) require that *for the relevant period* the applicant "is free from a disease or condition in relation to which" a person who has it would be likely to require health care or community services or meet the medical criteria for the provision of a community service.[29]

The relevant period

The period in which a person must be free from a disease or condition in relation to which a person who has it would require health care or community services or meet the medical criteria for the provision of a community service during the relevant period to meet PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c), varies depending upon the type of visa sought.

[26] Explanatory Statement to F2011L01098, SLI 2011 No.105, p.11.
[27] Inserted by SLI 2011 No. 105. The criteria apply to visa applications made before 1 July 2011, but not finally determined at that date, and visa applications made on or after 1 July 2011: r.6.
[28] Explanatory Statement to (SLI 2011 No.105).
[29] PIC 4005(1)(c)(i), 4006A(1)(c)(i), 4007(1)(c)(i), as amended by SLI 2011 No. 105. The criteria apply to visa applications made, but not finally determined, before 1 July 2011, and visa applications made after 1 July 2011.

For all permanent visa applicants and applicants for a temporary visa of a subclass specified in a written instrument (generally provisional visas), the relevant period is the period commencing when the application is made.[30] No end date is specified.

For all other temporary visa applicants, the relevant period is the period for which the Minister intends to grant the visa.[31] That is, the duration of the visa, commencing on the date the Minister intends to grant that visa.

Access to health care or community services or significant cost

Generally speaking, a person must be free from a disease or condition where the provision of health care or community services to a person with that condition would be likely to:

- result in a significant cost to the Australian community in the areas of health care and community services; OR
- prejudice the access of an Australian citizen or permanent resident to health or community services.[32]

Unless the application is for a temporary visa and there is no information known to Immigration to the effect that the person may not meet the health criteria, or is for a permanent visa that is made from a specified country, the decision maker *must* seek an opinion of a MOC on whether a person meets these criteria and must take that opinion to be correct.[33] The decision maker's role is limited to ensuring the MOC opinion is valid.[34]

The Department issues Notes for Guidance for MOC. These provide that a MOC is to consider the information in the Notes and apply these principles and some of the specifics when assessing an applicant against health requirements.[35]

Exemption to the "no significant cost" requirement

Visa applications made before 5 November 2011

For visa applications made before 5 November 2011, the "no significant cost" requirement does not apply to applicants:

- who are applying for a temporary visa; AND
- who would not be eligible for the provision of health care or community services due to applying for or holding that temporary visa subclass; AND
- that visa subclass is of a type not specified in a written instrument.[36]

In general terms, the effect is that those applicants for a temporary visa which is not intended by the legislature to be a pathway to permanent residence are exempted from the 'significant cost' requirement.

[30] PIC 4005(1)(c)(i), 4005(2), 4006A(1)(c)(i), 4006A(1A), 4007(1)(c)(i), 4007(1A). For the relevant instrument see "VisaSc" tab in Register of Instruments - Health Criteria.
[31] PIC 4005(2), PIC 4006A(1A), 4007(1A).
[32] PIC 4005(1)(c)(ii), 4006A(1)(c)(ii), 4007(1)(c)(ii),.
[33] Regulation 2.25A. See Assessing the Health Criteria.
[34] See Assessing Validity of a MOC Opinion.
[35] PAM3 - Migration Regulations -Schedules - Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - Notes for Guidance for Medical Officers of the Commonwealth of Australia (re-issued 19/11/2016).
[36] PIC 4005(3), 4006A(1B), and 4007(1B) were introduced by SLI 2011 No. 105 and applied to applications made on or after 1 July 2011, as well as those made prior to, but not finally determined at that date: r.6. Those provisions were repealed and substituted for visa applications made on or after 5 November 2011: SLI 2011 No. 199: r.5, Schedule 3. For the relevant instrument see "VisaSc" tab in Health Criteria – Register of Instruments.

The exemption appears, in light of its subsequent amendment (discussed below - Visa applications made on or after 5 November 2011) and the Explanatory Statement accompanying the amendments which introduced it, to be based on the premise that temporary visa holders are not eligible for health care or community services when they are in Australia.

The Explanatory Statement states:

> *The purpose of this amendment is to address the Federal Court's decision in* Robinson v Minister for Immigration and Multicultural and Indigenous Affairs *[2005] FCA 1626 (*Robinson*). The Federal Court relevantly held at paragraph [43] that:*
>
> > *A proper construction of Public Interest Criterion 4005 of the [Principal Regulations], requires the MOC [Medical Officer of the Commonwealth] to ascertain the form or level of condition suffered by the applicant in question and then apply the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition. It is not the case that the MOC is to proceed to make the assessment at a higher level of generality by reference to a generic form of the condition.*
>
> *Therefore, when considering the current paragraph 4005(c) in relation to provision of health care or community services to a person and the potential costs of the disease or condition that person has, the "hypothetical person" test established in the case of* Robinson *must be applied. An interpretation of this test is that the applicant's individual circumstances must not be taken into account. For example, although certain applicants would not be eligible for a particular service in Australia (due to the type of visa they are applying for and would hold if granted), this could not be taken into account for the purpose of deciding whether the provision of the service would be likely to result in a significant cost to the Australian community in the areas of health care and community services.*
>
> *The Federal Court decision is problematic for temporary visa applicants because in most cases, the applicants (due to the type of visa they are applying for and would hold if granted) would not have access to the same range of publicly-funded services available to an Australian resident such as a permanent visa holder. Hence, despite having a significant medical condition, the costs of this condition would not be passed on to the Australian community, as the person would not be eligible for these services and therefore would be expected to pay for any services required either personally or through a health insurance scheme, for example.*
>
> *It certainly would not seem fair or reasonable, for example, to refuse to grant a temporary visa to an applicant with a disability, or an elderly applicant, on the basis of services they would not be eligible for when in Australia (due to the type of visa they are applying for and would hold if granted).*
>
> *Further, the purpose… is that* [the 'no significant cost' requirement] *does not apply if an applicant applies for a temporary visa being of a particular subclass that is not specified in the instrument… It is intended that this instrument would specify temporary visas that may lead to a permanent visa, and persons who hold this type of temporary visa would be eligible for health care or community services when they are granted a permanent visa in Australia.*
>
> *Therefore, the effect… is that if an applicant applies for a* [temporary] *visa subclass that is not specified in that instrument, then* [the 'no significant cost' requirement] *does not apply because such an applicant would not be eligible for health care or community services when they are in Australia.*[37]

For the exemption to apply to those pre 5 November 2011 applicants who have applied for a visa not specified by the Minister, the applicant must not be eligible for health care or community services when they are in Australia due to the nature of the visa. Whether an applicant would not be eligible for

the provision of health care or community services due to applying for a temporary visa subclass or holding that temporary visa subclass is a question of fact for the decision maker. In determining this, regard may be had, but is not limited, to evidence such as:

- Schedule 2 criteria for the grant of such temporary visas which may require an applicant to arrange for health insurance;[38]
- any conditions imposed on the visa, notably Condition 8501 which provides that if an applicant meets the primary or secondary criteria for the grant of a visa, he or she must maintain adequate arrangements for health insurance while they are in Australia;
- any relevant information available from the Department and on its website indicating whether or not holders of particular temporary visa subclasses are covered by Australia's national health scheme or must hold adequate health insurance cover for the entire time they are in Australia;[39]
- any relevant information on the Australian Government Medicare website;[40]
- the existence and terms of any reciprocal health care agreements between Australia and the country of nationality of the visa applicant;[41] and
- any evidence submitted by the applicant.

Visa applications made on or after 5 November 2011

For visa applications made on or after 5 November 2011, there is no blanket exemption from the 'no significant cost' requirement for non-specified temporary visa applicants. If a person applies for a temporary visa, the subclass of which is not specified by the Minister in an instrument, then they must still be assessed against the 'no significant cost' requirement, but not in relation to all health care and community services. Instead, the health care and community services assessed will not include health care and community services specified by the Minister.[42] Persons who have applied for a temporary visa of a type specified in the instrument are required to be assessed in relation to the full range of health care and community services.

According to the Explanatory Statement that accompanied the introduction of this requirement, the criterion reflects the position that despite restriction on access to health related services, some temporary visa holders may nevertheless have access to some health care or community services which would result in a cost to the community:

> *The purpose of new subclause 4005(3) is to address an unintended consequence of existing subclause 4005(3) that commenced on 1 July 2001 as part of the* Migration Legislation Amendment Regulations 2011 (No. 1). *The unintended consequence is that, because of existing subclause 4005(3), a MOC is not able to consider the potential cost for the provision of health care and community services that may be used while in Australia but for which the applicant is not technically eligible.*
> *…*

[37] Explanatory Statement to F2011L01098, SLI 2011 No.105, p.15.
[38] For example, cl.457.223B, 572.225.
[39] See for example http://www.border.gov.au/Trav/Stud/More/Health-Insurance (accessed 30 November 2016).
[40] See for example: https://www.humanservices.gov.au/customer/services/medicare/medicare-card?utm_id=9 (accessed 16 November 2016).
[41] The Australian Government has signed Reciprocal Health Care Agreements (RHCA) with the governments of the United Kingdom, Sweden, the Netherlands, Belgium, Finland, Norway, Slovenia, Malta, Italy, New Zealand and the Republic of Ireland which entitles nationals of these countries to limited subsidised health services for medically necessary treatment while visiting Australia. For further information, see http://www.humanservices.gov.au/customer/services/medicare/reciprocal-health-care-agreements?utm_id=9 (accessed 16 November 2016).
[42] PIC 4005(3), 4006A(1B), 4007(1B), substituted by SLI 2011 No. 199. For the relevant instruments, see 'Services' and 'Visa Sc' tabs of the Register of Instruments: Health Criteria.

… it is possible that certain temporary visa applicants with diseases or medical conditions could access health care or community services even if they are not eligible for them. This might occur, for example, because a hospital will not refuse to provide medical treatment to people who require it. As these cases would result in a cost to the Australian community, it is reasonable that these costs should be taken into account by a MOC when assessing the applicant against the health criteria.

There are, however, certain health care or community services that cannot be accessed by temporary visa applicants such as social security payments. The effect of new subclause 4005(3) is that a MOC is not required to assess the relevant temporary visa applicant… against the specified health care and community services. The specified health care and community services include those which a temporary visa applicant is unlikely to be able to access.[43]

Assessing the health criteria - role of the Medical Officer of the Commonwealth and the Tribunal

Where the Minister or Tribunal is required by r.2.25A to seek an opinion from the MOC in determining whether an applicant meets the relevant health criterion, the Tribunal is to take the opinion of the Medical Officer of the Commonwealth (MOC opinion) to be correct.[44] However, this only applies where the MOC opinion is of a kind authorised by the Regulations.[45]

Where a MOC opinion was obtained under r.2.25A, and formed the whole or part of the reason for the refusal of the visa by the delegate and the applicant seeks review, the Tribunal may decide that a further MOC opinion is required.[46] The Regulations provide that in this circumstance a fee of $520 is payable for the further opinion.[47] There is no prescription as to who must pay the costs of a further MOC opinion although it is the Tribunal's policy to require the applicant to pay the fee.

If the applicant elects not to obtain a further MOC opinion, the Tribunal must consider the MOC opinion that was before the delegate. If that opinion is validly made, it must take that opinion to be correct.

If that opinion does not amount to an assessment of the relevant health criterion in accordance with the Regulations as at the time of the Tribunal's decision, the Tribunal will need to obtain a valid MOC opinion.[48] Whether a fee is payable in these circumstances depends upon whether r.5.41 applies. See Fees for a further MOC Opinion.

While the Tribunal is only required to take as correct a MOC opinion that complies with the Regulations, the Tribunal has no power to set aside a Medical Officer's opinion. Where the MOC opinion before the Tribunal does not comply with the Regulations, the Tribunal cannot determine the requirements of the health criteria for itself. The Tribunal must seek a fresh opinion or make enquiries of the MOC in order to clarify concerns regarding the opinion until it is satisfied it has a valid MOC opinion.

In cases where PIC 4005 is applicable and an adverse opinion is received from the MOC, the only issue before the Tribunal may be whether the opinion of the MOC is authorised by the Regulations.

[43] Explanatory Statement to SLI 2011, No.199, pp.28-9.
[44] r.2.25A(3).
[45] *MIMA v Seligman* (1999) 85 FCR 115 at [66].
[46] A further MOC opinion in these circumstances has previously been described as a Review MOC opinion or RMOC opinion. However, there is no position provided for in the Regulations called a Review Medical Officer of the Commonwealth.
[47] r.5.41. There are standard letter templates for inviting the applicant to provide a further MOC opinion and advising them of the fee. NB, if the applicant refuses the invitation, the Tribunal may still be obliged to seek a further MOC opinion. See 'Currency of MOC Opinion'.
[48] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18]-[20], citing *MIMA v Seligman* (1999) 85 FCR 115.

Where PIC 4006A or 4007 is applicable and there is an adverse MOC opinion, the requirements for assessing the waiver relate to what is the subject of the MOC opinion. This is the case in particular for PIC 4007 where the basis on which the MOC opinion finds the requirement is not met, i.e. significant cost or prejudice to access to health care or community services, forms the basis for consideration of whether the requirements for waiver are made out. Therefore, it appears that it is necessary to have a valid MOC opinion before the Tribunal can properly consider the waiver requirements.

Fees for a further MOC opinion

Regulation 5.41 provides for a fee for a further opinion of a MOC in merits review. It only applies where:

- the Minister was required to seek the opinion of a MOC under r.2.25A; and
- the visa refusal occurred because in the opinion of the MOC, the person did not satisfy a health criterion; and
- a further opinion of a MOC is required for the review.

Where an opinion was never validly made, r.5.41 does not apply. For example, an opinion that further medical evidence is required to determine whether a person meets a health criterion (often referred to as a "deferred opinion") is not an opinion that a person did not satisfy a health criterion. In such circumstances, there is no legislative requirement for payment of a fee to obtain another MOC opinion. The relevant case team may be contacted if assistance is needed in obtaining a valid MOC opinion.

Where a MOC opinion was validly made, but is no longer current, r.5.41 applies, and a fee for a further MOC opinion is payable. The Tribunal's policy is that the fee is payable by the applicant. The Tribunal may also require the Secretary of the Department to obtain a further MOC and provide the opinion to the Tribunal.[49]

Assessing Validity of a MOC opinion

In cases where PIC 4005 is applicable and an adverse opinion is received from the MOC, the only issue before the Tribunal may be whether the opinion of the MOC is authorised by the Regulations.

Where PIC 4006A or 4007 is applicable and there is an adverse MOC opinion, the requirements for assessing the waiver relate to the subject of the MOC opinion. This is the case in particular for PIC 4007 where the basis on which the MOC finds the requirement is not met, i.e. significant cost or prejudice to access to health care or community services, forms the basis for consideration of whether the requirements for waiver are made out. Therefore, it is necessary to have a valid MOC opinion before the decision maker can properly consider the waiver requirements.

In determining whether there is a valid MOC opinion, the decision maker must be satisfied that it has:

- an opinion;[50]

[49] Section 363(1)(d) of the *Migration Act 1958.*
[50] There is a standard form prepared by the Department titled "Medical Opinion of an Officer of the Commonwealth" (form 884) or the opinion may be in a document with a heading of "Medical Opinion". If the document contains a heading such as "Deferred Opinion", there may be some question as to whether that amounts to an opinion for the purposes of r.2.25A.

- by a Medical Officer of the Commonwealth (defined in r.1.03 to mean a medical practitioner appointed by the Minister in writing under r.1.16AA to be a Medical Officer of the Commonwealth for the purposes of the Regulations);[51]
- the opinion is on a matter referred to in r.2.25A(1) or (2) (for the purposes of (1) an opinion on whether a person meets certain health requirements); and
- the opinion addresses satisfaction of these requirements at the time of the Minister's decision.[52]

To ensure the MOC opinion addresses the applicable criterion some initial matters to check are:

- whether the opinion refers to the correct criterion. For example, if the opinion refers to PIC 4005 when the applicable criterion is 4007, this should be referred back to the MOC for clarification;
- whether the opinion correctly reflects assessment of costs and access to health care or community services during the relevant period;
- whether the opinion has assessed a temporary visa applicant against the "no significant cost" requirement, where the applicant is exempted from the requirement.

The MOC is entitled to differ in his/her opinion from reports put to him/her and is not obliged to give reasons for why any medical report or opinion was rejected. As a result of this it is difficult to successfully challenge a MOC opinion on the basis of an imputed rejection of expert medical evidence.[53]

The MOC is required to form his or her own opinion about whether the relevant PIC is satisfied after taking into account all material logically probative of that opinion before him or her. In so doing, the MOC is required to act reasonably and there must be a logical basis for the opinion. In *Haque* the Court considered an RMOC opinion for an applicant with learning difficulties.[54] The Court held that the opinion lacked an evidentiary basis and accordingly the Tribunal was not bound to accept it. As the Tribunal considered that it was bound to accept it, it failed to properly exercise its jurisdiction and thereby fell into jurisdictional error.

The opinion must reflect that the MOC has asked himself or herself the correct question, based on the terms of the requirement in the relevant PIC. Particular issues that have been the subject of judicial consideration in relation to the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) include:

- whether the MOC has considered the relevant characteristics of the person with the disease/condition of the applicant (the hypothetical person test); and

[51] In *Reynolds v MIAC* [2010] FMCA 6 (Lucev FM, 15 January 2010), the Court found that the Tribunal was entitled to presume that the MOC was a MOC without referring to any evidence, until the appointment was challenged (at [127]).
[52] *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [19] citing *MIMA v Seligman* (1999) 85 FCR 115 at [48]-[49].
[53] *Ramlu v MIMIA* [2005] FMCA 1735 (Driver FM, 14 December 2005) at [14], citing *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [32]-[37].
[54] *Haque v MIBP* [2015] FCCA 1765 (Judge Smith, 2 July 2015). In this case, the MOC obtained a specialist paediatrician's report which stated that the applicant 'suffers from autistic spectrum disorder with moderate developmental delay and behavioural problem. She is functioning fairly well and attending to all her personal hygienes and activities of daily living.' Upon review the applicant sought a new opinion, providing the Tribunal with a number of expert medical reports which suggested varying degrees of independence of applicant. The RMOC opinion found the applicant did not satisfy PIC 4005 as she was a person with 'severe cognitive impairment' and was 'totally dependent in all of her activities of daily living'. The RMOC did not personally examine applicant, but rather based the opinion on information including the medical reports. However, none of the reports supported the conclusion the applicant was totally dependent on others in all of her activities of daily life. The Court concluded that as the RMOC opinion was based upon a fact for which there was no evidence or any other logical basis, the opinion was not one formed according to law. That being so, the Tribunal was not bound to accept it and, because it considered that it was bound to accept it, it failed to properly exercise its jurisdiction and thereby fell into jurisdictional error.

- what is considered as "health care" in determining whether a person with the applicant's disease/condition with such requirements would likely result in significant cost to the Australian community; and
- obligations on the MOC in relation to an opinion that provision of health care or community services would result in a significant cost.

In *Traill v MIAC*[55] the Court considered the delegate's application of PIC 4005(1)(c) and found that the delegate constructively failed to exercise his jurisdiction because he relied upon the MOC's opinion which did not properly address the visa criterion upon which it bore and failed to meet the minimum standard for such an opinion. The Court noted that the report contained no opinion on whether the applicant had the capacity to function in his daily life without support; and that the MOC failed to properly ascertain the form or level of the condition suffered by the second applicant and then proceeded to make an assessment at a higher level of generality by reference to a generic form of an unidentified condition. The Court was further concerned that the report was simply a template statement drawn from a precedent used by the MOC. Taking these matters into account, the Court concluded that the report was so uninformative so as to be unreliable.[56] However, while it is well settled that for r.2.25A(3) to apply the MOC opinion must be one that is authorised by the regulations, aspects of the Court's criticism of the opinion in this case may be misleading as to what the regulations require, including, for example, the reference to whether the applicant had the capacity to function in his daily life without support. Nonetheless, to the extent that the opinion in question follows a 'template' (as the Court suggested) the Tribunal may need to consider whether an MOC opinion before them is affected. The Tribunal should also be careful to ensure it considers the terms of the relevant regulations.

Importantly, the MOC opinion must address the applicant's satisfaction or lack of satisfaction of the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) *at the time of the Tribunal's decision*.[57] Where there has been a lapse in time since the MOC opinion, the Tribunal will need to assess whether the circumstances of the case require that, in order to meet this requirement at time of decision, the Tribunal will need to obtain a further opinion.

Where the MOC opinion relates to PIC 4005(1)(c)(ii)(A), 4006A(1)(c)(ii)(A) or 4007(1)(c)(ii)(A), i.e. that provision of health care of community services relating to the disease or condition would be likely to result in significant cost to the Australian community, the MOC is not obliged to state what the significant costs would be in order for the MOC opinion to be valid.[58] It is for the MOC to determine whether a cost is significant based on his or her medical judgment.[59] Nor is the MOC obliged to explain why a particular cost is considered to be a significant cost.[60]

The 'hypothetical person' test'

The provisions of PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) require the MOC to consider whether or not the relevant disease or condition is such that a hypothetical person with it would be likely to require health care or community services or meet the medical criteria for the provision of a community service; and whether that provision of health care or community services would be likely to

[55] [2013] FCCA 2 (Judge Driver, 14 June 2013).
[56] *Traill v MIAC* [2013] FCCA 2 (Judge Driver, 14 June 2013) [45]-[47].
[57] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18]-[20], citing *MIMA v Seligman* (1999) 85 FCR 115. The Court in *Applicant Y* was considering Item 4007(1)(c).
[58] *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [13], citing *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [46]. The Court in JP1 was considering a MOC opinion in relation to (then) PIC 4005(c) for an applicant with HIV.
[59] *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [33] referring to *MIMA v Seligman* (1999) 85 FCR 115 at [53].
[60] *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [57].

result in significant cost to the Australian community; or would be likely to prejudice access of Australian residents to health care or community services. The person referred to in these provisions is not the applicant, but a hypothetical person who suffers from the disease or condition which the applicant has.[61] It is not a prediction of whether the particular applicant will in fact require such health care or community services.[62]

The test is for a hypothetical person because the MOC could reasonably be expected to be able to assess the nature of a disease or condition and its seriousness in terms of its likely future requirement for health care. However, one would not necessarily expect a MOC to inquire into the financial circumstances of a particular applicant or any family members or other sources of financial assistance.[63]

The test is for a hypothetical person who suffers from the form or level of condition suffered by the applicant. In *Robinson v MIMIA*[64] Siopis J found that the MOC opinion was not valid and the Tribunal erred in taking it to be correct, as it did not make the assessment based on the relevant level of the condition held by the applicant. In particular his Honour held:

> *A proper construction of Public Interest Criterion 4005 of the Regulations, requires the MOC to* ***ascertain the form or level of condition suffered by the applicant*** *in question and then to apply the statutory criteria by reference to* ***a hypothetical person who suffers from that form or level of the condition.*** *It is not the case that the MOC is to proceed to make the assessment at a higher level of generality by reference to a generic form of the condition.*[65] *(emphasis added)*

The Tribunal should consider the relevant MOC opinion before concluding that it is bound to accept it as correct. If the Tribunal is of the view that the opinion reflects that the MOC has applied the test in PIC 4005(1)(c) or 4007(1)(c) incorrectly by making its assessment by reference to the generic form of the disease or condition, it cannot take it to be correct. The appropriate course of action would be to seek a new opinion from the MOC.

As the legislation requires the MOC to consider a hypothetical person with the form or level of the disease or condition suffered by a particular applicant, there is no requirement to consider other details of a particular applicant's circumstances. The legislation does not require the MOC to examine personal factors of the applicant such as age, degree of compliance with medical regimes or ability to work, pay taxes and contribute to the community in order for the opinion to be valid.[66]

The opinion must be clear on its face as to what is the disease or condition to which the relevant PIC relates.[67] In *Ramlu v MIMIA*[68] the Court found jurisdictional error in the Tribunal decision on the basis that the Tribunal failed to turn its mind to issues relevant to assessing the validity of the further MOC

[61] *Imad v MIMA* [2001] FCA 1011 (Heerey J, 26 July 2001) at [13]. The Court was considering a challenge to the validity of PIC 4005(c) following amendments made after the decision in *MIMA v Seligman* (1999) 85 FCR 115 which found r.2.25B as it then was to be invalid. The Court in *Imad* found the amended 4005 was valid. Justice Heerey followed his own decision in *Inguanti v MIMA* (2001) FCA 1046 at [10] (Heerey J, 3 August 2001).
[62] *Imad v MIMA* [2001] FCA 1011 (Heerey J, 26 July 2001) at [13]. See also *Blair v MIMA* [2001] FCA 1014 (Carr J, 31 July 2001) at [44] and *Triandafillidou v MIMIA* [2004] FMCA 20 (Bryant CFM, 6 February 2004) at [57]-[58].
[63] *Imad v MIMA* [2001] FCA 1011 (Heerey J, 26 July 2001) at [14].
[64] *Robinson v MIMIA* (2005) 148 FCR 182.
[65] *Robinson v MIMIA* (2005) 148 FCR 182 at [43]. This case involved a visa application refused on the basis that the primary applicant's son, who had Down's Syndrome, failed to satisfy (then) 4005(c). The child only had a mild version of the condition. The Court, in concluding the MOC opinion was invalid and the Tribunal decision subject to jurisdictional error followed authorities including *Seligman* (where the Full Court at [83] made reference to "his level of impairment'), *Imad* at [14] and *Inguanti*, and expressly declined to follow the views of Finkelstein J at first instance in *X v MIMIA* [2005] FCA 429 on this issue.
[66] *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) at [41]-[47].
[67] *Ramlu v MIMIA* [2005] FMCA 1735 (Driver FM, 14 December 2005) at [22].
[68] [2005] FMCA 1735 (Driver FM, 14 December 2005).

opinion. The further MOC opinion in question referred to a number of diseases and conditions suffered by the applicant, but was not clear to which one(s) (then) paragraph 4005(c)(ii)(A) applied. The failure to state this clearly in the opinion meant that the Tribunal could not be clear what the relevant disease was, let alone the level of it. The Tribunal did not, therefore, consider issues relevant to whether the MOC opinion was properly made.

In light of this judgment it would be appropriate for the Tribunal, when presented with a MOC opinion which does not clearly identify which of an applicant's diseases or conditions has caused them to fail the health criteria, to seek clarification from the MOC or a revised opinion. Furthermore it would be advisable for the Tribunal to make clear in its decision that it has considered whether the MOC opinion has been properly made.

Currency of the MOC opinion

The MOC opinion being considered by the Tribunal must address the applicant's satisfaction or lack of satisfaction of the requirement in PIC 4005(1)(c), 4006A(1)(c) and 4007(1)(c) *at the time of the Tribunal's decision*.[69] Where there has been a lapse in time since the MOC opinion, the Tribunal will need to assess whether the circumstances of the case require that it seek a further opinion. This will be so even where the applicant has refused the invitation to obtain a further MOC opinion, as the primary obligation is upon the Minister or the Tribunal to obtain an opinion which would enable the making of a determination.

Where the Tribunal consults an out of date report, it risks taking into account irrelevant considerations in the form of medical opinions which no longer apply to an applicant.[70] Whether the Tribunal will need to obtain a further MOC opinion will depend on the circumstances of the case. Considerations relevant to whether further investigation is required by the Tribunal include:

- the amount of time that has elapsed between the issue of the MOC's report and the Tribunal's decision;
- any evidence of change (and, in particular, improvements) in the applicant's health; and
- the degree to which any other medical opinions demonstrate a lack of currency and reliability in the MOC opinion.[71]

Evidence of change in the ability to test or establish the level or severity of a condition due to the applicant's age at the time of decision may also indicate that a MOC opinion is no longer valid.[72]

Where the applicant has refused an invitation to obtain a further MOC opinion at review stage and, on the basis of the above considerations, the original MOC opinion is no longer current and cannot be taken to be correct, the Tribunal will need to obtain a further MOC opinion. The Tribunal may require

[69] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18]-[20], citing *MIMA v Seligman* (1999) 85 FCR 115 (French, North and Merkel JJ, 1 March 1999).
[70] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [22].
[71] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [20]. In *Applicant Y* the MOC opinion relied upon by the Tribunal was almost 2 years old as at the time of the Tribunal decision, the applicant having refused the invitation to obtain a further MOC opinion upon review. The applicant had submitted recent reports from the applicant's doctor to the Tribunal indicating an improvement in the applicant's condition since her initial diagnosis as HIV positive and that her prognosis was generally good. The medical evidence indicated that the applicant would not require hospitalisation in the reasonably foreseeable future, while the MOC opinion implied hospitalisation and significant inpatient management as the basis for its assessment of 'significant cost'. In *JP1 & Ors v MIAC* [2008] FMCA 970 (Riley FM, 22 August 2008) the Court rejected submissions based on *Applicant Y* in circumstances where the MOC opinion was only 4 months old and the applicant was arguing not that the MOC opinion itself was out of date, but rather that it was based on out of date guidelines.
[72] See *Pokharel v MIBP* [2016] FCCA 3295 (Howard J, 19 December 2016). In *Pokharel* the MOC opinions were based on a medical report that had been prepared when the applicant was only 3 months and 16 days old and the medical report noted that the degree of intellectual impairment for the condition was highly variable. The Court held that the Tribunal had asked itself a wrong question by failing to consider whether either of the opinions reflected the level or severity of the condition as at the date of decision (when the applicant was two years old).

the Secretary of the Department to arrange a further MOC opinion in accordance with s.363(1)(d) of the Act.

When must the Tribunal seek a MOC opinion?

The MOC opinion must address satisfaction of the health criterion requirements *at the time of the Tribunal's decision* upon review.[73] If a MOC opinion was obtained at primary level, depending on the nature of the evidence to the Tribunal, it may no longer be an opinion that the applicant satisfies the requirements at the time of decision.

Where the reason for refusal of the visa was wholly or partly as a result of an opinion of a MOC that a person did not meet a health criterion, the Tribunal may seek a further MOC opinion at review stage. There is a prescribed fee payable in these circumstances. Tribunal policy is that the fee is payable by the applicant. Where the Tribunal is obtaining a MOC opinion for the first time, that is, it is not a request for a further MOC opinion within the meaning of r.5.41, or where a valid MOC opinion was obtained, but was not a reason for the delegate's refusal of the visa, there is no *prescribed* fee.

If a valid MOC opinion was obtained at primary level and the reason for the refusal was wholly or partly the result of an opinion of a MOC, and the applicant refuses to obtain a further MOC opinion, the Tribunal will need to consider whether it can take the original MOC opinion to be correct in relation to satisfaction of the health criterion requirements at time of decision (see Currency of the MOC Opinion above). If it cannot take the original MOC opinion to be correct, then the Tribunal will still need to obtain a valid MOC opinion.[74] In these circumstances the Tribunal itself would need to obtain a further MOC. The Tribunal has the power to require the Secretary of the Department to arrange for any medical examination that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.[75]

Where the health criterion is the sole issue in dispute before the Tribunal, the Tribunal must address it in reviewing the decision. Failure to do so may constitute jurisdictional error on the grounds of 'failure to exercise jurisdiction', or 'failure to review the decision'. If no MOC opinion has yet been obtained, the Tribunal must seek the opinion of a MOC unless the matter falls within one of the exceptions in r.2.25A(1)(a) or (b). Where the matter does fall within one of the exceptions, the Tribunal may be able to decide the health criteria without a MOC opinion where there is no information known to the Tribunal (either through the application or otherwise) to the effect that the person may not meet any of the health requirements. The Tribunal may request that the Department arrange for the applicant to attend a panel doctor for assessment.[76] The necessary medical information can then be forwarded to the Tribunal who then makes a decision in relation to the health criteria (unless the medical information suggests the person may not meet the health criterion, in which case the Tribunal must seek a MOC opinion).

Regulation 2.25A(1) only requires that the Minister 'seek the opinion' of an MOC. How the opinion is requested or obtained is not provided for in the Regulations. There is no requirement for the Tribunal

[73] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [18] citing *MIMA v Seligman* (1999) 85 FCR 115.
[74] *Applicant Y v MIAC* [2008] FCA 367 (Tamberlin J, 19 March 2008) at [28]. The Court noted that the primary obligation under r.2.25A is on the Minister or the Tribunal to obtain a report which would enable the making of a determination.
[75] Section 363(1)(d) of the *Migration Act 1958.*
[76] Section 363(1)(d) of the *Migration Act 1958* authorises the Tribunal to require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination. In addition, s.60 provides that the Minister may require the applicant to visit and be examined by a person qualified to determine the applicant's health, physical or mental condition at a reasonable time and place, if the health, physical or mental condition of the applicant is relevant to the grant of a visa. In these circumstances an applicant must make every reasonable effort to attend such examination. Following *obiter dicta* by the High Court in *MIAC v SZKTI* (2009) 238 CLR 489 at [33], it appears that the Tribunal may also have this power.

to specify an individual MOC when seeking an opinion.[77] See the Letter Template Index and National Registry Procedures for procedural information about seeking an opinion from the MOC.

Health care

What is counted as falling within the meaning of 'health care' is relevant to the assessment of whether the cost of that care will be 'significant' for the purposes of PIC 4005(1)(c)(i), 4006A(1)(c)(i) or 4007(1)(c)(i). This issue is relevant to the Tribunal in terms of assessing whether the MOC has given an opinion that is authorised by the Regulations in assessing whether the health care required by a person with the condition/disease of the applicant would be likely to result in significant cost to the Australian community. There has been some consideration as to whether prescription medication which is self-administered comes within the meaning of 'health care' such that it can properly be taken into account in calculating whether the cost of that 'health care' would be 'significant'.

'Health care' in this context involves the provision of care by somebody to the person, but such provision does not necessarily require 'an element of personal attention or activity' by the provider. It has been held that the MOC may take into account the costs of self-administered medication when assessing whether the provision of 'health care' would be likely to result in a significant cost to the Australian community. The Court in *MIMIA v X* stated:

> *It is not necessary to mark the outer limit of the concept of the term "health care" in the context of the Regulations or to define exhaustively what kinds of persons might qualify as providers or the means by which provision might be made. The term must at least include, in our opinion, the prescription of medication by a legally qualified medical practitioner and the dispensing of that medication by a pharmacist. The fact that a particular medication is self-administered by the person, even if some considerable time after the prescription or the dispensing, cannot sensibly be isolated from the total process. Moreover, in the present case the prescription and dispensing is linked with the monitoring, which is unarguably health care.*[78]

Waiver of the Health criterion

There is provision for waiver of the requirements in PIC 4006A(1)(c) and 4007(1)(c). There is no provision for waiver of the requirement in PIC 4005(1)(c) or for any of the requirements in 4005-4007 in relation to tuberculosis or a disease/condition that would be a threat to public health in Australia or a danger to the Australian community.

PIC 4007

The waiver in PIC 4007(2) is only available if the applicant satisfies all other criteria for grant of the visa: PIC 4007(2)(a). If other criteria for the visa are in dispute, the Tribunal will not be in a position to consider the waiver until it is satisfied that the applicant meets those other criteria. There is no similar requirement in relation to the waiver in PIC 4006A(2).

Further, the waiver provision in PIC 4007(2) is only available if the Minister is satisfied that the granting of the visa would be unlikely to result in 'undue cost' to the Australian community or 'undue prejudice' to the access to health care or community services of an Australian citizen or permanent

[77] *Reynolds v MIAC* [2010] FMCA 6 (Lucev FM, 15 January 2010), at [63].
[78] *MIMIA v X* (2005) 146 FCR 408 (Black Cj, Heerey and Weinberg JJ, 29 September 2005) at [12]. The Full Court also held at [13] that the term "health care" is used in the same sense in 4005(c)(i)(A) and in the opening words of 4005(c)(ii). The Full Court disagreed with Finkelstein J at first instance who had held that health care necessarily requires an element of personal attention or activity by the provider and that the term 'health care' did not extend to the mere provision of prescription medication that is self administered: *X v MIMIA* [2005] FCA 429 (Finkelstein J, 15 April 2005) at [24].

resident. The consideration of these points relates back to the assessment in the adverse MOC opinion.[79]

There are then, two conditions which must be met before the waiver can be exercised:

1. the applicant must satisfy all other criteria for the grant of the visa: cl.4007(2)(a)
2. the decision maker must be satisfied that grant of the visa would be unlikely to result in:
   (a) undue cost to the Australian community: cl.4007(2)(b)(i); **or**
   (b) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident: cl.4007(2)(b)(ii).

The circumstances in which the Tribunal has power to actually exercise the waiver, will be rare, if they arise at all. Most often, the Tribunal is restricted to determining the question of satisfaction that grant of the visa would be unlikely to result in undue costs or prejudice to access. If the Tribunal is satisfied that the grant would be unlikely to result in either, it may remit with a direction that the applicant meets PIC 4007(2)(b) for the purpose of the relevant Schedule 2 visa criterion. Once the decision is remitted to the Department, an officer must determine whether the applicant satisfies all other criteria for grant of the visa and if so, must consider the waiver.

Strictly speaking, the task of determining whether costs or prejudice are "undue" is more accurately characterised as one of interpretation and fact-finding than as the exercise of a discretion.[80] Nevertheless, the Tribunal may have regard to any guidance that may be available in relation to legislative provisions containing such terms, such as may be given in Departmental guidelines, but it must not treat such guidance as determinative and must always have regard to the terms of the legislation and the individual circumstances of the case.[81]

Departmental guidelines in relation to the PIC 4007 health waiver tend to conflate the prior question of satisfaction as to the unlikelihood of undue cost and undue prejudice with the exercise of the discretion itself. They state:

What does 'undue' mean

Although 'undue' is not defined in migration law:

- *the dictionary definition of undue is "unwarranted; excessive; too great" and*
- *the courts have indicated that a broad range of discretionary considerations can be taken into account in determining whether costs or prejudice to access are "undue", which, in a given case, may include mitigation of costs or service, or consideration of compelling and compassionate circumstances.*

What to take into account

[79] Note that while r.2.25A requires the Tribunal to take a MOC's opinion to be correct for the purposes of determining whether a person meets PIC 4007(1)(c), a MOC does not need to be taken to be correct for the purposes of determining whether the significant cost or prejudice is 'undue'.

[80] See MRD Legal Services commentary, Application of policy, "Use of Policy and Guidelines in Exercise of Non-Discretionary Power"

[81] In *Xue Fan v MIAC* [2010] FMCA 490 (Burnett FM, 9 July 2010) at [22], the Court observed that PAMs are not binding, they being nothing more than procedural and policy guidance to officers applying the Migration Act and Regulations. The Court also noted, with reference to s.15AB *Acts Interpretation Act 1901*, that such guidelines do not fall within the class of extrinsic material to which regard may be had to assist in interpreting the legislation. Section 15AB(1) provides that "if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material". Section 15AB(2) then provides that, "[w]ithout limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes" materials such as explanatory memoranda and relevant reports laid down before either House of Parliament.

Given the broad range of discretionary considerations that can be taken into account, the individual circumstances of the visa applicant need to be considered in coming to a conclusion about whether the granting of the visa would be unlikely to result in undue cost or undue prejudice to access.

Each health waiver case must be considered on its merits – with all relevant factors taken into account, including any compelling and/or compassionate circumstances that warrant a waiver being exercised (for example, close family links to Australia and/or reasons why the family would find it difficult to return to their home country).

When making a waiver decision, section 65 delegates should consider the following policy guidelines for the relevant type of visa being processed - as the nature of the individual circumstances involved are likely to vary depending on the type of visa that has been applied for (even though the same PIC applies).[82]

The guidelines state relevant factors which are afforded significant weight for non-humanitarian visas,[83] and also set out factors to be taken into account and given particular weight in relation to humanitarian visas[84] and Foreign Affairs or Defence Sector students.[85]

Compelling and compassionate circumstances may be relevant to the consideration of the waiver; however, considerations are not restricted to such circumstances. The Full Court of the Federal Court considered the operation of the health waiver in the case of *Bui v MIMA*.[86] The Court held that the evaluation of whether an identified significant cost would be 'undue' may import consideration of compassionate or other circumstances and commented that it 'may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person would make some significant call upon health and community services. There may be circumstances of a "compelling" character, not included in the "compassionate" category, that mandate such an outcome.'[87] For further information please see MRD Legal Services Commentary on 'Compelling and/or Compassionate Circumstances'.

See the National Registry Procedures NRP 'Investigations' for further information on processing MOC related matters.

PIC 4006A

PIC 4006A only applies to Subclass 457 (Temporary Work (Skilled)) visas made before 18 March 2018.[88]

[82] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers – PIC 4007 Overview (re-issued 18/11/2017).
[83] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers – Assessing a waiver for a humanitarian visa (re-issued 18/11//2017).
[84] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers – PIC 4007 waivers for non-humanitarian visas – Factors afforded significant weight under policy (re-issued 18/11/2017).
[85] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC - Sch4/4005-4007 - The health requirement - Health Waivers - PIC 4007 waivers for Foreign Affairs or Defence Sector students (re-issued 18/11//2017).
[86] *Bui v MIMA* (1999) 85 FCR 134 (French, North and Merkel JJ 1 March 1999). This case involved judicial review of a decision of a delegate that the applicant did not meet PIC 4007 in the form prior to the amendments of 1 July 1999. The waiver was not exercised. The Full Court held at [49] that a request to the applicant to provide information on "compelling and compassionate circumstances" did not demonstrate an unduly restrictive approach to the exercise of the waiver. The delegate's decision was overturned following *MIMA v Seligman* (1999) 85 FCR 115 and the invalidity of r.2.25B.
[87] *Bui v MIMA* (1999) 85 FCR 134 (French, North and Merkel JJ 1 March 1999) at [47].
[88] PIC 4006A was repealed for visa applications made on or after 18 March 2018 as a consequence of the closure of Subclass 457 (the only visa to which it applied) from that date. The amendments do not affect visa applications made before 18 March 2018: Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), items 37 and 171 of Schedule 1, Part 1, and clause 6702(1) & (2) of Part 67, Schedule 13 of the Regulations, as inserted by item 178, Schedule 1 Part 1 of the amending regulation. The Subclass 457 visa was replaced with the Class GK Subclass 482 (Temporary Skills Shortage) visa and applicants for Subclass 482 must satisfy health criterion 4007.

PIC 4006A(2) provides a power to waive part of the health requirement (namely PIC 4006A(1)(c)) 'if the *relevant nominator* has given the Minister a written undertaking that the relevant nominator will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements'.[89]

'Relevant nominator' is defined in PIC 4006A(3) to mean an approved sponsor who:

- has lodged a nomination in relation to a primary applicant, or
- has included an applicant who is a member of the family unit of a primary applicant in a nomination for the primary applicant, or
- has agreed in writing for an applicant who is a member of the family unit of a primary applicant to be a secondary sponsored person in relation to the approved sponsor.

Note that not all Subclass 457 applicants are required to have a nomination lodged in respect of them. Only those applicants applying for the cl.457.223(2) [Labour Agreement] and cl.457.223(4) [Standard Business Sponsor] must be the subject of an approved nomination.

Subclass 457 applicants who applied under the 'service sellers' stream[90] and the 'persons accorded certain privileges and immunities' stream before 24 November 2012 [91], are not required to be the subject of a nomination. For these applicants, the waiver in PIC 4006A cannot be accessed.

Before the requirements of PIC 4006A(1)(c) can be waived, it must first be established that an applicant has a disease or condition that would result in them not being able to satisfy those requirements. Once that is established, the written undertaking must relate to *that* disease or condition.

There is no discretion to waive the requirements in the absence of a written undertaking. The term 'undertaking' is not defined in the Act or the Regulations, nor is the form of the undertaking prescribed. It is only necessary that the undertaking:

- be written
- be given by the relevant nominator
- be given to the Minister
- and be an undertaking that the relevant nominator will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c).[92]

In the absence of a statutory definition, the word 'undertaking' is to be given its ordinary meaning. The Macquarie Dictionary Online relevantly defines the word as 'a promise; pledge; guarantee'.[93] Where there is persuasive evidence that a purported undertaking cannot be met, there is some doubt that the term 'undertaking' can meaningfully be applied. As discussed below, consideration of whether a nominator can meet the purported undertaking may also be a relevant factor in considering whether to exercise the waiver.

[89] The term "relevant employer" in PIC 4006A was replaced with "relevant nominator" by SLI 2009 No. 289 and applies to *visa* applications made on or after 9 November 2009 as well as those made prior to, but not finally determined by that date: r.3(3); Schedule 2, Items [2] and [3]. According to the Explanatory Statement to SLI 2009 No. 289, the amendment "ensures that it is always the approved sponsor who has identified the visa applicant in the nomination, or has agreed in writing to be the approved sponsor of the visa applicant, who gives the written undertaking to meet the costs associated with the visa applicant's health condition, regardless of whether the approved sponsor is also the visa applicant's employer." The amendment reflects similar changes in references from employer to nominator in Subclass 457 criteria affected by SLI 2009 No. 202 applicable to visa applications not finally determined by 14 September 2009: r.3, Schedule 1.

[90] cl.457.223(8).

[91] cl.457.223(9) as in force prior to 24 November 2012. The Privileges and Immunities stream was removed from the Subclass 457 visa by the Migration Legislation Amendment Regulations 2012 (No. 4) (SLI 2012 No. 238), item 228 of Schedule 1.

[92] PIC 4006A(2).

The Tribunal must be satisfied that any written undertaking it has is from the relevant nominator. Departmental guidelines state:

> *…if the 'relevant nominator' is a company, the undertaking must have been 'executed' by the company.*
>
> *Under s.127 of the Corporations Act 2001, a company may execute a document:*
> - *without using a common seal if the document has been signed by:*
> - *2 directors of the company*
> - *a director and a company secretary of the company or*
> - *for a proprietary company that has a sole director who is also the sole company secretary – that director*
> - *using a common seal if the affixing of the seal has been witnessed by:*
> - *2 directors of the company*
> - *a director and a company secretary of the company or*
> - *for a proprietary company that has a sole director who is also the sole company secretary – that director.*[94]

The Tribunal may have regard to these guidelines, but should not treat them as binding evidentiary requirements. It is a matter for the Tribunal to determine what evidence is necessary to satisfy it that the undertaking has been given by the nominator. In the case of a nominator who is a company or unincorporated association, the Tribunal must be satisfied that the individual giving the undertaking has authority to do so on behalf of the nominator.

PIC 4006A(2) is ambiguous as to whether, for the undertaking to have been given to the Minister, it is necessary that it have been addressed to the Minister, or whether it is sufficient that an unaddressed undertaking be provided to the Minister (or Tribunal). On the one hand, it is arguable that the undertaking must be addressed to the Minister (or Tribunal), based on a view of an undertaking as a promise, pledge or guarantee addressed specifically to a person or group of persons, who may act in reliance on that promise. On the other hand, it is arguable that a breach of the undertaking is unenforceable by the Minister, and that there is no clear policy purpose to be served by making the discretion to exercise the power conditional upon an undertaking being specifically addressed to the Minister. On either construction, the relevant nominator must consider and express a commitment to meet the undertaking, and the Minister will have a record of the undertaking and whether it was honoured available when considering applications relating to the nominator in future. The Explanatory Statement which introduced the waiver for PIC 4005A (later renumbered as PIC 4006A in a technical amendment[95]) provides little if any guidance on this point.[96]

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[93] Macquarie Dictionary Online, accessed 16 November 2016.

[94] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC -Sch4/4005-4007 - The health requirement -Health Waivers - PIC 4006A (UC-457 Only) (re-issued 18/11/2017). Under ss.128 and 129 of the *Corporations Act 2001*, a person is, broadly speaking, entitled to assume that a document executed in this manner has been executed by someone authorised to act for the company in any dealings with that company.

[95] According to the Explanatory Statement for SLI 1995 No. 117: "In December 1994, public interest criterion 4005A was introduced into Schedule 4. It was intended as a relaxed health criterion for temporary entry classes 413 (Executive), 414 (Specialist) and 418 (Educational) with the relevant employer giving an undertaking to meet certain medical costs if they arose. However, 4005A was inadvertently included in a number of other classes that had criteria listed as 4001 to 4006. This regulation omits item 4005A and reinserts it as item 4006A which overcomes the problem".

[96] According to the Explanatory Statement for SLI 1994 No. 376: "The new public interest criterion 4005A is identical to existing public interest criterion 4005 but with an additional provision that a health objection on the grounds that the applicant's disease or condition would result in undue costs to Australian community resources and public funds may be waived where the proposed employer, or the family head's proposed employer, has provided a written undertaking to meet all costs related to the applicant's disease or condition. The waiver is available only where the applicant's disease or condition is not a public health risk or danger to the Australian community."

As mentioned above, the undertaking must be that the relevant nominator will meet all the costs related to *the specific* disease or condition that causes the applicant to fail to meet the requirements of PIC 4006A(1)(c). An undertaking stating that the nominator will meet the applicant's health costs without reference to the condition would not appear to meet this description.

The undertaking must be that the relevant nominator will meet *all* the costs related to the relevant disease or condition. Departmental guidelines state:

> *The relevant nominator must undertake to meet all of the costs related to the disease or condition that caused the visa applicant to fail to meet the requirements of PIC 4006A(1)(c).*
>
> *The undertaking must therefore, include the assessed estimated costs.*
> *…*
>
> *In most cases, the MOC's opinion that the applicant fails to satisfy the health requirement will be based on the likely cost of health care and community services in Australia….*
>
> *… generally, it would be reasonable to expect that a larger organisation would be able to meet a higher level of costs than a smaller organisation or an employer who is an individual. However, each case must be considered on its own merits.*
>
> *If there is doubt about the capacity of the relevant nominator to be able to meet the potential costs related to the disease or condition that caused the visa applicant to fail to meet the requirements of PIC 4006A(1)(c), s.65 delegates should request suitable documentary evidence (such as a letter from an auditor or accountant) confirming the capacity of the relevant nominator to meet those costs*.[97]

These guidelines should not be elevated to the status of legal requirements. In particular, PIC 4006A(2) contains no express requirement that the nominator must have an estimate of what all the relevant costs are before undertaking to meet all of them. Even if a nominator does have an opinion of a MOC as to health costs, it is not bound to consider that assessment correct. The undertaking is to pay all the relevant costs, regardless of whether they turn out to be more or less than the costs estimated by the MOC or nominator at the time the undertaking is given.

While not an express statutory requirement, the awareness of the nominator as to potential costs, however they are assessed, may be relevant to the decision whether to waive the requirement in PIC 4006A(1)(c).

Once a relevant undertaking has been given, the Tribunal has a discretion whether or not to exercise the waiver. Departmental guidelines state:

> *Under policy, before the s.65 delegate makes a decision to exercise a PIC 4006A(2) health waiver, they must assess whether the undertaking must be capable of being honoured.*
>
> *Consideration should be given to:*
> - *whether the relevant nominator has dishonoured previous undertakings*
> - *whether the relevant nominator has the capacity to meet the estimated costs involved and*
> - *if the 'relevant nominator' is a company, the undertaking must have been executed by the company.*[98]

[97] PAM3 – Migration Regulations >-Sch4 - 4005-4007 - The health PIC >-Sch4/4005-4007 - The health requirement >-Health Waivers - PIC 4006A (UC- 457 Only) (re-issued 18/11/2017).
[98] PAM3 – Migration Regulations >-Sch4 - 4005-4007 - The health PIC >-Sch4/4005-4007 - The health requirement - Health Waivers - PIC 4006A (UC- 457 Only) (re-issued 18/11/2017).

In exercising a discretion, the Tribunal should have regard to policy, but must not determine an issue simply by resolving whether or not it conforms to policy. In particular, the Tribunal should not decline to exercise the waiver simply because the undertaking does not meet one of these requirements, some of which appear to go beyond the requirements of the Regulations. The Tribunal may, however, consider each of the circumstances referred to, together with any other relevant information before it, and exercise its discretion based on the total circumstances of the case and having regard to the purpose of the provision. See Application of policy for further details.

Note that there is no provision to waive the requirements of PIC 4006A(1)(a) or (b), i.e. that the applicant be free from tuberculosis and from a disease or condition that could threaten public health in Australia or endanger the Australian community.

'One fails all fail' visa criteria

The so-called 'one fails, all fail' criteria have the effect of including health requirements in primary criteria for visa subclasses which apply to primary visa applicants, secondary visa applicants *and*, in certain circumstances, members of the family unit who are not included in the visa application.

The requirement for members of an applicant's family unit, even where they are not applicants for the visa, to satisfy the health requirement in PIC 4005 or 4007, generally appears in criteria for permanent visas, or temporary visas which provide a basis for grant of a later permanent visa. Typically, the member of the family unit not included in the application must meet the health requirement unless 'the Minister is satisfied that it would be unreasonable to require the person to undergo assessment'. An example of this is the Subclass 801 (Partner) (Residence) visa, where it is a requirement in cl.801.224(2)(b) that each member of the family unit of the applicant who is not an applicant for a Subclass 801 visa is a person who satisfies PIC 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

In considering this question, the person must first be a member of the family unit of the visa applicant/s. 'Member of the family unit' is defined in r.1.12 of the Regulations[99].

The 'unreasonable to require the person to undergo assessment' exception

In circumstances where the Tribunal is satisfied the person is a member of the family unit of the visa applicant and is not included in the visa application, then the Tribunal can consider whether it would be unreasonable to require the person to undergo assessment.

It is not possible for the Tribunal to be satisfied that it would be unreasonable to require a person to undergo assessment where the person has already undergone assessment. The exempting power does not exist to undo an assessment actually completed.[100] The power does not exist to be

[99] For visa applications made prior to 19 November 2016, a member of the family unit of an applicant includes dependent children ('dependent child' is defined in r.1.03 of the Regulations) and relatives who are dependent upon the relevant visa applicant. 'Dependent is also defined in r.1.05A of the Regulations. For visa applications made on or after 19 November 2016 or a visa granted as a result of such an application, Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 (F2016L01696) amended the definition to set an upper age limited of 23 years for children or step-children who are dependent unless they are incapacitated for work, and is limited to family members within the nuclear family. These amendments do not apply to refugee, humanitarian and protection visas. For further information see MRD Legal Services commentary 'Member of a Family Unit'.

[100] *MIMA v Ma* (1998) 82 FCR 455 at 460 (Whitlam J, 31 March 1998). The case concerned a Parent visa application. The daughter of the visa applicants was originally included in the visa application, underwent a health examination and was found by the MOC not to meet PIC 4005(c). The parents then withdrew her from the visa application. The Tribunal remitted the matter, finding that it could not see any good reason for requiring the daughter to undergo assessment. The Court set aside

exercised when it is known that a person is unable to satisfy the specified health criteria, even when the applicant has not yet undergone assessment.

What is unreasonable will depend on the individual circumstances of the case. Departmental guidelines indicate that non-migrating family members are not ordinarily required to complete health examinations, but circumstances where it may be reasonable to require an examination include:

- where the non-migrating family member is a young child remaining in their country of origin without parental support;
- where the non-migrating family member is remaining in their country of origin where there is ongoing conflict and stability; or
- where there is evidence that the non-migrating family member will ultimately seek to migrate to Australia.[101]

Assessment of non-applicant family members

Where the decision-maker finds that it would not be 'unreasonable to require the person to undergo assessment', the non-applicant family member will need to satisfy the relevant health criterion. Setting aside the exception, the assessment of whether a non-applicant satisfies the PIC is not materially different from the assessment that would be made for a primary or secondary visa applicant.

One question that may arise in such cases relates to the fact that both PIC 4005 or 4007 refer to an assessment of 'the applicant'. The concern with this terminology is that non-applicant (non-migrating) family members are not 'applicants' in any ordinary sense. While the use of the term may suggest some uncertainty about how the PICs operate with respect to non-applicants, no such ambiguity arises in the Schedule 2 criteria that require non-applicants be assessed against the health criteria.[102] For this reason, non-applicant family members should be assessed against PIC 4005 and 4007, notwithstanding that perceived ambiguity.

To construe the provisions as applying to anyone other than the non-applicant family member would result in a criterion such as cl.801.224(2)(b) having no utility.[103] It would also undermine the clear purpose of such a provision which is to ensure a decision-maker or MOC can properly consider any disease or condition (and any associated costs) that may affect a non-applicant family member, and the impact those matters may have on the potential grant of the visa.

Remittal power

If the Tribunal is satisfied that an applicant meets a discrete part of PIC 4005, 4006A or 4007 then it is permissible to remit with a direction that the applicant satisfies the particular sub criterion for the purpose of the relevant Schedule 2 clause (e.g. remit with direction that applicant meets PIC 4007(2)(b) for the purpose of cl.309.225 of Schedule 2 to the Regulations).[104] See Chapter 3 of the Procedural Law Guide for more detail about the remittal power.

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the Tribunal decision for legal error as it had no power to exercise the exemption. See also *Satya Nand v MIEA* (1996) 71 FCR 52 (Moore J, 27 November 1996).at 55-56

[101] PAM3 – Migration Regulations Sch4 - 4005-4007 - The health PIC -Sch4/4005-4007 - The health requirement -Health Waivers – Non-migrating family members (re-issued 18/11/2017).

[102] For example cl.801.224(2)(b)) clearly provides that each member of the family unit of the applicant who is not an applicant for a Subclass 801 visa is a person who, inter alia, satisfies PIC 4007.

[103] If such a criterion is assessed by reference to any one other than the non-applicant family member, the assessment against PIC 4005 or 4007 would become redundant, as any 'applicant' would already have been assessed against the applicable health criteria. For example, in the context of a Subclass 801 (Partner) (Residence) visa, the primary applicant would need to satisfy PIC 4007 under cl.801.223(1)(a), and any secondary applicants would need to satisfy PIC 4007 as part of cl.801.224(1)(a).

[104] s.349(2)(c), r.4.15(1)(b) and r.2.03.

Relevant case law

Applicant Y v MIAC [2008] FCA 367	Summary
Blair v MIMA [2001] FCA 1014	Summary
Bui v MIMA [1999] FCA 118	
Haque v MIBP [2015] FCCA 1765	Summary
Imad v MIMA [2001] FCA 1011	Summary
JP1 & Ors v MIAC [2008] FMCA 970	Summary
MIMA v Ma [1998] 82 FCR 455	
Pokharel v MIBP [2016] FCCA 3295	Summary
Sarabia v MIBP [2017] FCCA 2642	
Satya Nand v MIEA [1996] FCA 1057	
Ramlu v MIMIA [2005] FMCA 1735	Summary
Reynolds v MIAC [2010] FMCA 6	Summary
Robinson v MIMIA (2005) 148 FCR 182	Summary
MIMA v Seligman (1999) 85 FCR 115	
Traill v MIAC [2013] FCCA 2	Summary
Triandafillidou v MIMIA [2004] FMCA 20	Summary
MIAC v Wainwright [2010] FMCA 29	Summary
MIMIA v X [2005] FCAFC 209	Summary

Relevant legislative amendments

Title	Reference number
Migration Legislation Amendment Regulations 2008 (No.1)	SLI 2008 No.91
Migration Amendment Regulations 2009 (No. 9)	SLI 2009 No. 202
Migration Amendment Regulations 2009 (No. 13)	SLI 2009 No. 289
Migration Amendment Regulations 2011 (No. 6)	SLI 2011 No. 199
Migration Legislation Amendment Regulations 2011 (No. 1)	SLI 2011 No. 105
Migration Legislation Amendment Regulation 2012 (No. 4)	SLI 2012 No. 238
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014 No. 30
Migration Amendment Regulation (2016 Measures No.4) Regulation 2016	F2016L01696
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262

Available Decision Templates/Precedents

There are two decision templates available which are applicable to visa applications made but not finally determined before, or made on or after, 1 July 1999. These are:

- **Health criterion – PIC 4005 -** this template is suitable for a review of a visa refusal on the basis of PIC 4005

- **Health criterion – PIC 4007** - this template is suitable for a review of a visa refusal on the basis of PIC 4007

Last updated / reviewed: 14 August 2018

Partner Visa Overview

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Overview

Partner visas are designed for people who are spouses, de facto partners and prospective spouses of Australian citizens, Australian permanent residents and eligible New Zealand citizens who seek to enter and remain in Australia temporarily or permanently. There are currently two types of Partner visas prescribed by the Migration Regulations 1994 (the Regulations): Prospective Marriage visas and Partner visas.

Visa classes and subclasses

There are five classes of Partner visa. Each Partner visa class currently contains only one visa subclass:

- Prospective Marriage (Temporary) (Class TO) – *offshore temporary*
  - Subclass 300 (Prospective Marriage)
- Partner (Provisional) (Class UF) – *offshore temporary*
  - Subclass 309 (Partner (Provisional))
- Partner (Migrant) (Class BC) – *offshore permanent*
  - Subclass 100 (Partner)
- Partner (Temporary) (Class UK) – *onshore temporary*
  - Subclass 820 (Partner)
- Partner (Residence) (Class BS) – *onshore permanent*
  - Subclass 801 (Partner).

For further information as to the Prospective Marriage visa, see the MRD Legal Services Commentary: Subclass 300 – Prospective Marriage visas and for further information as to the Partner 309/100 and 820/801 visas, see the MRD Legal Services Commentary: Partner Visas: subclasses 309/100 and 820/801.

Tribunal's Jurisdiction

Offshore visa subclasses 300 and 309 are reviewable under s.338(5) of the Act.[1] The sponsor has the review right in these cases.[2]

Onshore visa subclasses 820 and 801 are reviewable under s.338(2) of the Act. Subclass 100 is generally reviewable under s.338(7A) of the Act.[3] The visa applicant has the review right in these cases.[4]

[1] Note, however, that applicants for these visas who hold a Subclass 303 (Emergency (Temporary Visa Applicant)) visa may be in or outside Australia when their visa is granted (cl.300.411, cl.309.411, cl.310.411), and in these circumstances the visa refusal is reviewable under s.338(7A) and the visa applicant has standing to apply for review: s.347(2)(a).
[2] s.347(2)(b).
[3] An exception applies to Subclass 445 (Dependent Child) visa holders, or people granted Subclass 309 or 310 visas under ss.345, 351, 391, 417, 454 or 501J (Ministerial intervention powers), or their family members, who may apply onshore (Item 1129(3)). In these circumstances, the visa refusal is reviewable under s.338(2) and the visa applicant has standing to apply for review under s.347(2)(a).
[4] s.347(2)(a).

For subclass 820 and 801 decisions, the Tribunal only has jurisdiction if the visa applicant is physically present in the migration zone at the time the application for review is made.[5] For Subclass 100 decisions an application for review can only be made by a visa applicant who was physically present in the migration zone at the time when the decision was made **and** who is physically present in the migration zone when the review application is made.[6]

There is no location requirement relevant to the sponsor who has a review right in respect of an offshore provisional (subclasses 300 and 309) visa refusal.

Due to the two-stage nature of the partner visa scheme discussed below, a delegate may refuse both a Subclass 820 (temporary) and Subclass 801 (permanent) visa at the same time. In these circumstances, while both decisions are reviewable under Part 5 of the Act, there is no capacity to apply for review of both decisions in a single review application form even where the decisions are in one singular decision letter.[7] Two separate applications are required as the statutory scheme establishes two different visas with separate criteria and the delegate's decision is to be treated as two decisions, one for each visa.[8] If an applicant applies for review of both decisions on one form, it is an invalid application in regard to at least one of the decisions, and the Tribunal must make a finding of fact as to which decision is reviewable.

Two Stage Processing

Generally, there is a two-stage process before a permanent visa is granted in the partner migration stream. First, a provisional (temporary) visa is granted and then, usually after two years[9] (some exceptions apply),[10] and if the relationship is ongoing (some exceptions apply),[11] the permanent visa may be granted.[12]

The applicant applies for the provisional and permanent visas at the same time and place, and the visa application charge is only payable on the permanent visa application.[13] If the criteria for the provisional visa are met, the visa is granted to allow travel to, and stay in, Australia until a decision on the permanent visa is made.[14]

Two-stage processing will not prevent the permanent visa being decided less than 2 years after the application is made where the visa is refused[15] or where the exceptions to the ongoing relationship

[5] s.347(3).
[6] s.347(3A). Note, however, that the requirement to be onshore when the decision was made does not apply to Subclass 445 (Dependent Child) visa holders, or people granted Subclass 309 or 310 visas under ss. 345, 351, 391, 417, 454 or 501J (Ministerial intervention powers), or their family members, who have applied onshore for their visa (Item 1129(3)). In these circumstances, the visa refusal is reviewable under s.338(2), the visa applicant has standing to apply for review under s.347(2)(a), and the review application may only be made when the applicant is onshore under s.347(3).
[7] r.4.12.
[8] *Basra v MIBP* [2018] FCA 422 at [35]-[41], Justice Mohinsky held that the Tribunal dealing with a Subclass 801 visa did not have jurisdiction to also review a Subclass 820 visa decision, as this had already been dealt with by another Tribunal. While this contrasts with another decision of the Federal Court in *Bojanovic v MIMA* [2002] FCA 113, where Mansfield J was of the view that the single application to the Tribunal identifying both decisions 'obliged' the Tribunal to consider both, *Basra* is a much more recent authority and it has been followed by the Federal Circuit Court in *Mohammed v MIBP* [2018] FCCA 2893 and *Tam & Anor v MIBP* [2018]FCCA 328 as the correct approach.
[9] Generally, the two-stage processing rule operates for ongoing relationships through a requirement that a person hold a provisional or temporary partner visa, and that at least 2 years have passed since the application for that visa was made: cl.100.221(2)(c) and cl.801.221(2)(d). Also see cl.100.221(2A)(c) and cl.801.221(2A)(c).
[10] cl.100.221(3), (4), (5) (6) and (7), and cl.801.221(5), (6) and (6A).
[11] cl.100.221(3) and (4); cl.801.221(3), (4), (5), and (6). For guidance on the 'child exception' and 'death exception', see the MRD Legal Services Commentary 'Partner Visas – Exceptions to Relationship Requirement – Death/Child'.
[12] cl.100.221 and cl.801.221.
[13] See Items 1124B(2), 1129(2), 1214C(2) and (3)(a), 1220A(2) and (3)(c).
[14] cl.309.511, 820.511, 300.511.
[15] cl.100.221(7)(a) and cl.801.221(7)(a).

requirement apply.[16] The requirement for at least 2 years to have passed does not apply to a Partner visa applicant who at time of application was in a 'long-term partner relationship'[17] with the sponsoring partner.[18] Similarly, the requirement does not apply in certain circumstances where the sponsoring partner held a permanent humanitarian visa.[19]

For Prospective Marriage visas, there is effectively a three-stage process. An applicant applies offshore for a temporary Prospective Marriage visa and then, after entering Australia and marrying their prospective spouse, applies for a Partner visa onshore in accordance with the two-stage process.

Legal issues

Relationship requirements

The key issue in Partner visa cases is generally whether the visa applicant meets the requirement that he or she is the spouse or de facto partner or, in the case of prospective marriages, genuinely intends to live together as the spouse, of the relevant Australian citizen, permanent resident or eligible New Zealand citizen.

For these applications:

- the definition of 'spouse' is contained in s.5(1) of the Act. It provides that 'spouse' has the meaning given by s.5F and is limited to married relationships of the same or different sex.[20] Relevant considerations to be taken into account are contained in r.1.15A.
- 'de facto partner' is separately defined in s.5CB of the Act, with additional criteria and relevant considerations contained in r.2.03A and r.1.09A of the Regulations.

For guidance on the meaning of spouse and de facto partner, see the MRD Legal Services Commentary: 'Spouse' and 'de facto partner'.

For guidance on assessing a genuine intention to live together as spouses in the future, see the MRD Legal commentary: Subclass 300- Prospective Marriage visas.

Exceptions to the relationship requirement

There are a few exceptions to the relationship requirement for a Partner visa: death of the partner, family violence and circumstances where there is a child in respect of whom the applicant and sponsor have certain rights and obligations. Separate commentary materials discuss these issues: 'Partner Visas – Exceptions to Relationship Requirement – Death/Child' and 'Family Violence'.

[16] cl.100.221(3), (4) and (7)(b) and cl.801.221(3), (4), (5), (6) and (7). For guidance on the 'child exception' and 'death exception', see the MRD Legal Services Commentary 'Partner Visas – Exceptions to Relationship Requirement –Death/Child'.
[17] As defined in r.1.03.
[18] cl.100.221(5) and cl.801.221(6A).
[19] cl.100.221(6).
[20] The definition of 'spouse' in s.5F was amended with effect from 9 December 2017 by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* to include same-sex relationships. Before this change, s.5F(2)(b) required parties to 'have a mutual commitment to a shared life as husband and wife to the exclusion of all others'. This meant that same-sex couples previously could only be granted a Partner Visa on the basis of satisfying the definition of 'de facto partner' in s.5CB.

Sponsorship

The other criteria for Partner visas generally relate to sponsorship. There are specific limitations on sponsorship for the purposes of Partner visa applications which are set out in r.1.20J, r.1.20KA, r.1.20KB, r.1.20KC and r.1.20KD of the Regulations. The limitations are:

- Serial sponsors – r.1.20J imposes a limit on the number of people that a person can sponsor in a lifetime (two), and a minimum time period that must elapse between each sponsorship (five years). A five year limitation also applies to those who themselves were sponsored for a partner visa.

- Parent visa holder (Subclasses 143/864) – r.1.20KA prohibits the holder of a contributory parent, Subclass 143 or Contributory Aged parent, Subclass 864 from sponsoring a partner within 5 years of being granted a parent visa where the partner was their spouse or de facto partner on or before the date of the grant of the parent visa.

- Serious offenders/child sex offenders – r.1.20KB prevents those convicted of a child sex offence or a serious offence indicating the person may pose a significant risk to a child from sponsoring a child for a Partner visa or Child visa.[21]

- Significant criminal record – r.120KC prevents those convicted of a relevant offence and with a significant criminal record in relation to the relevant offence/s from sponsoring a partner for a Subclass 820,309 or 300 visa.[22]

For further information on sponsorship limitations, see MRD Legal Services Commentary: 'Limitation on Sponsorships - Partner Visas'.

Health criteria

Another issue which may arise in Partner cases is the health criteria set out in Schedule 4 to the Regulations. The health criterion generally in dispute is Public Interest Criterion 4007, which contains a waiver provision. Where the issue under consideration is the public interest health criterion, the Tribunal may or may not also address the issue of the genuineness of the relationship. In some cases, this may not be in dispute. In others, evidence concerning the relationship may be inextricably linked with submissions for waiver of the health test, and it may be appropriate to address all these criteria. In other cases, the Tribunal may decide to remit on the health criteria only. Information on the health criteria can be found in the MRD Legal Services Commentary: Health Criteria – PIC 4005, 4006A and 4007.

Compelling and/or compassionate

Several criteria in the Partner visa stream require the visa applicant and/or sponsor to demonstrate that compelling and/or compassionate circumstances apply in their case. This can be an issue in dispute where:

- the relationship between de facto partners was not ongoing for the 12 months immediately prior to the visa application, **unless** the applicant can establish *compelling and compassionate circumstances for the grant of the visa*;[23]

[21] This limitation applies to applications for certain Partner and Child visas made on or after 27 March 2010 – Migration Legislation Amendment Regulations 2010 (No.2) (SLI 2010 No.50)
[22] r.1.20KC(2) sets out what is a relevant offence and r.120KD defines 'significant criminal record'.

- in the case of onshore applicants, certain Schedule 3 criteria must be met – including requirements that the visa application was made within a specified period of the last substantive visa held, **unless** the Minister is satisfied there are *compelling reasons for not applying those criteria*;[24]
- approval of sponsorships for all subclasses of Partner visas is subject to certain limitations on sponsorships contained in rr.1.20J and 1.20KA. Regulation 1.20J allows sponsorship approval in circumstances where a sponsor has successfully sponsored more than one partner, only if the Minister is satisfied that there are *compelling circumstances affecting the sponsor.*[25] Here, the compelling circumstances must specifically affect the sponsor. In the case of the sponsorship limitation contained in r.1.20KA, which relates to sponsorship by Contributory Parent visa holders, the compelling circumstances must specifically affect the applicant;[26]
- Public Interest Criterion 4007 (health requirements) may be waived if the Minister is satisfied that the granting of the visa would be unlikely to result in undue cost to the Australian community or undue prejudice to access to health care or community services.[27] To properly consider this, it has been held that decision makers may need to consider compassionate and/or compelling circumstances.[28]

For further detail see MRD Legal Services Commentary: Compelling and/or Compassionate Circumstances/Reasons.

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Regulations (Amendment) 1996	SR 1996, No.211	
Migration Legislation Amendment Regulations 2009 (No.2)	SLI 2009, No.116	No.7/2009
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144	No.9/2009
Migration Amendment Regulations 2010 (No.2)	SLI 2010, No.50	No.2/2010
Migration Legislation Amendment (2015 Measures No.2) Regulation 2015	SLI 2015, No.103	No.7/2015
Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016	F2016L01390	No.3/2016
Marriage Amendment (Definition and Religious Freedoms) Act 2017	No.129 of 2017	No.6/2017

Last updated/reviewed: 6 March 2019

[23] r.2.03A(3)(b).
[24] For example, cl.820.211(2)(d)(ii).
[25] r.1.20J(2).
[26] r.1.20KA(3)(b).
[27] cl.4007(2)(b)(i)-(ii).
[28] *Bui v MIMA* (1999) 85 FCR 134.

PARTNER VISAS - REGISTER OF GAZETTE NOTICES / WRITTEN INSTRUMENTS

No.	Tab name	Instrument description
1	IE	Specification of an organisation as Independent Expert for r.1.21
2	Evidentiary	Evidentiary requirements for r.1.24 (family violence - no judicially determined claim)

Last updated/reviewed: 9/3/18

Independent expert

Title	GN ref	immi ref	FRLI Reference	In force		Revokes	explanatory statement	Notes
				from	until			
Specification of organisations (r.1.21)		IMMI 13/023	F2013L00586	03/04/13	current	IMMI 05/064	yes	Made 19 March 2013, commencing the day after registration. Registered 2 April 2013.
Specification of an organisation for the purposes of subregulation 1.21(1) of the Migration Regulations 1994	S119	IMMI 05/064	F2005L01620	01/07/05	02/04/13	-	yes	Signed 22 June 2005; Published 1 July 2005

Family violence - evidentiary requirements (r.1.24)

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Evidentiary Requirements	12/116	F2012L02237	24/11/12	current	-	yes	Signed 22/11/12; commences 24/11/12

Notes

1. Regulation 1.24 of the Migration Regulations 1994 provides that the evidence mentioned in regulation1.23(9)(c) is (a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims); and (b) the type and number of items of evidence specified by the Minister by instrument in writing for this paragraph.

Limitation on Sponsorships – Partner and Family Visas

Overview

Key Requirements

- Regulation 1.20J
  - Which sponsorships are counted for the purpose of r.1.20J?
- Regulation 1.20KA
- Regulation 1.20KB
- Calculating the five year limitation period - r.1.20J, 1.20KA, 1.20KB
- Regulations 1.20KC and 1.20KD
  - Relevant offence
  - Significant criminal record

Legal Issues

- Compelling circumstances
  - Compelling circumstances affecting the sponsor – r.1.20J
  - Compelling reasons affecting the applicant – r.1.20KA
  - Compelling circumstances affecting the sponsor or the applicant – r.1.20KB
- Approving sponsorship where reasonable to do so
  - Discretion to approve sponsorship where sponsor has a 'significant criminal record' - r.1.20KC(4)

Relevant Case Law

Relevant amending legislation

Overview

There are a range of provisions in the Migration Regulations 1994 (the Regulations) that operate to limit sponsorship of visa applicants in certain circumstances. These are contained in Division 1.4B (Limitations on certain sponsorships under Division 1.4) of Part 1 to the Regulations. The most common kinds of sponsorship limitations arising before the Tribunal are dealt with in this commentary.

Regulations 1.20J, 1.20KA, 1.20KB, 1.20KC and 1.20KD operate to limit the approval of the sponsorship of visa applicants for specified Partner visa applications, and in the case of r.1.20KB, certain family visas as well.[1]

Regulation 1.20J was introduced in 1996 to curtail perceived abuses of partner migration programs arising as a result of sponsors who had sponsored, or had been a party to, several successive sponsorships (i.e. serial sponsorship). Regulation 1.20J limits the approval of sponsorship of partners, so that the (Australian) sponsor is only able to successfully sponsor two partners within a lifetime and requires a period of at least five years between any two sponsorships. The sponsorship limitation also applies where a person was themselves sponsored for a partner visa and subsequently applies to sponsor another spouse or de facto partner.

Regulation 1.20KA was introduced on 1 July 2009 to prevent the practice known as "split applications" in the Parent visa stream. That is, where one member of a married or de facto couple applies for a contributory parent category visa claiming that their partner is not migrating, and once he or she is granted a permanent Contributory Parent visa, he or she sponsors their partner for a partner visa and effectively avoids paying the higher visa application charge for a Contributory Parent visa.

Regulation 1.20KB was introduced on 27 March 2010 and places limitations on sponsorship of a child by 'sponsors of concern', and is intended to prevent sponsorship of a child by a person who has been charged or convicted of a serious offence indicating that the person might pose a risk to a child.

Regulation 1.20KC and 1.20KD commenced 18 November 2016 as part of the Government's commitment to reduce the rates of family violence in Australia. Regulation 1.20KC permits the Minister to request that the sponsor provide a police check from an Australian jurisdiction or from a foreign country, and refuse the visa application if the sponsor fails to provide a requested police check or if the sponsor has a significant criminal record (which is defined in regulation 1.20KD).

Key Requirements

Regulation 1.20J

Regulation 1.20J applies to applications for[2]:

- Spouse (Provisional) (Class UF) visas;
- Partner (Provisional) (Class UF) visas;
- Prospective Marriage (Temporary) (Class TO) visas;

[1] In this commentary a reference to partner is taken to include spouse, de facto (including same-sex), fiancé (prospective marriage). A reference to a sponsor is taken to include a nominator.
[2] It only applies to applications for these visas made on or after 1 November 1996. Migration Regulations (Amendment) 1996 (SR 1996 No.211): and Explanatory Statement to Statutory Rules 1996 No.211

- Extended Eligibility (Temporary) (Class TK) visas; and
- Partner (Temporary) (Class UK) visas.[3]

Under r.1.20J, sponsorship of an applicant for a partner visa listed above must not be approved unless the Minister, or the Tribunal on review, is satisfied that:

- the sponsor has not sponsored *more than one other person* who was granted a partner visa (or entry permit) as a result of sponsorship or nomination by the sponsor;[4] and
- at least five years have passed since the date of making an earlier successful visa application in which:
    - the sponsor previously sponsored another person[5] as their spouse, de facto partner[6] or prospective spouse; or
    - the sponsor was previously sponsored by another person[7] as their spouse, de facto partner[8] or prospective spouse.

This means that in general, a maximum of two different persons can be sponsored by the same sponsor, and 5 years must pass between any two sponsorships.

However, the Minister, or Tribunal on review, may approve the sponsorship if there are compelling circumstances affecting the sponsor. This applies irrespective of whether a person has already entered into two approved sponsorships, or has attempted to sponsor a person within the prescribed prohibited time period. [9]

A person who has previously been sponsored may themselves sponsor up to two other people, but they are still subject to the 5-year limitation.

The provision does not prevent sponsorship of the same spouse/de facto partner on more than one occasion or limit the number of times a person can be sponsored by different spouses/de facto partners.[10]

Which sponsorships are counted for the purpose of r.1.20J?

Only sponsorships that actually result in the grant of a visa or entry permit are relevant for the purposes of r.1.20J. If, for whatever reason, the visa or entry permit was not granted then this 'attempted' sponsorship is not counted.

Past visa grants on grounds of having ceased a partner relationship with the sponsor after suffering domestic / family violence **are** counted when determining whether the limitation on sponsorship under r.1.20J applies.[11]

[3] r.1.20J(1AA), inserted by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144) on 1 July 2009. This sub regulation replaced r.1.20J(1), which although expressed in slightly different terms, essentially applied to the same visa classes.
[4] r.1.20J(1)(a) for applications lodged on or after 1 July 2009; r.1.20J(1)(c) for applications lodged before 1 July 2009.
[5] r.1.20J(1)(b) for applications lodged on or after 1 July 2009; r.1.20J(1)(d) for applications lodged before 1 July 2009.
[6] As defined in s.5CB(1).
[7] r.1.20J(1)(c) for applications lodged on or after 1 July 2009; r.1.20J(1)(e) for applications lodged before 1 July 2009.
[8] As defined in s.5CB(1).
[9] r.1.20J(2).
[10] Regulation 1.20J(1)(a), or in the case of applications lodged before 1 July 2009, r.1.20J(1)(c) states that 'not more than one *other* person' (emphasis added) has been sponsored by the same sponsor and granted a Partner visa. This regulation is read in conjunction with r.1.20(1)(b), or in the case of applications lodged before 1 July 2009, r.1.20J(1)(d), which provides that 'if *another* person' (emphasis added) has been granted such a visa then 'not less than 5 years has passed since the date of making the application' for that visa.

Although the limitations in r.1.20J only apply where the current visa application was lodged on or after 1 November 1996, any previous sponsorships leading to the grant of a visa, entry permit or permission (even if they occurred before that time) may count towards the limit, depending on the date of the current visa application.[12] The following table shows which previous sponsorships are counted:[13]

Date of current visa application	Sponsorships counted
1 November 1996 – 30 June 1997	Only sponsorships that led to the grant of a visa (entry permits are not counted)
1 July 1997 – 31 December 1997	Only sponsorships that led to the grant of a visa, entry permit or other permission granted under the Act to remain indefinitely in Australia (temporary visas or entry permits are not counted)[14]
1 January 1998 – present	All sponsorships that led to the grant of a visa, entry permit (whether permanent or temporary) or a permission (other than a visa or entry permit) granted under the Act to remain indefinitely in Australia.[15]

A sponsorship for one of the two-stage Partner visa subclasses (309/100, 820/801 and formerly 310/110 and 826/814[16]) is counted once, not twice, even though the process results in the consecutive grant of two visas. This is because there is no separate sponsorship approval process for the permanent Subclass 100 and 801 (and previously 110 and 814) visas. The provisions in the time of decision criteria for these visas refer back to the sponsor who was approved as part of the process that resulted in the grant of the temporary visa.[17]

[11] r.1.20J(1)(a)(ii), or in the case of applications lodged prior to 1 July 2009, r.1.20J(1)(c)(ii). Regulation 1.20J(1)(c)(ii) was inserted with effect from 1 July 2005, including in relation to an application for a visa made, but not finally determined , before 1 July 2005: Migration Amendment Regulations 2005 (No.4) (SLI 2005, No.134). This amendment corrected an unintended outcome under the previous version of the regulation in that while limits were previously imposed on the number and frequency of Partner migration sponsorships, visas granted following cessation of the relationship as a result of domestic / family violence committed by the sponsor were not counted against the sponsor. As a result, perceived 'serial abusers' previously encountered no obstacle to continued sponsorships in multiple applications: Explanatory Statement to SLI 2005, No.134.

[12] *Wu v MIBP* [2016] FCCA 290 (Judge Smith, 15 February 2016) at [9] – [11]; followed in *Jiang v MIBP* [2016] FCCA 360 (Judge Lucev, 25 February 2016) at [17] - [24].

[13] This is due to amendments to this provision over time and the definition of 'relevant permission' in r.1.20J(1A). Prior to 1 September 1994, spouse and interdependency applicants in Australia were granted entry permits rather than visas. Sponsorships for entry permits do not count under r.1.20J as in force from 1 November 1996 to 30 June 1997. Under r.1.20J as in force from 1 July 1997 to 31 December 1997, sponsorships and nominations leading to the grant of *temporary* visas and entry permits or other temporary permissions only were not counted, in deciding visa applications made on or after 1 July 1997. However, if the grant of that temporary visa, entry permit or permission *also* led to permission to remain indefinitely in Australia, then the sponsorship on the *permanent* visa or entry permit would be counted. See: PAM3: Div 1.4B – Limitation on certain sponsorships under Division 1.4 - Sponsorship limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas (reissued 18/11/16) at [2.2] to [2.4].

[14] r.1.20J(1A)(b) as it applied immediately before 1 January 1998. Regulation 1.20J(1A)(b) was inserted by Migration Regulations (Amendment) (SR 1997, No.109) (F1997B02626).

[15] Regulation 1.20J(1A)(b) as amended by Migration Regulations (Amendment) (SR 1997, No.354) (F1997B02843) from 1 January 1998.

[16] Note that the Interdependent visa Subclasses 310, 110, 814 and 826 were removed from 1 July 2009 by SLI 2009 No.144.

[17] Clauses 100.221, 100.226 and 801.221 refer to the '*sponsoring spouse'* [pre 1 July 2009 applications] or the '*sponsoring partner*, [post 1 July 2009 applications]. 'Sponsoring partner' is currently defined in cl 100.111 and cl.801.111 as an Australian citizen, Australian permanent resident or eligible New Zealand citizen specified as the visa applicant's spouse, intended spouse or de facto partner in the grant of the provisional visa or who was the spouse or de facto partner of a person to whom the Minister has decided under ss.345, 351, 391, 417 or 501J of the *Migration Act 1958* to grant a provisional visa. Note that cl.100.111 was amended, for visa applications made on or after 9 November 2009, to make clear that the sponsoring partner must be a current Australian citizen, Australian permanent resident or eligible New Zealand citizen, bringing this definition into line with the other definitions of sponsoring partner: Migration Amendment Regulations 2009 (No.13) SLI2009, No.289. Clauses 110.221, 110.226 and 814.221 refer to the '*sponsor*', which is defined in cl.110.111 and cl.814.111 as the person who sponsored the visa applicant for the grant of the provisional visa or the person who was in an interdependent relationship with a person to whom the Minister has decided under s.345, 351, 391, 417 or 501J of the Act to grant a provisional visa.

Departmental examples (PAM3) of application of the sponsorship limitation in r.1.20J

The below extract from the current policy instruction[18] illustrates relevant examples of circumstances in which a sponsorship will 'count' for the purposes of r.1.20J. As with other references to policy instructions or PAM3, the Tribunal should not rely on any policy interpretation or instruction that would unduly fetter, be inconsistent with or go beyond the scope of the wording of r.1.20J itself.[19]

The relevant policy examples are:

- a sponsorship where the visa was granted but the applicant did not travel to Australia *counts*. The critical factor is visa grant. It does not matter what happens after this.
- a sponsorship where the visa application to which it was connected was refused does *not* count. The sponsorship must have resulted in the grant of a visa.
- a fiancé sponsorship where the visa was granted, the applicant travelled to Australia, but the marriage did not take place *counts*, unless the application currently being considered was lodged between 1 July 1997 and 31 December 1997 (in which case, the fiancé would have had to have married and been granted a permanent visa in order for the sponsorship to count).
- a spouse sponsorship where the visa was cancelled prior to the entry of the spouse in Australia *counts*, unless the application currently being considered was lodged between 1 July 1997 and 31 December 1997 and the previous visa granted was a provisional visa (in which case, the grant did not lead to the grant of a permanent visa).
- a person who was themselves sponsored as a spouse and later sponsored a fiancé has *not* used up their two sponsorships. The fact that the person was sponsored as a spouse is a separate consideration to the number of sponsorships they can enter into.
- the applicant:
    - was previously granted a Subclass 300 visa
    - after travelling to Australia, did not marry her sponsor
    - returned home and subsequently married another person

  and then applies for a Subclass 309/100 visa. This previous sponsorship does *not* count. The fact that the applicant has been sponsored before has no relevance to the current sponsor's ability to meet the r.1.20J criteria. It is only if the *current* sponsor has previously sponsored a person or was themself sponsored that r.1.20J would apply.
- a sponsorship where the applicant was granted a permanent spouse or interdependency visa on family violence grounds *counts*. Although the permanent visa was granted on family violence grounds and the relationship between the applicant and sponsoring spouse has ceased, it was granted as a result of the original sponsorship for the temporary visa.
- a sponsorship where the applicant was granted a Partner visa as a result of the sponsor having died *counts*. The sponsorship limitation would prevent the applicant from sponsoring another person within the 5 year period. However, this may be a situation where the decision maker would consider that compelling circumstances exist.

Regulation 1.20KA

Regulation 1.20KA applies to applications for the following temporary and provisional Partner visas:

[18] PAM3: Div 1.4B – Limitation on certain sponsorships under Division 1.4 – Sponsorship limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas (reissued 18/11/16) at [5].
[19] Further guidance can be found in the MRD Legal Services Commentary: Application of Policy.

- Partner (Provisional) (Class UF) visas;
- Partner (Temporary) (Class UK) visas; and
- Prospective Marriage (Temporary) (Class TO) visas.[20]

It only applies to applications for these visas made on or after 1 July 2009.[21]

Regulation 1.20KA restricts approval of sponsors where:

- the sponsor was granted a Contributory Parent (Subclass 143) or Contributory Aged Parent (Subclass 864) visa on or after 1 July 2009; and
- the sponsor seeks approval to sponsor their partner for a Partner (Provisional or Temporary) or Prospective Marriage (Temporary) visa on or after 1 July 2009; and
- the sponsor was the partner of the applicant on or before the granting of the Contributory Parent or Contributory Aged Parent visa.

In such cases, the sponsorship must not be approved unless at least five years has passed since the sponsor was granted her or his Contributory Parent or Contributory Aged Parent visa.[22]

However, the decision-maker may approve the sponsorship if:

- there are compelling reasons, other than reasons related to the visa applicant's financial circumstances, for the visa applicant not applying for the Contributory Parent or Contributory Aged Parent visa at the same time as their sponsor;[23] or
- the Partner visa applicant originally applied with their sponsor for a Contributory Parent or Contributory Aged Parent visa but subsequently withdrew the application for compelling reasons, other than reasons related to the visa applicant's financial circumstances.[24]

Regulation 1.20KA applies in relation to applications for Partner visas made on or after 1 July 2009 and only affects sponsors who were granted a Subclass 143 or 864 visa on or after 1 July 2009.[25]

Regulation 1.20KB

Regulation 1.20KB applies to applications for:

- Child (Migrant) (Class AH) visas;
- Child (Residence) (Class BT) visas;
- Extended Eligibility (Temporary) (Class TK) visas;
- Partner (Temporary) (Class UK) visas;
- Prospective Marriage (Temporary) (Class TO) visas; and
- Partner (Provisional) (Class UF) visas.[26]

[20] r.1.20KA(4).
[21] SLI 2009, No.116.
[22] r.1.20KA(1), (2),(4).
[23] r.1.20KA(3)(a).
[24] r.1.20KA(3)(b).
[25] r.1.20KA was introduced by the Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009 No.11).
[26] r.1.20KB(1).

It only applies to applications for these visas made on or after 27 March 2010.[27]

Regulation 1.20KB restricts the capacity of the Minister, or the Tribunal, to approve a sponsorship for the purposes of Child (Migrant) (Class AH), Child (Residence) (Class BT), Extended Eligibility (Temporary) (Class TK), Partner (Temporary) (Class UK), Prospective Marriage (Temporary) (Class TO) and Partner (Provisional) (Class UF) visas, where the sponsor or, in the case of a Child visa, the sponsor or their spouse or de facto partner, has been charged or convicted of child sex offences or related serious offences.

Regulation 1.20KB applies only in relation to applications for Child and Partner visas made on or after 27 March 2010.[28]

The sponsorship limitation in r.1.20KB applies if:

- the sponsor or the sponsor's spouse or de facto partner has been charged with or convicted of a registrable offence (a child sex offence or related serious offence); and[29]
- any of the primary or secondary applicants are under 18 at the time of application.[30]

The sponsorship limitation does not apply if:

- none of the applicants is under 18 at *the time of the decision* for approval of the sponsorship,[31] or
- the relevant charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction;[32] or the relevant conviction has been set aside.[33]

If the limitation applies, the Minister, or the Tribunal on review, nevertheless retains a discretion to approve the sponsorship if there are compelling circumstances affecting the sponsor or the applicant and:

- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the sponsorship, and they have not been subsequently charged with a registrable offence;[34] or
- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the sponsorship, has subsequently been charged with a registrable offence but such charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction. [35]

[27] SLI 2010 No.50.
[28] r.1.20KB was introduced by SLI 2010 No. 50.
[29] r.1.20KB(2), (3), (7), (8) and (13). The limitation may also apply where the Minster has requested a sponsor or a sponsor's spouse of de facto partner to provide a police check and he or she has not provided the police check within a reasonable time: r.1.20KB(12).
[30] r.1.20KB(1)(a).
[31] r.1.20KB(2)(a); r.1.20KB(3)(a); r.1.20KB(7)(a); r.1.20KB(8)(a).
[32] r.1.20KB(2)(b); r.1.20KB(7)(b).
[33] r.1.20KB(3)(b); r.1.20KB(8)(b).
[34] r.1.20KB(4) and (9).
[35] r.1.20KB(5) and (10).

Calculating the five year limitation period - r.1.20J, 1.20KA, 1.20KB

In the case of limitations under r.1.20J, the five year period is calculated from the date the earlier visa application or entry permit was made until the time of decision.[36] This includes situations where the sponsor was previously sponsored, in which case the five year period is calculated from the date the sponsor's own visa application was made to the time of decision on the current sponsorship.[37] The five year period may cease whilst a matter is before the Tribunal as the time of decision in these circumstances is when the Tribunal makes its decision.

In the case of the limitation under r.1.20KA (sponsors who are Subclass 143 or 864 visa holders), the period is calculated from the date the Contributory Parent visa was granted.[38]

In the case of the limitation under r.1.20KB, where the sponsor or, in the case of a Child visa, the sponsor or their spouse or de facto partner, has been convicted of child sex offences, but has completed the sentence more than 5 years before the date of the application for approval of the sponsorship, the Minister, or Tribunal on review, may approve the sponsorship. This is provided that in the time since the sentence was completed, the sponsor has not been charged with another registrable offence, or if charged with such an offence, the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction. In addition, there must be compelling circumstances affecting the sponsor or the applicant. If these conditions are satisfied, the Minister, or Tribunal, may consider whether to exercise the discretion. Determining whether five years have passed since the completion of the sentence may sometimes be problematic – for example taking into account periods of parole. If you are unsure whether the five year period has been met, please see MRD Legal Services.

Irrespective of whether a person has already entered into two approved sponsorships, or has attempted to sponsor a person within the prescribed prohibited time period, the sponsorship may still be approved where there are compelling circumstances affecting the sponsor (r.1.20J only), or in the case of r.1.20KA, where there are compelling circumstances affecting the applicant.[39] In the case of r.1.20KB, the five year period is a precondition for the decision maker to exercise the discretion. These issues are discussed further under 'Legal Issues' below.

Regulations 1.20KC and 1.20KD

Regulation 1.20KC applies to applications for:

- Prospective Marriage (Temporary) (Class TO) visas;
- Partner (Provisional) (Class UF) visas;
- Partner (Temporary) (Class UK) visas.[40]

It applies to applications for these visas made on or after 18 November 2016.[41]

[36] This is because r.1.20J applies in the context of the time of decision criteria relating to the approval of the sponsorship (eg. cl.309.222, cl.820.221A).
[37] r.1.20J(1)(c), or in the case of applications lodged prior to 1 July 2009, r.1.20J(1)(e).
[38] r.1.20KA(2).
[39] r.1.20KA(3).
[40] r.1.20KC(1).
[41] Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016, Schedule 7, Part 55, Item 5504.

As part of the amendments which introduced rr.1.20KC and 1.20KD, new time of decision criteria for grant of the visa were also introduced for the above listed visa classes which require that the sponsor has consented to the Department disclosing to each visa applicant included in the sponsorship any conviction of the sponsor for a relevant offence.[42] However, relevant offences are to be disregarded for the purposes of disclosure to a visa applicant where the conviction has been quashed or otherwise nullified; or the sponsor has been pardoned in relation to the offence and the effect of that pardon is that the sponsor is taken to have never been convicted of the offence.[43] For discussion of these time of decision criteria see the MRD Legal Services Commentaries: Prospective Marriage (Subclass 300) – Prospective marriage visas and Partner visas: Subclasses 309/100 and 820/801.

Regulation 1.20KC provides that the Minister (or Tribunal on review) must refuse to approve the sponsorship of each applicant for the visa if the sponsor has been convicted of a 'relevant offence' (or offences) and the sponsor has a 'significant criminal record' (defined in r.1.20KD) in relation to the 'relevant offence' (or offences).[44]

However, even if the applicant has been convicted of a 'relevant offence' and has a 'significant criminal record' in relation to that offence, discretion still remains to approve the sponsorship in certain circumstances. See 'Approving sponsorship where reasonable to do so' below for further discussion.

To help facilitate the checking of convictions and criminal records, r.1.20KC also permits the Minister to request, on one or more occasions, that the sponsor provide a police check relating to the sponsor from any or all of the following:

- a jurisdiction in Australia specified in the request;
- a foreign country specified in the request in which the sponsor has lived for a period, or a total period, of at least 12 months since the latest of either 10 years before the date of the request; or the date the sponsor turned 16.[45]

However, while a police check may ordinarily inform whether the sponsor satisfies the provision, it is not the only method by which a sponsor's criminal history may be revealed. For example, if the Tribunal becomes aware of a sponsor's criminal history through dob-ins or other material, it should consider whether it is satisfied on the available evidence that the offence(s) have taken place or whether any further enquiries are necessary.

If the sponsor has been requested to provide a police check(s) but fails to do so within a reasonable time, a decision may be made to refuse to approve the sponsorship for each applicant for the visa.[46]

Relevant offence

A 'relevant offence' is defined as an offence against a law of the Commonwealth, a State or a Territory of Australia, or a foreign country, involving any of the following matters:

- violence against a person, including (without limitation) murder, assault, sexual assault and the threat of violence;
- the harassment, molestation, intimidation or stalking of a person;

[42] cl.300.222(2), cl.309.222(2) and cl.820.221(4)(b) of Schedule 2 to the Migration Regulations.
[43] cl.300.222(3), cl.309.222(3) and cl.820.221(5) of Schedule 2 to the Migration Regulations.
[44] r.1.20KC(3).
[45] r.1.20KC(5).
[46] r.1.20KC(6).

- the breach of an apprehended violence order, or a similar order, issued under a law of a State, Territory or a foreign country;
- firearms or other dangerous weapons;
- people smuggling;
- human trafficking, slavery or slavery-like practices (including forced marriage), kidnapping or unlawful confinement;
- aiding, abetting, counselling or procuring the commission of an offence involving any of the matters listed above;
- attempting to commit an offence involving any of the matters listed above.[47]

Significant criminal record

A sponsor has a 'significant criminal record' in relation to a 'relevant offence' or offences if, in relation to that offence or offences, the sponsor has been sentenced to:

- death;
- imprisonment for life;
- a term of imprisonment of 12 months or more; or
- two or more terms of imprisonment, where the total of those terms is 12 months or more.[48]

Where a sponsor has been sentenced to two or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.[49] For instance, if a sponsor has been sentenced to two terms of nine months for two offences to be served concurrently, the total of the terms is 18 months. This would be a 'significant criminal record' if those sentences were in relation to relevant offences notwithstanding the person may only have spent nine months actually in prison.

Additionally, if a sponsor has been sentenced to periodic detention, the sponsor is taken to have been sentenced to a term of imprisonment equal to the number of days the sponsor is required under the sentence to spend in detention.[50] Similarly, if a sponsor has been convicted of a 'relevant offence' and the court orders that the sponsor participate in a residential drug rehabilitation scheme or a residential program for the mentally ill, the sponsor is taken to have been sentenced to a term of imprisonment equal to the number of days the sponsor is required to participate in the scheme or program.[51] By way of example, if a sponsor has been sentenced to periodic detention of 200 days and also ordered by a court to 200 days participation in a residential drug rehabilitation scheme and/or residential program for the mentally ill, they will be taken to have been sentenced to a total of 400 days, and therefore a term of imprisonment of 12 months or more. Where that sentence for periodic detention and/or court ordered participation in residential schemes or program was in relation to a conviction for a 'relevant offence' listed in r.1.20KC(2), they will have a 'significant criminal record'.

A sentence imposed on a sponsor for a 'relevant offence', or the conviction of a sponsor for a 'relevant offence' is to be disregarded for the purpose of determining whether they have a 'significant criminal record' if:

[47] r.1.20KC(2).
[48] r.1.20KD(1).
[49] r.1.20KD(2).
[50] r.1.20KD(3).
[51] r.1.20KD(4).

- the conviction has been quashed or otherwise nullified; or
- the sponsor has been pardoned in relation to the conviction concerned and the effect of that pardon is that the sponsor is taken never to have been convicted of the offence.[52]

Legal Issues

Compelling circumstances

Compelling circumstances affecting the sponsor – r.1.20J

In most cases, the main legal issue that arises in regard to r.1.20J relates to the waiver of the sponsorship limitations and the meaning of 'compelling circumstances' under r.1.20J(2).

- Regulation 1.20J(2) provides that the decision-maker may approve the sponsorship, despite the limitation, if satisfied that there are 'compelling circumstances *affecting the sponsor'*. The legislative intention of this provision can be found in the Explanatory Statement which accompanied the introduction of r.1.20J. It indicates that 'compelling circumstances' affecting the sponsor includes: [53] the previous spouse or de facto partner has died;
- the previous spouse or de facto partner has abandoned the sponsor and there are children requiring care and support;
- the new relationship is long-standing;[54] or
- there are dependent children of the new relationship.

Departmental guidelines substantially reflect the policy intent contained in the Explanatory Statement.[55]

The above examples are not intended to be exhaustive. The Explanatory Statement emphasises that the purpose of the sponsorship limitation is to curtail abuse of the partner migration programs. Decision makers should be mindful of this when assessing whether to approve a sponsorship despite the limitation.

Departmental guidelines also emphasise that every aspect of the sponsor's circumstances could be relevant to the existence of compelling circumstances. While there is no definitive list, some general aspects that may be particularly important are:

- the nature of the hardship and/or detriment that would be suffered (by the sponsor) if the sponsorship were not approved; and

[52] r.1.20KD(5)
[53] Explanatory Statement to SR 1996 No. 211 (see [Regulation 67 - New Division 1.4B].
[54] What is a 'long-standing' relationship will depend on the evidence, the circumstances of each case and the nature of the hardship/detriment that would occur if the sponsorship/nomination were not approved. Guidance may also be drawn from the definition of 'long-term partner relationship' (previously 'long term spouse relationship') in r.1.03, which is included in cl.100.221(5) and cl.801.221(6A). Relevant departmental guidelines are PAM3: Div1.2/r.1.03 - Long-term partner relationship (reissued 14/2/14).
[55] PAM3: Div 1.4B – Limitation on certain sponsorships under Division 1.4 – Sponsorship limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas (reissued 18/11/16) at [7.1 – 7.2] and Explanatory Statement to SR 1996 No. 211 - New Division 1.4B].

- the extent and importance of the ties the sponsor has to Australia, and the consequent hardship/detriment that would be suffered if the sponsorship were not approved and the sponsor were compelled to leave Australia to maintain their relationship with the applicant.

The appropriate approach to the exercise of the discretion has been found to be that '*the material reveal circumstances such that the Tribunal would be overwhelmingly inclined to exercise the discretion in favour of the applicant and would approve the sponsorship*'.[56] ,

'Compelling circumstances' is construed to mean circumstances which force or drive the decision-maker to decide whether or not the jurisdictional fact arises for the exercise of the discretion. The circumstances must be so powerful that they lead the decision-maker to make a positive finding that the prohibition should be waived.[57]

Further discussion of the case law which may be applicable can be found in the MRD Legal Services Commentary: Compelling and/or Compassionate Circumstances/Reasons.

Compelling reasons affecting the applicant – r.1.20KA

The limitation on sponsorship contained in r.1.20KA does not apply where the visa applicant had compelling reasons, other than reasons related to his or her financial circumstances, for:

- not applying for a Contributory Parent / Aged Parent visa at the same time as the proposed sponsor;[58] or
- withdrawing his or her application for a Contributory Parent / Aged Parent visa made at the same time as the proposed sponsor.[59]

There are three important differences in the consideration of compelling reasons in the r.1.20KA context compared to that in r.1.20J, namely:

- the compelling reasons must be the visa applicant's reasons (rather than affecting the sponsor);
- the reasons must be for not applying for a Subclass 143 or 864 visa at the same time as the proposed sponsor or for withdrawing an application for such a visa; and
- while the compelling reasons may include where the visa applicant was unable to migrate with the proposed sponsor due to family illness or other obligations, they may not include reasons related to her or his financial circumstances.

The term 'compelling' is not defined in the legislation, although Departmental guidelines state that it may include where the visa applicant was unable to migrate with the proposed sponsor due to a major family illness or other significant obligations.[60] The judgment in *Zhang v MIBP* provides an example of a judgment involving waiver of r.1.20KA, with the Court finding no error in the Tribunal's finding that there were no compelling reasons, other than reasons relating to financial circumstances, for the

[56] *Babicci v MIMIA* [2004] FCA 1645 (Moore J, 16 December 2004) at [17] where Moore J preceded the above with: '.... the Tribunal must consider whether the circumstances are (to use the defined meaning in the New Oxford Dictionary referred to above) such that they evoke interest or attention in a powerfully irresistible way. It is a way that must be irresistible to the Tribunal…'.
[57] *Babicci v MIMIA* (2005) 141 FCR 285 at [24] upholding *Babicci v MIMIA* [2004] FCA 1645.
[58] r.1.20KA(3)(a).
[59] r.1.20KA(3)(b).
[60] PAM3: Div 1.4B – Limitation on certain sponsorships under Division 1.4 – Sponsorship limitations – Partner (Provisional/Temporary) and Prospective Marriage visas at [12.2] (reissued 18/11/16).

applicant not applying for the visa at the same time as his wife. [61] For a full discussion of the issue see the MRD Legal Services Commentary: Compelling and/or Compassionate Circumstances/Reasons.

Compelling circumstances affecting the sponsor or the applicant – r.1.20KB

The limitation on sponsorship contained in r.1.20KB may be waived where the sponsor or, in the case of a Child visa, the sponsor or his or her spouse or de facto partner:

- completed the sentence more than 5 years before the date of the application for approval of the sponsorship; and
- in the time since the sentence was completed, the sponsor has not been charged with another registrable offence, or if charged with such an offence, the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction; and
- there are 'compelling circumstances affecting the sponsor or the applicant'.

The term 'compelling circumstances' is not defined in the legislation. Departmental guidelines provide that 'compelling' is to be given its ordinary dictionary meaning in this context.[62] For a full discussion of the issue see the MRD Legal Services Commentary: Compelling and/or Compassionate Circumstances/Reasons.

Approving sponsorship where reasonable to do so

Discretion to approve sponsorship where sponsor has a 'significant criminal record' - r.1.20KC(4)

If the Minister (or Tribunal on review) is satisfied that the sponsor has a 'significant criminal record', it must still consider whether it is reasonable to approve the sponsorship despite the 'significant criminal record' being present. The range of factors that must be considered when assessing whether it is reasonable include, but are not limited to:

- the length of time since the sponsor completed the sentence (or sentences) for the relevant offence (or offences);
- the best interests of any children of the sponsor or any children of the applicant who is seeking to satisfy the primary criteria for the grant of the visa concerned;
- the length of the relationship between the sponsor and the applicant who is seeking to satisfy the primary criteria for the grant of the visa concerned.[63]

The Tribunal must not restrict itself only to the factors listed above however, and must also have regard to all matters raised by the sponsor and applicant in support of approving the sponsorship as well as any other relevant considerations that arise on the available evidence.

Whether it is 'reasonable' to approve the sponsorship despite a 'significant criminal record' being present is a question of fact for the decision maker. However to avoid an inference being drawn about matters that were or were not considered in making that finding, decision makers should ensure that cogent reasons are recorded in their decisions that demonstrate a consideration of all relevant factors.

[61] *Zhang v MIBP* [2017] FCCA 2739. The applicant in *Zhang* claimed compelling reasons due to his mother having been diagnosed with cancer, but the Tribunal found his sister was able to care for his mother and it was his brother who was making the decisions in relation to her care.
[62] See PAM3 - Div 1.4 - Form 40 sponsorship - Protection of children - Sponsors of concern - Approving sponsorships under r.1.20KB waiver provisions at [29] (reissued 9/5/14).
[63] r.1.20KC(4).

Relevant Case Law

Babicci v MIMIA [2004] FCA 1645	Summary
Babicci v MIMIA (2005) 141 FCR 285	Summary
Wu v MIBP [2016] FCCA 290	Summary
Jiang v MIBP [2016] FCCA 360	
Zhang v MIBP [2017] FCCA 2739	

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Regulations (Amendment) 1996	SR 1996, No.211	
Migration Regulations (Amendment)	SR 1997, No.109	
Migration Regulation (Amendment)	SR 1997, No.354	
Migration Legislation Amendment Regulations 2009 (No. 2)	SLI 2005, No.116	
Migration Amendment Regulations 2005 (No.4)	SLI 2005, No.134	
Migration Amendment Regulations 2009 (No. 7)	SLI 2009, No.144	No.09/2009
Migration Amendment Regulations 2010 (No. 2)	SLI 2010, No. 50	No.2/2010
Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016	F2016L01390	No.03/2016

Last updated/reviewed: 23 July 2019

‘Spouse’ and ‘de facto partner’

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Overview

The terms 'spouse' and 'de facto partner' are used throughout the *Migration Act 1958* (the Act) and the Migration Regulations 1994 (the Regulations) in a variety of contexts. The terms are central concepts for the various Partner visas as these visas generally require that the visa applicant be the spouse or de facto partner of the sponsoring partner.[1] The terms 'spouse' or 'de facto partner' are also relevant when determining various familial relationships which may form part of a criterion for a visa.[2]

To meet the definition of 'spouse' the couple must be in a marriage that is recognised as valid for the purposes of the Act, have a mutual commitment to a shared life as a married couple to the exclusion of all others, be in a genuine and continuing relationship and live together or not separately and apart on a permanent basis.

The definition of 'de facto partner' is satisfied if a person is a partner of another person where the couple have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, they live together or do not live separately and apart on a permanent basis and they are not related by family. Although not part of the de facto partner definition, additional visa criteria relating to minimum age and minimum length of relationship also apply to persons applying for a visa on the basis of being in a de facto relationship.

For visa applications lodged before 1 July 2009, the requirements for a de facto relationship were defined within the pre 1 July 2009 definition of spouse contained in r.1.15A.[3]

Key Requirements

Definition of spouse (s.5F) and de facto partner (s.5CB) – post 1 July 2009

Subsection 5(1) of the Act provides that 'spouse' and 'de facto partner' have the meanings given by s.5F and s.5CB respectively.

Subsection 5F(1) provides that a person is the 'spouse' of another where those two people are in a 'married relationship'.[4] Subsection 5CB(1) defines a person as the 'de facto partner' of another person

[1] Visa Subclasses 100, 309, 801 and 820 each contain criteria to the effect that the visa applicant is the 'spouse' or 'de facto partner' of an Australian citizen/permanent resident/eligible New Zealand citizen. The Subclass 300 prospective spouse visa for fiancées of such persons also involves a less direct consideration of the definition of 'spouse' – for further information see the MRD Legal Services Commentary: Prospective Marriage (Subclass 300) – Fiancé(e) visas.

[2] For example: the definition of 'member of the family unit' in r.1.12 includes the term 'spouse' and 'de facto partner'; the definition of 'member of the immediate family' in r.1.12AA includes reference to a 'spouse' and 'de facto partner'; the definition of orphan relative in r.1.14 includes a requirement that the visa applicant 'does not have a spouse or de facto partner''; and the definition of remaining relative in r.1.15 includes a requirement that 'the applicant, and the applicant's spouse or de facto partner (if any), have no near relatives…'.

[3] The definitions for partner relationships (including spouse, de facto and other interdependent relationships) were changed with effect from 1 July 2009 as part of a number of amendments to the Act made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*. The Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144) amended the Regulations to accompany the changes to the Act. For more information about pre-1 July 2009 definitions, see below under Definition of spouse pre 1 July 2009 or contact MRD Legal Services.

[4] This excludes de facto partners, though for visa applications before 1 July 2009 the term 'spouse' included certain de facto relationships. See Definition of spouse pre 1 July 2009 below.

if the person is in a 'de facto relationship' with the other person. Both definitions provide that the couple may be of the same sex or a different sex.[5]

Subsections 5F(2) and 5CB(2) define 'married relationship' and 'de facto relationship' for the purposes of the Act. The definitions of spouse and de facto partner are supplemented by r.1.15A and r.1.09A which outline factors to consider when determining if these definitions are met. The key requirements of a de facto relationship are broadly similar to those relevant to the determination of the existence of a spouse relationship. The requirements for spouse relationships contained in s.5F and de facto partner relationships in s.5CB are as follows:

Spouse – s.5F *r.1.15A considerations*	**De facto – s.5CB** *r.1.09A considerations*
Married to each other in a marriage that is recognised as valid under the Migration Act[6]	Not in a married relationship with each other[7] and not related by family[8]
Mutual commitment to a shared life as a married couple to the exclusion of all others[9]	Mutual commitment to a shared life to the exclusion of all others[10]
Relationship is genuine and continuing[11]	
Live together or do not live separately and apart on a permanent basis[12]	

Considerations for determining whether the spousal relationship or de facto relationship exists – r.1.15A(3) and r.1.09A(3)

For Partner visa applications only, when considering whether the above requirements in s.5F or s.5CB for a 'spouse' or 'de facto' relationship are satisfied, r.1.15A and r.1.09A require that the Minister (or the Tribunal on review) **must** consider all of the circumstances of the relationship, including the following matters:

(a) **the financial aspects of the relationship**, including:
- any joint ownership of real estate or other major assets
- any joint liabilities
- the extent of any pooling of financial resources, especially in relation to major financial commitments
- whether one person in the relationship owes any legal obligation in respect of the other
- the basis of any sharing of day-to-day household expenses;

(b) **the nature of the household**, including:
- any joint responsibility for care and support of children
- the living arrangements of the persons

[5] The definition of 'spouse' in s.5F was amended with effect from 9 December 2017 (applicable to all live applications) by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (No. 129, 2017) to include same-sex marriages. Before this change, same-sex married couples could only be granted a Partner Visa on the basis of satisfying the definition of 'de facto partner' in s.5CB.
[6] s.5F(2)(a). See the MRD Legal Services Commentary: Valid marriage
[7] s.5CB(2).
[8] s.5CB(2)(d). 'Related by family' is defined in s.5CB(4)
[9] s.5F(2)(b).
[10] s.5CB(2)(a).
[11] s.5F(2)(c) and s.5CB(2)(b).
[12] s.5F(2)(d) and s.5CB(2)(d).

- any sharing of the responsibility for housework;

(c) **the social aspects of the relationship**, including:
- whether the persons represent themselves to other people as being in the relevant kind of relationship (i.e. married to each other or in a de facto relationship)
- the opinion of the persons' friends and acquaintances about the nature of the relationship
- any basis on which the persons plan and undertake joint social activities

(d) **the nature of the persons' commitment to each other**, including:
- the duration of the relationship
- the length of time during which the persons have lived together
- the degree of companionship and emotional support that the persons draw from each other
- whether the persons see the relationship as a long-term one.

For visa applications other than Partner visas the decision-maker **may** consider any of the above circumstances when determining whether a person is the 'spouse' of another, but is not required to do so.[13]

For further information about what the consideration of the prescribed matters entails and how it relates to determining whether a relationship meets the s.5F or s.5CB definitions, see the discussion below under Key Issues.

Additional criteria for de facto partners – r.2.03A

Regulation 2.03A provides for additional visa criteria that are not part of the s.5CB(2) definition, that apply where a person claims to be in a de facto relationship for the purposes of a visa application. The additional criteria are:

- the parties are both at least 18 years old;[14] and
- for certain applications,[15] the applicant must have been in the de facto relationship for at least the 12 months immediately before making the visa application, unless compelling and compassionate circumstances for the grant of the visa exist.[16]

The 12 month relationship requirement in r.2.03A(2) does not apply in various circumstances, including where the de facto relationship has been registered under a relevant State or Territory law,[17] and in certain circumstances involving a permanent humanitarian visa or visa application relating to the applicant's de facto partner.[18] The requirements of r.2.03A are discussed in more detail below.

[13] r.1.15A(4) and r.1.09A(4). In *Nguyen v MIAC* [2010] FMCA 847 (Burchardt FM, 10 November 2010) the Court held, at [25]-[28], that the Tribunal erred by considering that r.1.15A(3) imposed a mandatory series of conditions as the class of visa in consideration was a remaining relative visa. In spite of this, the Court held that this error made no difference to the outcome as all the matters referred to by the Tribunal were plainly matters properly relevant to the consideration of whether the visa applicant was in a spousal relationship.
[14] r.2.03A(2).
[15] r.2.03A(3)(a). The 12 month requirement only applies in relation to applications for permanent, Business Skills (Provisional), Student (Temporary), Partner (Provisional), Partner (Temporary) or General Skilled Migration visas. Also see r.2.03A(4) and r.2.03A(5) for circumstances where r.2.03A(3) does not apply.
[16] r.2.03A(3).
[17] r.2.03(5) – applicable to visa applications made on or after 9 November 2009 only.
[18] r.2.03(4).

Definition of spouse pre 1 July 2009

For visa applications lodged before 1 July 2009, r.1.03 provided that 'spouse' had the meaning set out in r.1.15A, which included both married and de facto relationships, but not interdependent relationships which were separately provided for in r.1.09A of the Regulations.[19]

The key requirements under r.1.15A for both de jure marital relationships and de facto marital relationships are that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others;[20] the relationship is genuine and continuing;[21] the parties live together or, where they live separately and apart, this is not on a permanent basis.[22]

For de facto relationships there is the additional requirement that both parties are of full age; that is 18 where either of them is domiciled in Australia or, if neither of the parties is domiciled in Australia, both of the parties have turned 16;[23] and where either party is an applicant for a permanent visa, a Student (Temporary) (Class TU) visa, a Partner (Provisional) (Class UF) visa, a Business Skills (Provisional) (Class UR), a Partner (Temporary) (Class UK) visa or a General Skilled Migration visa, the parties' relationship existed for a 12 month period immediately before the application for the visa unless the applicant can establish compelling and compassionate circumstances for the grant of the visa. For further details see the MRD Legal Services Commentary: Compelling and/or Compassionate Circumstances/Reasons.

For Partner visa applications only, when considering whether the 'spouse' definition requirements for a married relationship in r.1.15A(1A) or for a de facto relationship in r.1.15A(2) are satisfied, r.1.15A(3) requires that the Minister (or the Tribunal on review) **must** have regard to all of the circumstances of the relationship. These matters are essentially the same as applications assessed under the post 1 July 2009 definition of 'spouse', although there are minor differences in the text. For further information about what the consideration of the prescribed circumstances entails and how it relates to determining whether a relationship meets the r.1.15A definition, see the discussion below under Key Issues.

For the purposes of determining whether a relationship is genuine and continuing under the pre 1 July 2009 definition, r.1.15A(5) provided that if 2 people have been living together at the same address for 6 months or longer, such cohabitation is to be taken as 'strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason'. This presumption does not apply to applications made on or after 1 July 2009.[24]

[19] Interdependent relationships, which required a 'mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships' encompassed same-sex relationships before 1 July 2009: r.1.09A(2)(c)(i) as in force before that time. For more information about interdependent relationships, contact MRD Legal Services.
[20] r.1.15A(1A)(b)(i) and r.1.15A(2)(c)(i)
[21] r.1.15A(1A)(b)(ii) and r.1.15A(2)(c)(ii). For the purposes of determining whether a relationship is genuine and continuing, (repealed) r.1.15A(5) provided that if 2 people have been living together at the same address for 6 months or longer, such cohabitation is to be taken as 'strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason'. See *MIMA v Asif* [2000] FCA 228 (Drummond, North and Madgwick JJ, 7 March 2000) at [23]; *Ho v MIMA* [2006] FMCA 1285 (Phipps FM, 1 September 2006) at [36] and *Nguyen v MIMA* [2010] FMCA 847 (Burchardt FM, 10 November 2010) at [38] & [40] and *Jayasinghe v MIMA* [2006] FCA 1700 (Middleton J, 12 December 2006) at [50].
[22] r.1.15A(1A)(b)(iii) and r.1.15A(2)(c)(iii)
[23] r.1.15A(2)(b). The term 'domicile' is not defined in the Regulations. For further information about the concept of domicile see the MRD Legal Services Commentary: Valid Marriage in relation to 'marriageable age',
[24] Following the amendments made by SLI 2009, No.144.

Key Issues

The issue of whether parties are in a spouse or de facto relationship within the meaning of the Act and Regulations involves a factual determination by the Tribunal. Specific issues relevant to determining whether a spouse or de facto relationship exists are considered below.

Mutual commitment to a shared life

The definition of 'spouse' and the definition of 'de facto partner' require that the parties 'have a mutual commitment to a shared life (as a married couple) to the exclusion of all others'.[25] An assessment of whether the claimed relationship involves a 'mutual commitment to a shared life' requires an assessment of the subjective intentions of the parties.[26]

In considering this requirement in the context of married relationships the Full Federal Court held that people enter into marriages with a variety of purposes and motives. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country.[27] Romantic involvement does not necessarily need to exist for a relationship to be genuine and for the parties to have the relevant commitment, nor is an absence of love and affection determinative.[28] The Tribunal should consider whether the parties' intentions or motives for entering into a relationship are consistent with having a mutual commitment to a shared life.[29] For this reason an arranged marriage, or a relationship entered into for the purposes of gaining entry into Australia or for some other purpose will not, of itself, fail to meet this requirement, provided both parties have a commitment to a shared life.

The level of commitment to the relationship does not need to be of equal strength or quality between the parties, although a reciprocal commitment, at some level, is required. A genuine relationship does not require parity of commitment between the parties, but rather a commitment by each to the other, to the exclusion of all others. There may be relationships where the parties have different levels or degrees of commitment to each other, or where the commitment of the parties to each other is of a different quality. Such differences do not matter in the application of this requirement as long as each party has a commitment of the kind described in the test.[30] The Tribunal will have asked the wrong

[25] See s.5F(2)(b) and s.5CB(2)(a). For applications assessed under the pre-1 July 2009 definition of spouse, see r.1.15A(1A)(b)(i) and (2)(c)(i) where the relationship must be in the nature of 'husband and wife' regardless of whether it is a married relationship or a de facto relationship.

[26] In *Singh v MIEA* [1996] FCA 1429 at [13] Branson J, found that 'consideration of the subjective intentions of the parties to the relationship' were relevant in considering r.44 of the Migration Regulations (1989) (requiring that the relationship is a genuine, continuing relationship between two spouses and the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others).

[27] *Re MILGEA and Dhillon* [1990] FCA 144 (Northrop, Wilcox and French JJ, 8 May 1990), citing with approval Street CJ in *R v Cahill* (1978) 2 NSWLR 453 at 458. *Dhillon* involved judicial review of a decision to refuse to grant a permanent entry permit and to deport a person who had entered Australia on a temporary permit granted on the basis of marriage to an Australian citizen. In *Garcevic v MIAC* [2012] FMCA 931 (Raphael FM, 11 October 2012) at [34], the Court accepted that *Dhillon* and a number of other cases considering repealed provisions requiring a 'mutual commitment to a shared life as husband and wife to the exclusion of others' still represents the law as to what might constitute a married relationship within the meaning of s.5F.

[28] *MIBP v Angkawijaya* [2016] FCAFC 5 (Allsop, Kenny and Griffiths JJ, 29 January 2016) at [3]; *Harchandai v MIBP* [2017] FCA 1395 (Perram J, 29 November 2017) at [29].

[29] In *Harchandani v MIBP* [2017] FCA 1395 (Perram J, 29 November 2017), the Court stated that while motives may be examined, they are not mandatory considerations and s.5F does not *require* the finding of relevant motives on the part of the parties when considering they are in a *spouse* relationship.

[30] *Sevim v MIMA* (2001) 114 FCR 126 at [71]. See also *You v MIAC* [2007] FMCA 1064 (Riethmuller FM, 6 July 2007) in which Riethmuller FM stated at [35] that spouses demonstrate different levels of mutual commitment 'ranging from barely sufficient to enable a marriage to subsist to levels of commitment akin to devotion'.

question if it focuses upon the degree of commitment of the parties, rather than the mutuality of the commitment.[31]

To the exclusion of all others

Both the definition of spouse and de facto partner require that the parties have a mutual commitment *to the exclusion of all others*. Polygamous marital relationships (i.e. concurrent, ongoing *de jure* marital relationships, or an ongoing *de jure* marital relationship concurrent with an ongoing *de facto* marital relationship) cannot meet this requirement.

In order for the spouse or de facto partner definition requirements to be met, there can be only one genuine partner relationship. If there have previously been concurrent relationships, it must be shown that the other concurrent relationships have ended, either by death or permanent separation.

Where the evidence indicates that an applicant may be in a polygamous or bigamous marriage, this may raise a question as to the validity of the second or later marriage. For further detail, refer to the MRD Legal Services Commentary: Valid Marriage. However, if the marriage is not valid, it will then be necessary to consider the application in relation to the de facto provisions of s.5CB and r.1.09A.[32] Both de facto and spouse relationships must be to the exclusion of all others,[33] which requires a factual assessment of whether any other spousal or de facto relationship is ongoing.

Sexual infidelity by one of the parties to the relationship does not necessarily take the relationship outside the definition of spouse or de facto. It will be a matter of fact and degree in the circumstances of the case, to be considered, along with all the other circumstances of the relationship, in determining whether the parties have or had the requisite commitment to a shared life to the exclusion of all others at the relevant time.[34]

Genuine and continuing relationship

Both the spouse and the de facto partner definitions require that the relationship is 'genuine and continuing'. Whether the relationship between the parties is a genuine and continuing relationship is a question of fact to be determined by the Tribunal as a matter of inference and conclusion to be derived from all relevant evidence.[35] The Federal Circuit Court has held that 'genuine' refers to a relationship which is, at the relevant time, neither a sham or a false relationship.[36] For a relationship to be 'continuing', parties need not show that their relationship will last into the long-term or endure for a period beyond that which is reasonably foreseeable.[37] In the same judgment, it also held that the focus of s.5F(2)(c) is on the relationship such as it is, and it is not to be qualified by whether the quality of the relationship otherwise answers the description of a married relationship of husband and wife.[38]

[31] *Ndegwa v MIMIA* [2005] FMCA 74 (O'Dwyer FM, 7 February 2005) at [7].
[32] or r.1.15A(2) and (3) for pre-1 July 2009 visa applications
[33] See s.5CB(2)(a) for de facto relationships and s.5F(2)(b) for married relationships in respect of applications assessed under the post 1 July 2009 definition and r.1.15A(1A)(b)(i) for spouse relationships and r.1.15A(2)(c)(i) for de facto relationships under the pre-1 July 2009 definition.
[34] *Cao v MIAC* [2007] FMCA 225 (Riley FM, 21 March 2007) at [36] and [42].
[35] *Chand v MIMA* [1997] FCA 530 (Beaumont, Lindgren and Lehane JJ, 27 May 1997).
[36] *Malhi v MIBP* [2017] FCCA 119 (Judge Jones, 2 February 2017) at [37]
[37] *Malhi v MIBP* [2017] FCCA 119 (Judge Jones, 2 February 2017) at [38]
[38] *Malhi v MIBP* [2017] FCCA 119 (Judge Jones, 2 February 2017) at [35]. However, it is unclear how the genuineness of a relationship is to be assessed without having regard to the quality of the claimed relationship as a spouse or de facto relationship, and it remains to be seen how (or whether) this reasoning might be applied in future cases.

Similar to assessing mutual commitment, it should be recognised that people enter into partner relationships for a variety of purposes.[39] Because the test involves consideration of the subjective intentions of the parties to the relationship, issues of credibility of the parties to the relationship may assume particular importance.[40] Whilst the credibility of an applicant in asserting the existence and nature of the relationship is of very considerable importance it is not necessarily decisive.[41] For Partner visa applications, assessment against the spouse and de facto partner definitions must be made in light of a consideration of all the circumstances of the relationship, including the matters prescribed in r.1.15A(3) and r.1.09A(3) respectively.[42] A variety of matters may be considered in relation to whether a relationship is genuine and continuing, but it is not necessarily appropriate to treat any single matter as determinative. For example, it would be wrong to presuppose some level of frequency of sexual activity within a relationship and impose that as a standard for determining whether the spousal relationship is genuine and continuing.[43]

Living together or not living separately and apart on a permanent basis

Both the definitions of 'spouse' and 'de facto partner' require that the parties 'live together or do not live separately and apart on a permanent basis'. There is no requirement that the parties have previously lived together to meet this requirement.[44] While cohabitation may satisfy the requirement that the parties live together, the fact the parties are not currently living together is not fatal because the alternative requirement is satisfied where the parties do not live separately and apart on a permanent basis. This is commonly the situation for offshore cases where an applicant is living overseas whilst the sponsor is living in Australia and the separation is seen as temporary.

The words 'separately' and 'apart' are distinct terms, with 'separately' being a term of art referring to the breakdown of the relationship and 'apart' referring to residing at different places; though there may be a degree of overlap between them, e.g. physical separation (living apart) is a constituent characteristic of living 'separately', but is not necessarily evidence of it in all instances.[45]

Appropriate consideration should also be given to the cultural and/or religious background of the applicant and sponsor and the evidentiary proof that could be expected to be available in light of such considerations and any other considerations put forward in relation to this issue if the parties are not living together. This may include, for example, any laws or cultural norms which prohibit or discourage unmarried and/or same sex couples from living together.

[39] See *Kumar v MIBP* [2015] FCCA 3161 (Judge Street, 26 November 2015), where the Court accepted that a finding that a relationship is not genuine and continuing, essentially because one party has the intention to obtain financial gain, could give rise to a jurisdictional error (at [13]).
[40] See *Singh v MIEA* [1996] FCA 1429 at [13] and [24] where Branson J considered r.44 of the Migration Regulations (1989) (requiring that the relationship is a genuine, continuing relationship between two spouses).
[41] *MIMA v Asif* [2000] FCA 228 at [20]. Depending on other relevant evidence, a claim may succeed although an applicant's evidence is rejected as lacking credibility. Objective evidence logically relevant to proving a party's state of mind on the issue is often available and relevant.
[42] These considerations are mandatory only in the assessment of a spouse or de facto relationship for a Partner visa application: r.1.15A(2) and r.1.09A(2). However, any evidence submitted going towards these considerations would likely be seen as relevant to any assessment of a spouse relationship under the Regulations.
[43] *Simpson v MIEA* (1994) 35 ALD 389 (Heerey J, 29 August 1994) at [17] in which the Court stated '[m]arriage relationships can be genuine and continuing whether the spouses have frequent sex, little sex, or no sex at all.'. This case pre-dates r.1.15A and considered r.44 of the Migration Regulations (1989) which required a 'genuine, continuing relationship between the two spouses'.
[44] *SZOXP v MIBP* [2015] FCAFC 69 (Kenny, McKerracher and Edelman JJ, 11 June 2015) at [65], overturning the decision at first instance in *MIBP v SZOXP* [2014] FCCA 565 (Judge Emmett, 26 March 2014). This case considered the definition of 'de-facto' in s.5CB, but the reasoning would be equally applicable to the definition of 'spouse'.
[45] *White v MIBP* [2014] FCCA 2486 (Judge Burnett, 29 October 2014) at [22], in which the court appeared to accept submissions about this interpretation of the terms based on the judgments of *Main v Main* (1949) 78 CLR 636 at 641-642 and *Tulk v Tulk* (1907) 13 ALR 45. Upheld on appeal in *White v MIBP* [2015] FCA 1376 (Collier J, 4 December 2015), although the court did not consider the interpretation of these terms.

While parties to a spousal or de facto relationship may be separated for periods of time due to any number of reasons, there is a need to assess the intentions of the parties throughout the separation. If one party to the relationship intends the separation be permanent, then the intentions or wishes of the other party are irrelevant (see also above, Mutual Commitment to a Shared Life).[46]

Considerations for determining whether a spouse or de facto relationship exists – r.1.15A and r.1.09A

For an application for a Partner visa, r.1.15A(2) (spouse) and r.1.09A(2) (de facto) requires that the decision-maker 'must consider' all of the circumstances of the relationship, including certain prescribed matters in r.1.15A(3) and r.1.09A(3). For other visa application types, where these considerations are not mandatory, r.1.15A(4) and r.1.09A(4) provides that the decision-maker 'may consider' any of the prescribed matters .

Failure to mention a relevant consideration in the reasons for decision can lead to an inference that it was not taken into account[47] and failure to consider the prescribed matters in Partner visa cases will generally give rise to jurisdictional error.[48] The Full Federal Court in *He v MIBP*[49] addressed what it means to consider all of the circumstances of a relationship, including the prescribed matters in r.1.15A(3) and r.1.09A(3), and held that:

- r.1.15A(2) and r.1.09A(2) require the Tribunal to identify the relevant circumstances of the relationship, including the prescribed matters and any other relevant circumstances revealed by the evidence and materials;[50]
- the Tribunal must consider these circumstances by applying an active intellectual process and giving proper, genuine and realistic consideration to them;[51]
- each prescribed matter poses a question for the Tribunal to answer, not merely think about, and the Tribunal is required to make findings upon each matter in the paragraphs ((a) to (d)) and subparagraphs (Roman numerals), even if the finding is that no conclusion can be reached upon it;[52] and
- if the Tribunal's written statement of reasons does not set out a finding concerning a prescribed matter, it may lead to an inference that the member made no such finding as part

[46] *Li v MILGEA* (1992) 33 FCR 568 at 576. Considering the then definition of 'spouse' in r.2(1) of the Migration Regulations which required in r.2(1)(a)(ii) that 'the parties are not living separately and apart on a permanent basis…' Hill J held that if the parties live separately, whether that separation is permanent depends on their mutual intention. 'It will not be to the point that the wife hopes or intends that the separation will be but temporary, if the husband has a different intention, the separation then will indeed be permanent.'
[47] *Li v MIAC* [2008] FCA 902 (Jessup J, 17 June 2008) at [24]-[28] where the court considered an earlier version of r.1.15A; and *Sun v MIBP* [2017] FCA 1270 (Reeves J, 27 October 2017) at [61] and [68].
[48] *Nassouh v MIMA* [2000] FCA 788 (Katz J, 14 June 2000) where the Court set aside a decision of the IRT for failure to consider the matters in r.1.15A(3) in determining whether the applicant for a Spouse (Provisional) (Class UF) visa and the sponsor were in a married relationship; and *Vu v MIBP* [2016] FCCA 2723 (Judge Cameron, 7 September 2016) where the court held that the Tribunal's jurisdiction to make a decision did not arise until the conditions precedent to its existence, which included consideration of the matters in r.1.15A(3) were satisfied and that 'where a question vital to the existence of the Tribunal's jurisdiction to decide an issue is not expressly addressed, one must suspect that it has been overlooked': at [29]-[33].
[49] *He v MIBP* [2017] FCAFC 206 (Siopis, Kerr and Rangiah JJ, 14 December 2017).
[50] *He v MIBP* [2017] FCAFC 206 (Siopis, Kerr and Rangiah JJ, 14 December 2017) at [58]-[59]. See also *Sun v MIBP* [2017] FCA 1270 (Reeves J, 27 October 2017) at [61] and *Li v MIAC* [2008] FCA 902 (Jessup J, 17 June 2008) at [24]-[27].
[51] *He v MIBP* [2017] FCAFC 206 (Siopis, Kerr and Rangiah JJ, 14 December 2017) at [58] and [73]. See also *Sun v MIBP* [2017] FCA 1270 (Reeves J, 27 October 2017) at [41] and [47].
[52] *He v MIBP* [2017] FCAFC 206 (Siopis, Kerr and Rangiah JJ, 14 December 2017) at [76] and [77].

of his or her mental process when making the decision and so failed to comply with the obligation to 'consider' the circumstances.[53]

While the prescribed matters must be considered in Partner visa cases, they are not criteria that must each be satisfied.[54] Rather, all relevant circumstances and evidence of the relationship must be considered in making a decision whether, on balance, the requirements of the definition in terms of a genuine and continuing relationship and a mutual commitment to a shared life (as a married couple) to the exclusion of all others are met where the parties are living together or not separately and apart on a permanent basis.[55] There could be genuine and continuing relationships with the appropriate mutual commitment where none of the matters set out in r.1.15A(3) or r.1.09A(3) were in evidence.[56]Appropriate consideration should be given to the cultural and/or religious background of the applicant and sponsor and the evidentiary proof that could be expected to be available in light of such considerations as well as the individual circumstances of the parties.[57] For example, some countries may prohibit same sex relationships, requiring couples to hide a genuine relationship or it may not be the norm in certain cultures for a wife to jointly own property with her husband or to have joint financial assets. In relation to Subclass 309 cases the visa applicant will usually be overseas and the sponsoring partner may be in Australia, with limited ability to spend time with the other party. In these circumstances there is likely to be little evidence in relation to a shared household or joint finances.

Where the Tribunal is considering a criterion that requires the definition of spouse or de facto partner to be met at the time of the visa application, the information supplied in relation to the r.1.15A(3) or r.1.09A(3) matters may relate to circumstances after the time of application. The Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the applicant and the sponsor were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined.[58] When drawing such inferences, the Tribunal should be careful to relate that evidence to the earlier point in time.[59]

[53] *He v MIBP* [2017] FCAFC 206 (Siopis, Kerr and Rangiah JJ, 14 December 2017) at [79]. The Court found in that case that even though the Tribunal's reasons were not structured in a manner that formulaically addressed each of the prescribed matters in turn, there was no jurisdictional error because its reasons demonstrated it did make findings upon, and therefore, considered, the extent of pooling of financial resources under r.1.15(3)(a)(iii), living arrangements under r.1.15(3)(b)(ii) and evidence of others attesting to the relationship under r.1.15(3)(c)(ii): at [83]-[86]; see also *Zhang v MIAC* [2005] FCAFC 30 at [20]-[21]. Although the Tribunal is not generally obliged to evaluate in detail and make findings on every item of *evidence* before it, when making its findings it should set out sufficient reasoning and refer to evidence submitted, including that which is relevant to the prescribed matters in r.1.15A(3) or r.1.09A(3) to reflect that the required consideration of all circumstances of the relationship (including the prescribed matters) has taken place.

[54] *Li v MIAC* [2007] FMCA 454 (Riley FM, 8 May 2007) at [73]. The Court stated the Tribunal decision would have involved jurisdictional error 'if the Tribunal had taken the view that, to meet the criteria, the applicant must have pooled her financial affairs with the sponsor's…'. Decision upheld on appeal in *Li V MIAC* [2007] FCA 1098 (Kenny J, 3 August 2007).

[55] See for example *Gurung v MIMA* [2006] FMCA 1493 (Riley FM, 21 December 2006) where the court characterised a previous spouse visa application made by the parties as an integer of the claim which the Tribunal was required to consider, rather than a mere item of evidence, which could be rejected as irrelevant or misconceived: at [50]-[51], [62] and [67].

[56] *Li v MIAC* [2007] FMCA 454 (Riley FM, 8 May 2007) at [72]. The Court gave Romeo and Juliet as an example of such a relationship.

[57] See *Reddy v MIMIA* [2004] FMCA 516 (Barnes FM, 8 September 2004) at [21] – [22]. The Court considered a claim of jurisdictional error for failure to take account of submissions on cultural and religious factors affecting the sponsor to explain a matter relied upon by the Tribunal to conclude there was no mutual commitment to a shared life and found no error by the Tribunal.

[58] *Ally v MIAC* [2008] FCAFC 49 (Moore, Goldberg and Jacobson JJ, 3 April 2008) at [32]-[35]; *Jayasinghe v MIMA* [2006] FCA 1700 (Middleton J, 12 December 2006) at [35], citing *MIEA v Pochi* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it 'tends to logically show the existence or non-existence of' the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 (O'Loughlin J, 29 November 1991) at [13]-[15].

[59] See e.g. *Truong v MIBP* [2014] FCA 1312 (Greenwood J, 3 December 2014).

The following are examples of kinds of evidence that may be relevant to the r.1.15A(3) or r.1.09A(3) considerations, some of which are drawn from the Department's guidelines:[60]

- (a) financial aspects – joint loans, operation of joint bank accounts, pooling of financial resources, legally binding financial obligations and sharing day to day household expenses;
- (b) nature of the household – joint ownership or lease of residential property, joint rental receipts, joint utility accounts, correspondence addressed to both parties at the same address, shared responsibility for care and support of children and shared responsibility for housework;
- (c) social aspects of the relationship – evidence that the relationship has been declared to and accepted by other government and commercial/public institutions or authorities, statements of parents, family members, relatives, friends and other interested parties, joint membership of organisations or groups, joint participation in sporting, cultural, social or other activities, joint travel, plans for the future and whether the parties present themselves as a couple socially;
- (d) nature of the commitment – mutuality of commitment, the parties' knowledge of each other's personal circumstances, including background and family situation, evidence of intentions that the relationship be long term, e.g. extent to which the parties have combined their affairs and provided for each other, such as being beneficiary to each other's will and superannuation.

Not married (de facto)

Specific to the de facto partner definition, s.5CB(1) provides that for the purposes of the Act, a person is the de facto partner of another person whether of the same sex or a different sex if the parties are in a de facto relationship.

Section 5CB(2) requires that the parties are not in a married relationship (for the purpose of s.5F(2)) with each other. This does not, however, require a person in a de facto relationship to be unmarried. A person who is legally married, for example, may be in a de facto relationship where the person's married relationship does not satisfy the definition of spouse contained in s.5F, for example where the marriage is not recognised under Australian law or the person remains legally married but her or his married relationship has ended. For further discussion on the requirements of a valid marriage, see the MRD Legal Services Commentary: Valid marriage and above for further guidance on the definition of spouse.

Not related by family (de facto)

In relation to the de facto partner definition, s.5CB(2)(d) requires that the parties in a de facto relationship are not related by family. A person who is related by family to his or her partner cannot satisfy the definition of being in a de facto relationship with that person. Section 5CB(4) provides that two persons are related by family for the purpose of s.5CB(2)(d) where any of the following relationships is present:

- one is the child (including an adopted child) of the other, or

[60] PAM3 Reg 1.15A – Spouse - Assessing Spouse Relationships at 4 – 7 (re-issued date 1 July 2012). These are examples only and should not be treated as an evidentiary requirement for meeting the definition.

- one is another descendant of the other (even if the relationship between them is traced through an adoptive parent), or
- they have a parent in common (who may be an adoptive parent of either or both of them).

The definition of 'parent' in s.5(1) provides that someone is the parent of a person if the person is his or her child because of the definition of child in s.5CA of the Act, which refers to the meaning of a child contained in the *Family Law Act 1975* and separately includes adoptive relationships. For the purposes of the regulations, the definition of 'parent' in this context would also include a 'step-parent'.[61] Section 5CB(4) further requires the Tribunal to disregard whether an adoption is declared void or has ceased to have effect for the purpose of considering if persons are related by family.

Additional criteria for de facto partners – r.2.03A

Regulation 2.03A prescribes additional criteria that must be met if a person claims to be in a de facto relationship for the purposes of a visa application.[62] These additional criteria are supplementary to the relevant Schedule 2 criteria and not part of the de facto relationship definition in s.5CB or the factors listed in r.1.09A. A person may therefore be in a de facto relationship for purposes other than their own visa application, despite not meeting r.2.03A.

Duration of the relationship (12 month relationship requirement)

For certain visa applications, r.2.03A(3) requires that the de facto relationship existed for at least 12 months before making the visa application. The 12 month relationship requirement only applies in respect of applications for permanent, Business Skills (Provisional), Student (Temporary), Partner (Provisional), Partner (Temporary) or General Skilled Migration visas.[63] It does not apply where an applicant for one of these visas is in a de facto relationship with a person who:

- is an applicant for a permanent humanitarian visa,[64] or
- is or was a permanent humanitarian visa holder and was in the claimed de facto relationship before the permanent humanitarian visa was granted and advised the Department of that relationship.[65]

Further, the 12 month relationship requirement does not apply in the following circumstances:

- for visa applications made on or after 9 November 2009, where the de facto relationship is a relationship that is registered under a prescribed law of a State or Territory (see below for further details)
- if the applicant can establish compelling and compassionate circumstances for the grant of the visa.[66] For further information see the MRD Legal Services commentary: Compelling and/or Compassionate Circumstances/Reasons.

[61] r.1.14A(1).
[62] r.2.03A(1).
[63] r.2.03A(3)(a).
[64] r.2.03A(4)(b).
[65] r.2.03A(4)(a).
[66] r.2.03A(3)(b). A decision-maker need not go on to consider whether there are compelling and compassionate circumstances for r.2.03A(3)(b), if there was no de facto relationship at the time of application: see *Nepal v MIBP* [2015] FCCA 305 (Judge Coates, 13 February 2015). The Court said in *obiter* that the existence of 'compelling and compassionate' circumstances cannot exist without the de facto relationship, because whatever facts make up such circumstances, they would not be 'compelling and compassionate' if not related to a de facto relationship. While circumstances relating to a de facto relationship would generally be relevant to the grant of a *partner* visa, the language of r.2.03A does not clearly state that the circumstances must be related to the relationship or, if so, how closely.

Although the 12 month relationship requirement is not part of the de facto definition in s.5CB, the length of the relationship may be relevant in assessing whether the relationship is genuine and continuing under s.5CB(2)(b) and is a matter expressly listed at r.1.09A(3)(d)(i) as a circumstance that may be relevant in considering the nature of the persons' commitment to each other.

Registered relationships

The 12 month relationship requirement does not apply for visa applications made on or after 9 November 2009 where the de facto relationship is a relationship that is registered under a law of a State or Territory prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008.[67] These Regulations prescribe certain relationships as defined under certain Acts of the States or Territories for the purpose of s.2E of the *Acts Interpretation Act 1901*. Currently, the following laws and kinds of relationships are prescribed:

State / Territory	**Legislation**	**Kind of relationship**
Victoria	*Relationships Act 2008* (Vic)	A registered domestic relationship as defined in s.3.
Tasmania	*Relationships Act 2003* (Tas)	A significant relationship as defined in s.4.
Australian Capital Territory[68]	*Civil Unions Act 2012* (ACT)	A civil union as described in s.6.
	Domestic Relationships Act 1994 (ACT)	A relationship as a couple between 2 adult persons who meet the eligibility criteria for entering into a civil partnership mentioned in s.37C.
New South Wales	*Relationships Register Act 2010* (NSW)	A registered relationship as defined in s.4.
Queensland[69]	*Relationships Act 2011* (Qld) now known as *Civil Partnerships Act 2011* (Qld)	A relationship as a couple between 2 adults who meet the eligibility criteria mentioned in s.5 for entry into a registered relationship (now known as a civil partnership).

[67] r.2.03A(5) as amended by Migration Amendment Regulations 2009 (No.12) (SLI 2009, No.273).

[68] The *Civil Unions Act 2012* (ACT) and the *Domestic Relationships Act 1994* (ACT) are currently prescribed under the Acts Interpretation (Registered Relationships) Regulations 2008, which was amended by the Attorney-General's Legislation Amendment (Updated References) Regulations 2015 (SLI No. 113, 2015) following legislative changes in the ACT. However, civil partnerships registered under the repealed *Civil Partnerships Act 2008* (ACT) (which was previously prescribed under the Acts Interpretation (Registered Relationships) Regulations 2008) that have not been terminated, are taken to be civil partnerships under the *Domestic Relationships Act 1994* (ACT) (see the transitional provisions in Part 6 of the *Civil Union Act 2012* (ACT) (the version that was effective between 12/09/12-11/09/13: http://www.legislation.act.gov.au/a/2012-40/20120912-53673/pdf/2012-40.pdf).

[69] The *Relationships Act 2011* (Qld) was renamed the *Civil Partnerships Act 2011* (Qld) by the *Relationships (Civil Partnerships) and Other Acts Amendment Act 2015* (Qld) (Act No.33 of 2015), effective on 22 March 2016. While the reference to the Queensland Act in the Acts Interpretation (Registered Relationships) Regulations 2008 has not been updated to reflect this name change, s.52(2) of the *Civil Partnerships Act 2011* (Qld) provides that a reference in an Act to the *Relationships Act 2011* (Qld) is, from the commencement and if the context permits, taken to be a reference to the *Civil Partnerships Act 2011* (Qld), while s.52(1) provides that registered relationships in effect before the amendment are also taken to be civil partnerships: see the transitional provisions in Part 7 of *Civil Partnerships Act 2011* (Qld).

South Australia	*Relationships Register Act 2016* (SA)	A relationship as a couple between 2 adults who meet the eligibility criteria mentioned in s.5 for entry into a registered relationship.

Whether a relationship is registered under a relevant law is a question of fact for the decision-maker. Unlike r.2.03A(3) which explicitly refers to the applicant being in a de facto relationship *before the date of the application*, r.2.03A(5) is silent on when the relationship must be registered. As r.2.03A is supplementary to the relevant Schedule 2 criteria, and does not otherwise need to be met at time of application, it appears as long as the de facto relationship is registered at the time the decision-maker is considering r.2.03A, the 12 month requirement does not apply.[70]

Minimum age

Regulation 2.03A(2) additionally requires that persons claiming to be in a de facto relationship for the purposes of a visa application must be at least 18 years of age. It appears to be intended that this requirement must be met at the time of the visa application.[71] If either party is under 18 years of age when the application is made, the visa applicant will not be able to satisfy the additional criteria contained in r.2.03A(2). Whereas a person between 16 years of age and 18 years of age may be allowed to marry where a court order has been made in accordance with s.12 of the *Marriage Act 1961* in exceptional circumstances, no similar exception applies in the case of de facto relationships.

Relevance of grant of temporary partner visa

Temporary Partner visas (Subclasses 309 and 820) have both a time of application and time of decision requirement that the visa applicant be the spouse or de facto partner[72] of the sponsor. Where a temporary visa has been granted, this reflects a decision that the visa applicant met these criteria. In the context of review of a decision to refuse to grant a permanent Partner visa (Subclass 100 or Subclass 801) where the applicant has been granted a temporary Partner visa, there has been some consideration of the relevance of the temporary visa grant to the assessment of spouse or de facto relationship for the permanent visa and whether the decision-maker is bound by that decision, or whether it is bound to have regard to that decision in making its assessment of the spouse or de facto relationship.

In a procedural sense, it has been held that, where an applicant has been granted a temporary Partner visa and is seeking the permanent Partner visa, the applicant is entitled to consider that they have met the requirement for a spouse or de facto relationship and this is not in issue unless or until the delegate (or on review the Tribunal) specifies that it is an issue.[73] In this circumstance, the

[70] This is consistent with Departmental policy, which indicates that the registration of a relationship can satisfy r.2.03A(5) if it takes place at any time up until the time of decision, as long as it continues at that time: PAM3 Reg 2.03A – Criteria applicable to de facto partners – If the relationship is registered under Australian State/Territory law (re-issued date 10 October 2015).
[71] The link to the time of the visa application is suggested by the wording 'If a person… applies for a visa' in r.2.03A(2). This is also consistent with cl.309.213(1)(a) or cl.820.211(2)(c)(i) which require that the applicant is sponsored by a de facto partner who has turned 18 at the time of application (if the partner is under 18 years old they must be a spouse: cl.309.213(1)(b) and cl.820.211(2)(c)(ii)). See also PAM 3 Reg 2.03A – Criteria applicable to de facto partners – Minimum age requirement (re-issued date 10 October 2015).
[72] In the case of Subclass 309 applications, the visa applicant may be the intended spouse of the sponsor. For applications on or after 1 July 2009, the applicant may be the spouse, de facto partner or, in the case of Subclass 309 applications, the intended spouse of the sponsor.
[73] *Herft v MIAC* [2007] FMCA 756 (Smith FM, 6 June 2007) at [11]. The Court was considering an applicant for a Subclass 100 visa. The reasoning in relation to the procedural obligation and the finding of jurisdictional error in this case relied upon the High Court judgment in *SZBEL v MIMIA* (2006) 228 CLR 152.

Tribunal could not make a decision on the basis of the applicant not being in a genuine spouse or de facto relationship in relation to a permanent Partner visa (Subclass 100 or 801) where the applicant has been granted the relevant temporary visa (Subclass 309 or 820) and the delegate did not refuse the permanent visa on the basis of not meeting the requirement for a spouse or de facto relationship, without giving the applicant an opportunity to give evidence and present arguments in relation to the issue.[74]

However, there is no legal basis on which the decision of the delegate to grant the temporary visa could be automatically binding on another decision-maker considering the criteria for the grant of a permanent Partner visa.[75] The Tribunal may have, and often will have, different and additional evidence bearing upon the parties' relationship at the time of the grant of the temporary visa. To say that the Tribunal must accept the decision, based on different evidence, on the basis of which the temporary visa was granted as correct on the issue of the spouse or de facto relationship is inconsistent with the Tribunal's obligation to consider whether the requirements of s.5F or s.5CB are met as at the time of its decision in relation to the permanent visa.[76]

Apart from the procedural fairness obligation discussed above, the fact of the grant of the temporary visa is not a relevant consideration that must be taken into account by the decision maker in making a decision as to whether there is a spouse or de facto relationship for the purposes of the permanent visa.[77]

Relevant case law

Ally v MIAC [2008] FCAFC 49	
MIBP v Angkawijaya [2016] FCAFC 5	Summary
MIMA v Asif [2000] FCA 228	
Bretag v IRT [1991] FCA 582	
Cao v MIAC [2007] FMCA 225	
Chand v MIMA [1997] FCA 530	
Davis v MIMIA [2004] FCA 686	Summary
MILGEA v Dhillon [1990] FCA 144	Summary
Garcevic v MIAC [2012] FMCA 931	Summary
Gurung v MIMA [2006] FMCA 1493	Summary
Harchandani v MIBP [2017] FCA 1395	
Herft v MIAC [2007] FMCA 756	Summary
He v MIBP [2017] FCAFC 206	Summary
Ho v MIMA [2006] FMCA 1285	Summary
Jayasinghe v MIMA [2006] FCA 1700	

[74] See *SZBEL v MIMIA* (2006) 228 CLR 152.
[75] *Latt v MIAC* [2007] FCA 766 (McInnis FM, 22 May 2007) at [31]-[32].
[76] *Ho v MIMA* [2006] FMCA 1285 (Phipps FM, 1 September 2006) at [28]-[31].
[77] *Ho v MIMA* [2006] FMCA 1285 (Phipps FM, 1 September 2006) at [29]-[31]. See also *Latt v MIAC* [2007] FMCA 766 (McInnis FM, 22 May 2007) at [32], where the Court held that there was no legal basis that the decision should be 'even taken into account by another delegate' when considering the criteria for the grant of a Partner visa.

Kumar v MIBP [2015] FCCA 3161	
Latt v MIAC [2007] FMCA 766	
Li v MILGEA [1992] FCA 14; (1992) 33 FCR 568	Summary
Li v MIAC [2008] FCA 902	Summary
Li v MIAC [2007] FMCA 454	
Li v MIAC [2007] FCA 1098; 96 ALD 361	
Malhi v MIBP [2017] FCCA 119	Summary
Nassouh v MIMA [2000] FCA 788	
Ndegwa v MIMIA [2005] FMCA 74	Summary
Nepal v MIBP [2015] FCCA 305	
Nguyen v MIAC [2010] FMCA 847	Summary
Reddy v MIMIA [2004] FMCA 516	
Sevim v MIMA [2001] FCA 1597	
Simpson v MIEA (1994) 35 ALD 389	
Singh v MIEA [1996] FCA 1429	
SZBEL v MIMIA (2006) 228 CLR 152	Summary
SZOXP v MIBP [2015] FCAFC 69	Summary
MIBP v SZOXP [2014] FCCA 565	Summary
Truong v MIBP [2014] FCA 1312	Summary
Vu v MIBP [2016] FCCA 2723	
White v MIBP [2014] FCCA 2486	Summary
White v MIBP [2015] FCA 1376	
You v MIAC [2007] FMCA 1064	Summary
Zhang v MIMIA [2005] FCAFC 30	Summary

Relevant amending legislation

Marriage Amendment (Definition and Religious Freedoms) Act 2017	No. 129, 2017
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144
Migration Amendment Regulations 2009 (No.12)	SLI 2009, No.273
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008	No. 144, 2008

Last updated/reviewed: 19 February 2018

Partner visas:
Subclasses 309/100 and 820/801

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Overview

The Partner Subclass 820 and 801 (onshore) and 309 and 100 (offshore) visas are designed for people who are spouses or de facto partners of Australian citizens, Australian permanent residents or eligible New Zealand citizens and who seek to enter and remain in Australia permanently.

The key requirement of Partner visas is that the visa applicant is in a 'spouse' or 'de facto' relationship with his or her sponsoring partner. see the MRD Legal Services Commentary: 'Spouse and de facto partner'.

There is a two-stage process before a permanent visa is granted, for both onshore and offshore applicants. Applicants apply for temporary and permanent visas at the same time and are initially assessed against the temporary visa criteria. The relevant subclasses are:

Onshore:

- Subclass 820 (Partner) (Temporary)
- Subclass 801 (Partner) (Residence)

Offshore:

- Subclass 309 (Partner) (Provisional)
- Subclass 100 (Partner) (Migrant)

This commentary examines these four subclasses. For more information on other subclasses see the MRD Legal Services Commentary: Partner Visas Overview.

Tribunal's jurisdiction

A decision to refuse to grant a Subclass 820 and 801 visa is a Part 5 reviewable decision under s.338(2) of the Act. The visa applicant has standing to apply for review if they are onshore at the time of application for review.[1]

A decision to refuse to grant a Subclass 309 is a Part 5 reviewable decision under s.338(5) of the Act and only the sponsor has standing to apply for review.[2]

A decision to refuse to grant a Subclass 100 visa is only a Part 5 reviewable decision under s.338(7A) of the Act where the visa applicant was onshore at the time of the refusal decision and at the time of the review application.[3] Only the visa applicant has standing to apply for review in these cases.[4] Accordingly if the holder of the Subclass 309 visa is outside Australia at the time of the refusal decision on their Subclass 100 visa, there is no merits review right for that decision.

Where the visa applicant specifies in the same review application that he/she is seeking review of both the Subclass 820 and 801 refusal decisions, there is no capacity to combine review applications

[1] s.347(2)(a) and s.347(3).
[2] s.347(2)(b).
[3] s.347(3A).
[4] s.347(2)(a).

of these two reviewable decisions in respect of the one individual in a single review application.[5] In those circumstances the Tribunal must make a finding of fact as to which decision is reviewable. There is, however, no impediment to a person lodging a separate review application in respect of each decision provided each application meets the requirements for a valid review application.[6]

Requirements for a valid visa application

Onshore applications – Subclasses 820 and 801

The requirements for a valid application for Subclass 820 and 801 visas are contained at Items 1214C and 1124B of Schedule 1 to the Migration Regulations 1994 (the Regulations). These include that the application must be made on a specified form, the applicant must be in Australia, but not in immigration clearance and holders of certain subclasses of visa must have held those for at least 2 years.

At the same time and place as making the 820 visa application the applicant must also apply for a Partner (Residence) (class BS) visa (the Subclass 801 visa). The 801 visa application must also be accompanied by the applicable application charge.

When applying for the subclass 801, if the applicant holds a Subclass 820 or Subclass 309 visa at the time of making the application, the applicant must not have had a Partner visa (Subclass 100, 110, 309, 310, 801, 814, 820, 826) refused in the 21 days immediately before making the application for the Subclass 801 visa.[7]

From 14 September 2009, a person who has had a visa refused or cancelled onshore, and would otherwise be unable to make a further visa application onshore where s.48 of the Act applied, may be able to make an application for an onshore partner visa.[8] However, these persons are required to meet further Schedule 1 requirements as follows:

- that she/he has not been refused a Partner visa (Subclass 100, 110, 309, 310, 801, 814, 820, 826) since last entering Australia;[9]
- that she/he has provided with the application a signed sponsorship form by the sponsoring partner who is an Australian citizen, Australian permanent resident or eligible New Zealand citizen who claims to be the spouse or de facto partner and two statutory declarations from

[5] r.4.12. Combining applications would also be inapplicable for Subclass 309 and 100 refusal decisions as the same person does not have standing to apply for review of each decision under s.347.
[6] See *Basra v MIBP* [2018] FCA 422 at [35]-[41] where Moshinsky J held that the Tribunal dealing with a Subclass 801 visa did not have jurisdiction to also review a Subclass 820 visa decision, as this had already been dealt with by another Tribunal. While this contrasts with another decision of the Federal Court in *Bojanovic v MIMA* [2002] FCA 113, where Mansfield J was of the view that the single application to the Tribunal identifying both decisions 'obliged' the Tribunal to consider both, *Basra* is a much more recent authority and it has been followed by the Federal Circuit Court in *Mohammed v MIBP* [2018] FCCA 2893 and *Tam & Anor v MIBP* [2018] FCCA 328 as the correct approach.
[7] Item 1124B(3)(d)
[8] r.2.12(1)(a), (b), inserted by Migration Amendment Regulations 2009 (No.10) (SLI 2009, No.229). The amendments apply to applications for a visa made on or after 14 September 2009.
[9] This requirement is in item 1124B(3)(e), inserted by SLI 2011, No.105 for applications made on or after 1 July 2011; for applications between 14 September 2009 and 30 June 2011 the requirement in item 1214C(3)(h) (as in force) was only that they had not been subject to visa refusal or cancellation under s.501. Alternatively, a person will be taken to have met the requirement in item 1124B(3)(e) if they claim to be a dependent child of someone who has met the requirement: item 1124B(3A) (or for applications made between 14 September 2009 and 30 June 2011, in item 1214C(3)(i)). For applications made on or after 1 July 2011, an applicant who has left and re-entered the migration zone while holding a bridging visa is taken to have been continuously in the migration zone: item 1124B(3A)(b).

Australian citizens, permanent residents or eligible New Zealand citizens who are not the partner declaring the applicant and the partner are in a married or de facto relationship.[10]

Offshore applications – Subclasses 309 and 100

The requirements for a valid application for Subclass 309 and Subclass 100 visas are contained at Item 1220A and Item 1129 respectively of Schedule 1 to the Regulations. These include that the application be made on the approved form and the applicant be outside Australia (for subclass 100 certain visa holders may apply inside or outside Australia). The subclass 309 application must be made at the same time and place as the Subclass 100 visa and the Subclass 100 visa application must be accompanied by the application charge.

Visa Criteria

Temporary visas - Subclass 309 and 820

For both the Subclass 309 and 820 visas there are time of application and time of decision criteria.

Time of Application

Both Subclass 309 and 820 visas have the following time of application criteria:[11]

- **spouse or de facto partner of an Australian citizen, permanent resident, eligible NZ citizen or intention to marry**
    - the applicant must be the spouse or de facto partner of an Australian citizen, Australian permanent resident or eligible New Zealand citizen.[12]
    - 'Spouse' is defined in s.5F or the Act and 'de facto relationship' is defined in s.5CB of the Act and supplemented by r.1.15A and r.1.09A respectively. These definitions are discussed below.
    - *For Subclass 309*, alternatively, he or she must intend to marry such a person under a marriage that is a valid marriage under the Act.[13]
    - *For Subclass 820* there are two exceptions to this requirement:

      (i) If the applicant holds a Subclass 300 visa, validly married the sponsoring partner and the sponsoring partner has died, the applicant would otherwise have continued to be the spouse of the sponsoring partner, and has developed close business, cultural or personal ties in Australia;[14] or

[10] Item 1124B(3)(e). Alternatively, a person will be taken to have met the requirement in item 1124B(3)(e) if they claim to be a dependent child of someone who has met the requirement: item 1124B(3A). For applications made on or after 1 July 2011, the Regulations also require that the statutory declarations were declared no more than 6 weeks before the day on which the application for the Partner (Residence) (Class BS) was made: item 1124B(3)(e)(iii)(C), and an applicant who has left and re-entered the migration zone while holding a bridging visa is taken to have been continuously in the migration zone: item 1124B(3A)(b).

[11] Note that prior to 1 January 2012, for a Subclass 309 visa, it was also a criterion for the grant of the visa that an Assurance of support, if requested, had been accepted: cl.309.227. Clause 309.227, and its secondary criterion equivalent, cl.309.325, were omitted by Migration Legislation Amendment Regulations 2011 (No.2) (SLI 2011, No,250) in respect of visa applications made, but not finally determined by 1 January 2012, as well as those made on or after that date.

[12] cl.309.211(2)/cl.820.211(2)(a)(i).

[13] cl.309.211(3). See MRD Legal Services Commentary Valid Marriage for the Purpose of the Act.

[14] cl.820.211(7). For guidance on the 'death exception', see Partner Visas – Exceptions to Relationship Requirement – Death/Child.

(ii) If the applicant holds or held a Subclass 300 visa, validly married the sponsoring partner (while on that visa, if not the holder of a substantive visa) but that relationship has ceased and the applicant, a family unit member of the applicant and/or a dependent child of the applicant or sponsoring partner has suffered family violence;[15]

- **not a prohibited sponsor (woman at risk)** - the spouse, de facto partner or intended spouse of the applicant is prohibited from being a sponsoring partner if she is a woman who was granted a Subclass 204 (Woman at Risk) visa within the 5 years immediately preceding the application; and on the date of grant of that visa the applicant is a male person and was a former spouse or de facto partner of that woman, having been divorced or permanently separated from that woman, or the applicant was the spouse or de facto partner of that woman and that relationship had not been declared to Immigration;[16]
- **sponsored -** the Australian citizen, permanent resident or eligible New Zealand citizen with whom the applicant is in a spouse /de facto relationship, or , in the case of a subclass 309, who the applicant intends to marry, must have sponsored the applicant.[17] Note that if the applicant's spouse (or intended spouse) is under 18, the (intended) spouse's guardian or parent must be the sponsor.[18]

Additional time of application criteria for Subclass 820:

- **visa status** - the applicant must not hold a Subclass 771 (Transit) Visa;[19]
- **additional requirements if no substantive visa** - if the applicant does not hold a substantive visa, the applicant must either:
    - satisfy Schedule 3 criteria (3001, 3003, 3004) unless the Minister is satisfied there are compelling reasons or must have entered Australia on a diplomatic (Subclass 995) or special purpose visa under the SOFA forces agreement and satisfy Schedule 3 criterion 3002;[20] or
    - have entered Australia as the holder of a Subclass 300 visa or while engaged to, or intending to marry, an Australian citizen or permanent resident and have subsequently married him or her;[21]
- **Subclass 300 holders** - if the applicant holds a Prospective Marriage (Subclass 300) visa, and cannot meet the spouse/de facto, sponsorship and visa or Schedule 3 requirements of cl.820.211(2), he or she must have validly married the sponsoring partner;[22]
- **complied substantially with previous visa conditions** - applicants who hold certain visas must have also substantially complied with conditions to which the visa was subject.[23]

[15] cl.820.211(8) and (9). See the MRD Legal Commentary: Domestic/Family Violence
[16] cl.309.212/cl.820.211(2)(a)(ii). The purpose of this clause is to maintain the integrity of the 'Woman at Risk' component of the offshore humanitarian program.
[17] cl.309.213/cl.820.211(2)(c)(i); cl.820.211(5)(f)(i); cl.820.211(6)(c).
[18] cl.309.213(1)(b), (2)(b)/cl.820.211(2)(c)(ii); cl.820.211(5)(f)(ii); cl.820.211(6)(c)(ii). The parent / guardian must be over 18 and be an Australian citizen, permanent resident or eligible New Zealand citizen. For visa applications made on or after 1 July 2009, this requirement only applies to 'spouses' as defined in s.5F (i.e. married) as de facto partners must be at least 18 years for the purposes of a visa application: r.2.03A.
[19] cl.820.211(1)(a).
[20] cl.820.211(2)(d). Clause 820.211(2A) applies to applicants who are SOFA members or civilian component members or dependent children of such members with a valid national passport and dependent child certificate of a SOFA member. Regulation 1.03 defines Status of Forces Agreement (SOFA) forces members and SOFA forces civilian component members
[21] cl.820.211 (5) and (9), and, for visa applications made before 22 March 2014, cl.820.211(3) and (4). Clauses820.211(3) and (4) were repealed for visa applications made on or after 22 March 2014: SLI 2014, No.30.
[22] cl.820.211(6)(b)
[23] cl.820.212 applies in certain circumstances where the applicant has held one of the following visas: Skilled – Independent Regional (Provisional) (Class UX); Subclass 475 (Skilled – Regional Sponsored); Subclass 487 (Skilled – Regional Sponsored); Skilled – Regional Sponsored (Provisional) (Class SP).

Time of Decision

- **Continue to meet certain time of application requirements**
  - The visa applicant must continue to be the spouse or de facto partner of the sponsoring partner;[24]
  - *For Subclass 309* where the application was based upon an intended marriage, the intended marriage must have taken place;[25]
  - *For Subclass 820* there are three exceptions to continuing to meet the partner relationship requirements of cl.820.211(2),(5) or (6). These are:
    - (i) the sponsoring partner has died and the applicant would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died and the applicant has developed close business, cultural or personal ties in Australia;[26]
    - (ii) the relationship has ceased and the applicant and/or a dependent child of the applicant or sponsoring partner has suffered domestic/family violence committed by the sponsoring partner;[27]
    - (iii) the relationship has ceased and the applicant has custody of or access to, or a residence or contact order relating to a child in respect of whom the sponsoring partner has a child maintenance obligation, or has been granted custody or access, or has a residence or contact order.[28]
- **sponsorship approved** - the sponsorship must be approved by the Minister and still be in force.[29]
- **disclosure of convictions for relevant offence(s)** - for visa applications lodged on or after 18 November 2016 the sponsor has consented to the disclosure to each applicant included in the sponsorship of any conviction for a relevant offence[30] unless the conviction has been quashed or otherwise nullified or the sponsor has been pardoned in relation to the conviction and the effect of that pardon is that the sponsor is taken never to have been convicted of the offence.[31]
- **public interest criteria / special return criteria**
  - the applicant and family members must satisfy certain public interest criteria relating to considerations including health, character, security, foreign relations, debt to the Commonwealth, Australian values, child welfare, intends to live permanently, passports, and the provision of false or misleading information.[32]

[24] Cl.309.221, Cl.820.221 which requires that the applicant continue to meet the applicable requirements of subclause 820.211.
[25] Cl.309.224, which also requires that the spouse relationship is continuing.
[26] Cl.820.221(2). See below Exceptions – Death
[27] cl.820.221(3). See also below, Exceptions-Family Violence
[28] cl.820.221(3). See also below, Exceptions - Child.
[29] cl.309.222,cl.820.221(4). Regulations 1.20J, 1.20KA, 1.20KB and 1.20KC limit the Minister's power to approve certain Sponsorships. For a discussion of the limitations on sponsorships, see the MRD Legal Services commentary Limitation on Sponsorship - Partner Visas.
[30] cl.309.222(2). The meaning of 'relevant offence' is set out in r.1.20KC(2); for further discussion see MRD Legal Services Commentary Limitation on Sponsorship - Partner Visas.
[31] cl. 309.222(2) and (3), cl.820.221(4) and (5) The meaning of 'relevant offence' is set out in r.1.20KC(2); for further discussion see MRD Legal Services see Commentary Limitation on Sponsorship - Partner Visas.
[32] Cl.309.225, 309.228, cl.820.223 – 820.225, requiring compliance with PIC 4001 – 4004, 4007, 4009, 4015, 4016, 4019 - 4021

- Subclass 309 applicants and family members who have previously been in Australia, must also satisfy special return criteria;[33]

- Note that even members of the applicant's family unit who are **not** applicants for the visa must satisfy certain public interest criteria.[34]

- **passport**

  - the applicant must meet certain passport requirements. The content and the source of this requirement differ depending upon the date of visa application.[35]

Permanent visas - Subclasses 100 and 801

There are no time of application criteria for Subclasses 100 and 801. This is because, with limited exceptions, the applicant will have already been assessed against the time of application criteria for the provisional temporary visa.

The primary criteria for the grant of a Subclass 100 and 801 permanent partner visa are:[36]

- **holder of a provisional partner visa**

  - with exceptions, the applicant must hold a temporary partner visa;[37]

- **spouse / de facto partner**

  - the applicant must be the spouse or de facto partner of the sponsoring partner,[38] except where the sponsoring partner has died,[39] or where the relationship has ceased and the applicant (or a member of the applicant or sponsoring partner's family unit) has suffered relevant family/domestic violence committed by the sponsoring partner, or the child exception applies;[40] and

- **two years since application**

  - at least two years must generally have passed since the application was made.[41] The 'two year requirement' does not apply to an applicant if:

  - the applicant meets the child, death or family violence exemptions;[42]

[33] Special return criteria 5001 and 5002: cl.309.226 and cl.309.228(1)(b).
[34] Members of the applicant's family unit who are not applicants for a Subclass 309 visa must satisfy PIC 4001 – 4004 and, unless it is unreasonable, PIC 4007: cl.309.228(2), cl.820.224(1A).
[35] For visa applications made on or after 1 July 2005 but before 24 November 2012, the requirement was contained in cl.309.230, cl.820.226 (inserted by Migration Amendment Regulations 2005 (No.4) (SLI2005, No.134) and omitted by SLI 2012, No.256). For visa applications made on or after 24 November 2012, PIC 4021, which was inserted into cl.309.225 and cl.820.226 by SLI 2012, No.256 applies.
[36] Note that prior to 1 January 2012, it was also a criterion for the grant of a Subclass 100 and 801 visa that an Assurance of support, if requested, had been accepted. (cl.100.223, 801.222). Clauses 100.223 and 801.222, and their secondary criteria equivalent, cl.100.323 and 801.322, were omitted by SLI 2011, No,250 in respect of visa applications made, but not finally determined by 1 January 2012, as well as those made on or after that date.
[37] cl.100.221(2), cl.100.221(2A), cl.801.221(2), cl.801.221(2A), cl.801.221(3), cl.801.221(4), cl.801.221(5) and cl.801.221(6). For visa applications made before 22 March 2014, certain Subclass 100 visa applicants who had held a Subclass 309 visa but subsequently departed Australia do not need to be current temporary partner visa holders: cl.100.221(2)(a)(ii), amended from 22 March 2014 by SLI 2014, No.30. An applicant is not required to hold a temporary partner visa if he or she previously held one which ceased on notification of the decision to refuse the permanent visa, the decision was reviewed by a Tribunal, and the Tribunal remitted the primary decision, or decided that all the other criteria for the grant of the permanent visa have been satisfied except for the requirement that the applicant hold a temporary visa: cl.100.221(4A); cl.801.221(8). For further information, see Requirement to hold a temporary partner visa.
[38] cl.100.221(2)(b), cl.100.221(2A)(b), cl.801.221(2)(c) and cl.801.221(2A)(b).
[39] cl.100.221(3); cl.801.221(5).
[40] Where the applicant entered Australia on a Subclass 309 visa and still holds or, in certain circumstances for pre 22 March 2014 visa applications, held that visa: cl.100.221(4); where the applicant holds a Subclass 820 visa: cl.801.221(6).
[41] Or two years since the date of Ministerial intervention, if applicable. Cl.100.221(2)(c), cl.100.221(2A)(c), cl.801.221(2)(d), cl.801.221(2A)(c).

- the applicant and sponsoring partner were in a long-term partner relationship at the time of application;[43]
- *for Subclass 100*, the Department was informed that the applicant was in a married or de facto relationship with his or her sponsoring partner who later held a permanent humanitarian visa;[44]
- the Tribunal has previously remitted the primary decision, or decided that all the other criteria for the grant of the permanent visa have been satisfied except for the requirement that the applicant hold a temporary visa;[45] or
- *for visa applications made before 22 March 2014*, the applicant was granted specified entry permits under the 1989 or 1993 versions of the Migration Regulations.[46]

- **nomination**
  - *for Subclass 100*, the applicant must be nominated by the sponsoring partner in certain circumstances. These are: if at least two years have passed since the application was made and the applicant does not meet cl.100.221(2A) (applicant holds a Subclass 309 visa as a result of Ministerial intervention), or cl.100.221(3) (death exception) or cl.100.221(4) (child and domestic/family violence exceptions);[47]
- **public interest criteria -** the applicant and family members must satisfy certain public interest criteria relating to considerations including health, character, and the provision of false or misleading information.[48]
- **passport** - the applicant must meet certain passport requirements. The content and source of this requirement differ depending upon the date of visa application.[49]

Both a Subclass 801 and 100 visa can be granted either whilst the applicant is in Australia, but not in immigration clearance, or whilst the applicant is outside Australia.[50]

[42] cl.100.221(3) ,(4) and (7); cl.801.221(3), (4), (5), (6), and (7). See also below in relation to the Exceptions.
[43] cl.100.221(5); cl.801.221(6A).
[44] cl.100.221(6).
[45] cl.100.221(4A); cl.801.221(8).
[46] The specified entry permits were: extended eligibility (spouse) (code number 820) under the 1989 Regulations; or Class 820 (extended eligibility (spouse)) under the 1993 Regulations: cl.801.221(7)(b) and (c). These sub-clauses were repealed on 22 March 2014: SLI 2014, No.30.
[47] cl.100.226.
[48] cl.100.222-100.225, cl.801.223-801.226, requiring compliance with PIC 4001 – 4004, 4007, 4009, 4019 - 4021 . For a discussion of Public Interest Criterion (PIC) 4001 (character test), see the Public Interest Criterion 4001 commentary material. For a discussion of PIC 4005 and 4007 (health criteria), see the Public Interest Criteria 4005 & 4007 commentary material. For a discussion of PIC 4020, see the MRD Legal Services Commentary: PIC 4020 and other statutory requirements relating to 'bogus documents' and 'false or misleading information'. PIC 4020 was added as a requirement to cl.100.222(a), 100.224(1)(a), 801.224(1) and 801.226 by SLI 2013, No.146. PIC 4020 applies to cl.100.222(a), 100.224(1)(a), cl.100.322(a) and cl.801.224(1) for visa applications made on or after 1 July 2013, and visa applications made from15 October 2007 but not finally determined at 1 July 2013; and to cl.801.226 and secondary criterion cl.801.325 for visa applications made on or after 24 November 2012 but not finally determined at 1 July 2013.
[49] For Subclass 100 visa applications made on or after 1 July 2005 but before 24 November 2012, the requirement was contained in cl.100.227 (inserted by SLI2005, No.134. That criterion was omitted, and the content broadly transferred to new PIC 4021, which was inserted into cl.100.222 for visa applications made on or after 24 November 2012 by SLI 2012 No. 256. For Subclass 801 visa applications made on or after 1 July 2005 but before 24 November 2012, the terms of the requirement was expressly set out in cl.801.226 (inserted by SLI 2005, No.134). That criterion was substituted, and the content broadly transferred to PIC 4021, which was inserted into the same clause for visa applications made on or after 24 November 2012 by SLI 2012 No.256.
[50] cl.100.411 and cl.801.411 as amended SLI 2010, No.38. Grant where the applicant is outside Australia applies to all visa applications made but not finally determined as at 27 March 2010, and all visa applications made on or after 27 March 2010. For applications decided prior to this date, the Subclass 801 applicant must have been in Australia but not in immigration clearance when the visa was granted.

Legal issues

Relationship requirements

The key issue in Subclass 309/100 and 820/801 visa cases is generally whether the visa applicant meets the requirement that he or she is the spouse or de facto partner of the relevant Australian citizen, permanent resident or eligible New Zealand citizen.

For these applications:

- the definition of 'spouse' is contained in s.5(1) of the Act. It provides that 'spouse' has the meaning given by s.5F. Section 5F of the Act provides that a person is the spouse of another only where those two people are in a married relationship. Additional considerations are contained in r.1.15A of the Regulations.
- 'de facto partners' is separately defined in s.5CB of the Act, with additional criteria and considerations contained in r.2.03A and r.1.09A of the Regulations.

See the MRD Legal Commentary: 'Spouse' and 'de facto partner' and MRD Legal Services Commentary: Valid Marriage.

Can the sponsor change during the application process?

Generally the sponsor for the temporary visa (i.e. the 309 or 820 visa) must continue to be the sponsor for the permanent visa.[51] There are exceptions where the sponsor has died, or where the applicant, or a member of the applicant's or sponsor's family unit has suffered domestic/family violence.

However, where an applicant holds, or held, a Subclass 300 (Prospective Marriage) visa, and has made their visa application on or after 27 March 2010, that person may be sponsored for the Subclass 820 visa by an Australian citizen, permanent resident or eligible New Zealand citizen who was **not** the original sponsor for the Subclass 300 visa, provided the applicant is in a relationship with this 'subsequent sponsor' at the time of applying for the Class UK visa.[52]

Exceptions to the continuing relationship requirement

There are exceptions to the continuing relationship requirement in certain cases involving death, children, or family violence.

Death

An applicant may satisfy time of decision criteria where the sponsoring partner has died. The Tribunal must be satisfied the applicant would continue to meet the spouse or de facto relationship requirement except that the sponsoring partner has died.[53] For Subclass 100, the sponsoring partner must have died after the applicant first entered Australia as the holder of Subclass 309 visa.[54]

[51] See cl.100.221(2)(b), 100.111, 801.221(2)(b), (c), 801.111.
[52] cl.820.111. This also has the effect that an applicant may still satisfy the death or family violence exceptions even where they were in a spousal relationship with a subsequent sponsor when this event occurred rather than the original sponsor for the prospective marriage visa: SLI 2010 No.38 and Explanatory Statement to SLI 2010, No,38, p.41.
[53] Cl.801.221(5)(b) and 801.221(5)(c), 100.221(3)(c).
[54] cl.100.221(3)(b)

In addition to the above requirements, for Subclass 801, the applicant must also satisfy the Tribunal that he or she has developed close business, cultural or personal ties in Australia.[55] For detailed commentary on the death exceptions in partner cases, please refer to the MRD Legal Services Commentary 'Exceptions to Relationship Requirement for partner visa - Death or child'.

Child

At the time of decision, there is also a 'child' exception available in the Partner visa Subclasses 820, 801 and 100.[56] In brief, the exception requires the applicant to have custody or joint custody, or access to, or a residence or contact order under the *Family Law Act 1975* relating to at least 1 child in respect of whom the sponsoring partner has joint custody or access or a residence order made under the *Family Law Act*, or an obligation under a child maintenance order or any other formal maintenance obligations.

If this exception potentially applies please refer to the MRD Legal Services Commentary 'Exceptions to Relationship Requirement for partner visa - Death or child' for a detailed commentary.

Domestic or family violence

An applicant for a Subclass 100/801/820 visa may also satisfy the time of decision relationship criteria where the spouse or de facto relationship has ceased and the applicant or a member of the sponsoring partner's family unit has suffered relevant domestic/family violence.[57] For detailed commentary on domestic/family violence exception in partner cases, please refer to the MRD Legal Services Commentary: 'Domestic/Family Violence'.

'Long-term partner relationship'– r.1.03

Criteria for the grant of a permanent spouse visa include a requirement that at least two years have passed since the application was made. An applicant need not be in a spouse or de facto relationship for two years after the time of application if he or she has been in a 'long-term partner relationship' at the time of application.[58]

'Long-term partner relationship' is defined at r.1.03 of the Regulations in relation to an applicant for a visa to mean a relationship between the applicant and another person, each as the spouse or de facto partner of the other, that has continued, if there is a dependent child (other than a step-child) of both the applicant and the other person — for not less than two years; or in any other case if the visa application was made on or after 27 March 2010, for not less than three years.[59]

Whether the relationship has continued for the required time is a question of fact when considering all the circumstances of the parties' relationship. For example, the decision maker may be satisfied that the relationship has continued for at least the required number of years even where there have been periods of separation between the parties, but the decision maker may be satisfied the separation was not a final breakdown of the relationship. See the MRD Legal Services Commentary: 'Spouse' and 'de facto partner'.

[55] cl.801.221(5).
[56] cl.820.221(3), cl.801.221(6) and cl.100.221(4).
[57] cl.100.221(4); cl.801.221(6), cl.820.221(3).
[58] cl.100.221(5); cl.801.221(6A).
[59] r.1.03 definition of 'long-term partner relationship' as amended by SLI 2010, No.38. If the application was made before 27 March 2010, the spouse or de facto relationship must have been not less than five years.

12-month rule for de facto relationships

Partners claiming to be in a de facto relationship, generally must demonstrate that their relationship was ongoing for the 12 months immediately prior to the visa application. The exceptions to the 12 month requirement are: compelling and compassionate circumstances are established for the grant of the visa, or the de facto partner is, or was, the holder of a permanent humanitarian visa and before it was granted the de facto relationship had been advised to immigration, or the partner is an applicant for a permanent humanitarian visa, or the de facto relationship is registered under a relevant State or Territory law.[60]

For further detail as to compelling and compassionate circumstances see MRD Legal Services Commentary: Compelling and/or compassionate circumstances.

Sponsorship limitations

There are various limitations on who can be a sponsoring partner as follows:

- Serial sponsors – r.1.20J restricts the ability of a sponsor who has successfully sponsored more than one partner from sponsoring any further partners (unless the Minister is satisfied there are compelling circumstances affecting the sponsor);
- Subclass 143 (Contributory Parent) or 864 (Contributory Aged Parent) visa holders are prevented by r.1.20KA from sponsoring their previous partner for a Partner visa within 5 years of his or her subclass 143 or 864 grant (unless compelling reasons exist);
- Sponsors of concern – r.1.20KB requires that the Minister, or Tribunal on review, must refuse to approve a sponsorship where the sponsor has been charged with, or convicted of, a registrable offence. [61] In certain circumstances, if the Minister/Tribunal is satisfied there are compelling circumstances affecting the sponsor or applicant the Minister/Tribunal may approve the sponsorship;[62]
- Sponsors with a significant criminal record – r.1.20KC requires that the Minister, or the Tribunal on review, refuse to approve a sponsorship where the sponsor has a significant criminal record in relation to a relevant offence (or offences) listed in r.1.20KC(2). However, the sponsorship may be approved if the Minister or Tribunal considers it reasonable to do so having regard to certain matters.[63] The Minister/Tribunal may also refuse to approve a sponsorship if an applicant, following a request, fails to provide a police check within a reasonable time.[64]

For further detail on the above sponsorship limitations see MRD Legal Services Commentaries: Limitation on Sponsorships - Partner Visas and Compelling and/or compassionate circumstances.

[60] r.2.03A(3), (4) and (5). Under a law of a State or territory prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5), as inserted by Migration Amendment Regulations 2009 (No.12) (SLI 2009, No.273).
[61] r.1.20KB, inserted by Migration Amendment Regulations 2010 (No.1) (SLI 2010, No.50). Note that if none of the primary or secondary applicants are under 18 at the time of decision on the application for approval of the sponsorship, or where the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction, or the conviction has been quashed or otherwise set aside, r.1.20KB will not apply: r.1.20KB(2) and (3).
[62] r.1.20KB(4) and (5).
[63] r.1.20KC(4).
[64] r.1.20KC(5).

Secondary Applicants –Subclasses 309 and 820 – Permissible Directions on remittal

Where there is a valid application for review of a secondary applicant's visa application, the Tribunal will also need to consider the refusal of their visa application.[65] Generally a secondary applicant will have been refused on the basis that the primary applicant did not meet the primary criteria. However, that is not always the case and the starting point for consideration of the secondary applicant's review application will be the basis upon which the delegate refused the secondary applicant's visa application.[66]

Where the secondary applicant's visa application has been refused on the basis that the primary applicant did not meet the primary criteria and the Tribunal has now found the primary applicant does meet one of the criteria, care should be taken as to which criteria the Tribunal finds the secondary applicant has met and the direction it makes. For example, the Subclass 309 time of application criteria for a secondary applicant requires the secondary applicant to be a member of the family unit of, and made a combined application with, a person who satisfies the primary criteria in Subdivision 309.21.[67] That requires the Tribunal to be satisfied that not only is the secondary applicant a member of the family unit of the primary applicant but also that the primary applicant meets *all* applicable time of application criteria in Subdivision 309.21.

The secondary criterion can only be met if there are findings to support all relevant parts of the criterion.

The Tribunal has no power to remit a matter generally without any direction.[68] However, where the refusal of the secondary applicant's visa was on the basis that the primary applicant had been refused, it is open to the Tribunal to remit the secondary applicant by including reasoning in the decision that addresses them expressly and that they are being remitted their visa application is to be reconsidered on the basis of the direction given for the primary applicant.

Requirement to hold a temporary partner visa

The permanent partner visa criteria in cl.100.221 and cl.801.221 generally require an applicant to hold a temporary partner visa.[69] However, as the temporary visa ceases upon notification of the decision to refuse the permanent visa, an applicant for review of the permanent visa refusal generally would not meet this requirement.[70]

Subclauses 100.221(4A) and 801.221(8) allow applicants for permanent visas who ceased to hold temporary visas on notification of a decision to refuse the grant of a permanent visa to nevertheless be eligible for the grant of a permanent visa after a successful decision following remittal by the

[65] If the review application is properly made for review of a part 5 reviewable decision, the Tribunal must review the decision, s.348(1).
[66] See also the President's Direction on Conducting Migration and Refugee Reviews, in effect from 2 August 2018, at [8.2].
[67] cl.309.311
[68] See *MIAC v Dhanoa* [2009] FCAFC 153 at [53]-[62].
[69] cl.100.221(2)(a), (2A)(a), (3)(a), (4)(a); cl.801.221(2)(a), (2A)(a), (3), (4), (5)(a), (6)(a).
[70] s.82(7) of the Act, provides that a visa to remain in Australia until a particular date (including the date of a specified event) ceases to be in effect at that date and cl.309.511/cl.820.511 states that the temporary visa is in effect until there is notification of a decision on the permanent visa. While Subclass 820 is not in its terms a visa to remain in Australia (cl.820.511 refers only to permission to travel to and enter Australia) a Subclass 820 visa may cease on notification of a subclass 801 refusal on the basis that the Subclass 820 visa is in practice a visa to remain in Australia (compare cl.309.511, which expressly refers to permission to remain in Australia).

Tribunal.[71] Each clause is an alternative way of satisfying the 100/801.221 criterion, and is met in the following circumstances:

(a) if the applicant held a 309/820 visa that ceased on notification of a decision of the Minister to refuse a 100/801 visa; and

(b) if the Tribunal:

(i) has remitted that decision for reconsideration and, as a result, the Minister decides that the applicant satisfies the criteria for the grant of a 100/801 visa apart from the criterion that the applicant hold a 309/820 visa; or

(ii) has determined that the applicant satisfies the criteria for the grant of a 100/801 visa apart from the criterion that the applicant hold a 309/820 visa.

In the absence of any other requirement to hold a temporary visa, reference to 'the criterion that the applicant hold a 309/820 visa' appears to mean the requirement to hold a temporary visa in each of the various alternative subclauses of cl.100.221 or 801.221. Reference to 'the criteria for the grant of a 100/801 visa' appears to refer to the other requirements in each of those subclauses.[72]

The words 'if the Tribunal… has remitted that decision' mean effectively that subparagraph (b)(i) can only be found to be met by the delegate after a remittal from the Tribunal. Subparagraph (b)(ii) can be met on a review by the Tribunal, where the Tribunal determines that the requirements of a subclause are met (other than holding the temporary visa). The effect of this is that the Tribunal, if satisfied that other criteria of the alternatives of cl.100.221 or 801.221 are met, may remit the decision and the applicant may still meet the criteria for a grant of the visa even though he/she is no longer the holder of the 309/820 visa.

Concurrent Subclass 820 and 801 review applications

Where an applicant has validly sought review of both the Subclass 820 and 801 visa refusals, a decision on each will be required.[73]

Generally, at the primary decision level, the Subclass 801 visa is refused on the basis that the applicant does not hold a Subclass 820 visa. Where the Tribunal remits the Subclass 820, it can only remit the Subclass 801 by making a direction that a relevant criterion for Subclass 801 is met. The applicant is not the holder of a Subclass 820 visa until it is granted by the delegate. Therefore, unless at the time of the Tribunal's decision the delegate has made that decision, the Subclass 801 could not be remitted on the basis of a criterion that requires that the applicant is the holder of a Subclass 820. It may be possible to remit the Subclass 801 on another criterion, or on an independent subclause of a criterion which includes holding a Subclass 820 visa, depending on the findings made by the Tribunal. For example, if the Subclass 820 was remitted on the basis that the Tribunal found the

[71] Explanatory Statement to SR 1999 No. 68.
[72] So for example, the applicant could meet cl.801.221(8) if they met the requirements of cl.801.221(2) other than holding the temporary visa, i.e. that the applicant is sponsored, is the spouse/de facto of the sponsoring partner, and at least 2 years have passed since the application.
[73] To note, concurrent review applications for refusal of Subclasses 309 and 100 visas will not likely be valid due to the differing location requirements of the visa applicant for each. If the visa applicant is offshore at the time the Subclass 309 and 100 are refused, then their sponsoring partner may bring the review on the Subclass 309 but the decision on the Subclass 100 is not a Part 5 reviewable decision. See above the Tribunal's Jurisdiction.

applicant is the spouse or de facto partner of the sponsoring partner, then the Subclass 801 might be remitted on the basis that at the time of the Tribunal's decision the applicant meets cl.801.221(1)(c).[74]

If the Tribunal affirms the refusal of the Subclass 820, it follows that the Subclass 801 will also be affirmed on the basis that the applicant does not hold a Subclass 820 visa. However, in this circumstance, the decision on the Subclass 820 visa would be the reason or part of the reason for affirming the Subclass 801 refusal and so the Tribunal would need to put this to the applicant under s.359A.[75]

An applicant may apply for judicial review of the Tribunal's decision on the Subclass 820 and where at that point the Tribunal has not yet determined the Subclass 801 review application, the applicant may request the Tribunal adjourn its decision on the Subclass 801 pending the outcome of the judicial review. There is no obligation on the Tribunal to delay its decision of the 801, however, the request should be considered in accordance with usual principles, taking account of all relevant circumstances, including when the Court is likely to make a decision.[76]

Relevant case law

Basra v MIBP [2018] FCA 422	
MIAC v Dhanoa [2009] FCAFC 153	Summary

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Regulations (Amendment) 1995	SR 1995, No. 38	
Migration Regulations (Amendment) 1996	SR 1996, No.276	
Migration Amendment Regulations 1999 (No. 4)	SR 1999 No. 68	
Migration Amendment Regulations 2002 (No.2)	SR 2002, No.86	
Migration Amendment Regulations 2005 (No.4)	SLI 2005, No.134	LB_2005_1
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144	LB_2009_09
Migration Amendment Regulations 2009 (No.10)	SLI 2009, No.229	LB_2009_15
Migration Amendment Regulations 2009 (No.12)	SLI 2009, No.273	LB_2009_16
Migration Amendment Regulations 2010 (No.1)	SLI 2010, No.38	LB_2010_01
Migration Amendment Regulations 2010 (No. 2)	SLI 2010, No.50	LB_2010_02
Migration Legislation Amendment Regulations 2011 (No.1)	SLI 2011, No.105	LB_2011_03
Migration Legislation Amendment Regulations 2011 (No.2)	SLI 2011, No.250	LB_2012_01
Migration Legislation Amendment Regulation 2012 (No 5)	SLI 2012, No.256	LB_2012_10

[74] Cl.801.221(1)(c) is a time of decision criterion requiring that the applicant be the spouse or de facto partner of the sponsoring partner.
[75] For further guidance on s.359A please see the MRD Legal Services Procedural Law Guide at Chapter 10.
[76] For further guidance on adjourning or rescheduling a hearing see the MRD Legal Services Procedural Guide at Chapter 22.

Migration Amendment (Internet Applications and Related Matters) Regulation 2013	SLI 2013, No.252	
Migration Legislation Amendment Regulation 2013 (No. 3)	SLI 2013, No.146	LB_2013_10
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30	LB_2014_02
Migration Legislation Amendment (2015 Measures No.2) Regulation 2015	SLI 2015, No.103	LB_2015_07
Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016	F2016L01390	LB_2016_03
Marriage Amendment (Definition and Religious Freedoms) Act 2017	No.129 of 2017	LB_2017_06
Home Affairs Legislation Amendment (2018 Measures No.1) Regulations 2018	F2018L00741	

Available Decision Templates / Precedents

There is a range of decision templates/precedents available on CaseMate for Subclasses 309, 100, 820 and 801. These are:

- **Subclass 100 Visa Refusal – General (pre 1 July 2009)** - for pre 1 July 2009 Subclass 100 visa applications including where the issue in dispute is satisfaction of the criteria relating 'spouse' or other criteria.
- **Subclass 100 Visa Refusal – General (post 1 July 2009) -** for all post 1 July 2009 Subclass 100 visa applications including where the issue in dispute is satisfaction of the criteria relating 'spouse' or other criteria.
- **Subclass 309 Visa Refusal – General (pre 1 July 2009) –**for pre 1 July 2009 Subclass 309 visa applications including where the issue in dispute is satisfaction of the criteria relating 'spouse', intention to marry, woman at risk, sponsorship or other criteria.
- **Subclass 309 Visa Refusal – General (post 1 July 2009) –**suitable for all post 1 July 2009 Subclass 309 visa applications, including where the issue in dispute is satisfaction of the criteria relating to 'spouse/de facto', intention to marry, woman at risk, sponsorship or other criteria.
- **Subclass 801 Visa Refusal - General - (pre 1 July 2009) -** suitable for pre 1 July 2009 Subclass 801 visa applications, including where the issue in dispute is satisfaction of the criteria relating 'spouse/de facto', or other criteria.
- **Subclass 801 Visa Refusal - General - (post 1 July 2009) -** suitable for all post 1 July 2009 Subclass 801 visa applications, including where the issue in dispute is satisfaction of the criteria relating to 'spouse/de facto', or other criteria.
- **Subclass 820 – General - (pre 1 July 2009) -** suitable for pre 1 July 2009 Subclass 820 visa applications, including where the issue in dispute is satisfaction of the criteria relating to 'spouse/de facto', woman at risk, sponsorship, Schedule 3, or other criteria.

- **Subclass 820 – General - (post 1 July 2009) -** suitable for all post 1 July 2009 Subclass 820 visa applications, including where the issue in dispute is satisfaction of the criteria relating to 'spouse/de facto', woman at risk, sponsorship, Schedule 3, or other criteria.
- **Subclass 100/801/820 – Domestic Violence (pre 15 October 2007) -** for use in review of a decision to refuse a Subclass 100, 801 or 820 visa where the applicant is claiming domestic violence.
- **Subclass 100/801/820 – Family Violence (post 15 October 2007) -** for use in review of a decision to refuse a Subclass 100, 801 or 820 visa where the applicant is claiming family violence.

Last updated/reviewed: 7 February 2019

Subclass 300 – Prospective Marriage visas

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Overview

Subclass 300 (Prospective Marriage) is the only subclass in the Prospective Marriage (Temporary) Visa (Class TO) class. It is a temporary visa for people outside Australia who intend to marry, in Australia, the Australian citizen, Australian permanent resident or eligible New Zealand citizen who is their prospective spouse (fiancée).

The visa allows the holder to travel to, enter and remain in Australia for 9 months from the grant of the visa. It is a condition of the visa that the visa holder marries their intended spouse within the nine months.

The visa category is designed so that after marrying their prospective spouse (within the period that their visa is in effect) the visa holder can make a combined application for temporary and permanent partner visas. In other words, the process to achieve a permanent partner visa involves three visa applications: a Prospective Marriage (Temporary) Visa (Class TO) – Subclass 300 (Prospective Marriage), followed by a combined application for Partner (Temporary) (Class UK) – Subclass 820 (Partner) and Partner (Residence) (Class BS) – Subclass 801 (Partner).

Tribunal's jurisdiction

A decision to refuse to grant a Subclass 300 visa is reviewable under Part 5 of the *Migration Act 1958* (the Act), provided the visa applicant does not hold a Subclass 303 Emergency (Temporary Visa Applicant) visa and was sponsored in accordance with s.338(5)(b).[1] It is the sponsor who has standing to bring the review application.[2]

Requirements for a valid visa application

The requirements for making a valid application for a Subclass 300 visa are set out in Item 1215 of Schedule 1 to the Migration Regulations 1994 (the Regulations). These include that the application must be made on a specified form, the visa application charge must be paid and the applicant must be outside Australia.[3]

An application by a person claiming to be a member of the family unit of an applicant may be made at the same time and place as, and combined with, the application by that person.[4]

[1] s.338(5) and item 1215(3)(a) and (b). Subclass 303 was repealed on 22 March 2014 by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (F2014L00272), Part 4. Note that decisions made under s.501 on character grounds are not reviewable under Part 5.
[2] s.347(2)(b).
[3] Item 1215(1), (2) and (3) as in force at the time of application. If an applicant holds a Subclass 303 visa, they need not be outside Australia at the time of application. Subclass 303 visa was repealed on 22 March 2014 by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (F2014L00272), Part 4.
[4] Item 1215(3)(c).

Visa criteria

The criteria for the grant of a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Regulations. The primary criteria to be satisfied at time of application and time of decision are detailed at Subdivisions 300.21 and 300.22 respectively.

The applicant must be outside Australia when the visa is granted.[5]

Legal issues

There is limited judicial consideration of the Subclass 300 criteria. This may be attributable to the nature of this Subclass, as where the application is refused it would generally be easier for the applicant to reapply or marry offshore and apply for a spouse visa.

The parties must have turned 18 (cl.300.212A, 300.213)

For visa applications made on or after 1 July 2013, the visa applicant and sponsor must have turned 18 at the time of the visa application.[6] These age requirements were introduced to help ensure there was genuine consent to the marriage, noting that young age was a risk factor for forced marriages.[7]

Met and know each other personally (cl.300.214, 300.221)

For visa applications made on or after 1 July 2013, the parties must have met in person since each of them turned 18.[8] According to the Explanatory Statement which accompanied this amendment, the previous criteria allowed 'for persons who only met in person as children to apply for and be granted the visa'.[9] The change is one of a range of measures designed 'to provide greater protections to applicants, who, on account of their young age, could become victims of forced marriage and/or people trafficking.'[10]

Clause 300.214 further requires the parties to be 'known to each other personally'. This requirement is independent of the requirement that the parties 'have met'.[11] Although the meaning of this has not been the subject of specific judicial consideration, there appears to be no reason why the parties could not come to 'know each other personally' through letters, phone, fax, email or internet, provided the couple

[5] cl.300.412.
[6] cl.300.212A and cl.300.213(2).
[7] SLI 2013, No.146. The Explanatory Statement to SLI 2013, No.146 explained the intention behind the change as follows: "…to ensure that both parties to a Prospective Marriage Visa application genuinely consent to a marriage by ensuring that both visa applicant and sponsor are of marriageable age and legally able to consent to the marriage before they are able to lodge a valid visa application. Evidence presented to the [Senate Legal and Constitutional Affairs] Committee also suggested that even a slight increase in the minimum age would increase the likelihood of applicants and sponsors being more mature and so better able to respond to pressure from family members to enter an unwanted marriage.": at p.17.
[8] cl.300.214(1) and cl.300.221. This requirement in cl.300.214 was amended for visa applications made on or after 1 July 2013: SLI 2013, No.146. For applications made before 1 July 2013, the requirement in cl.300.214 was that the parties had met and were known to each other personally.
[9] Explanatory Statement to SLI 2013, No.146 at p.17.
[10] Explanatory Statement to SLI 2013, No.146 at p.2.
[11] *MIAC v Yucesan & Anor* [2008] FCAFC 110 at [16].

has met in person.[12] Hence, to meet this criterion the parties may have met only briefly, but come to know each other through other means of contact.

Intention to marry / Intention to marry within the visa period (cl.300.215, 300.221)

The Tribunal must be satisfied that at both the time of application, and at the time of decision, the parties have a genuine intention to marry.[13] This may be evidenced by a letter from a marriage celebrant, a Notice of Intended Marriage, or other relevant evidence (e.g. evidence of wedding plans, bookings etc).[14] Oral evidence provided by the parties would also be relevant to the Tribunal's examination of these criteria.

Intention to live together as spouses (cl.300.216, 300.221)

Clauses 300.216 and 300.221 require the Minister's (or Tribunal's on review) satisfaction of the parties' *intention* to live together as spouses – it looks at the parties' *aspirations*. It is not an assessment of whether the parties are actually spouses at the time of application or time of decision. The question is whether they intend to live together as spouses, after they are married. Therefore, while the definition of spouse at s.5F of the Act, supplemented by the matters in r.1.15A of the Regulations, may be a useful tool to assist the Tribunal in considering the relationship that the parties **intend** to have in the future, it would be an error of law to apply the definition to their current circumstances.[15] In referring to the r.1.15A(3) matters, care should be taken that the Tribunal is asking the right question of itself (i.e. that the parties genuinely *intend* to live together as spouses in the sense that term is used in the Regulations (i.e. with reference to the applicable definition)). In addition to stating the correct test, the Tribunal must properly apply that test.[16] Jurisdictional error may arise if the focus of the Tribunal is entirely on past events and not upon the future intentions of the parties.[17]

Cultural / religious factors may also affect the type / amount of evidence available regarding future intentions. In addition, discussion of the definition of Spouse and the r.1.15A matters may not be appropriate where the parties present their relationship as an engagement and an intention to cohabit in the future only - in this instance to look at the current or past circumstances of the parties in terms of the definition of spouse and r.1.15A matters may indicate jurisdictional error.[18]

The following examples of matters may be a useful guide to relevant lines of enquiry:[19]

- What the incidents of the proposed relationship would be: whether it was intended to be monogamous, what relationship either has with others, what role the visa applicant was to play with the sponsor's child, etc.

[12] [2008] FCAFC 110 at [28].
[13] cl.300.215 and cl.300.221.
[14] 'Notice of Intended Marriage' forms are available through the Attorney-General's Department at https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Pages/Forms.aspx (accessed 4 December 2018).
[15] For a discussion of s.5F of the Act and r.1.15A of the Act, refer to MRD Legal Commentary Spouse and de facto partner.
[16] *Habbebe v MIMIA* [2005] FMCA 163 at [24]. See also *Pham v MIAC* [2009] FMCA 287 at [14].
[17] *Habbebe v MIMIA* [2005] 163 at [24].
[18] *Bui v MIAC* [2009] FMCA 1096 at [34]. Not disturbed on appeal: *Bui v MIAC* [2010] FCA 234.
[19] *Habbabe v MIMIA* [2006] FMCA 163 at [25].

- What arrangements the parties intended to make to live together, if any. Whether they intend to stay with friends, obtain a house or flat together. Where they intended to live.

- What roles each would take in the relationship? Would the visa applicant work full time? Was it intended the sponsor would work or be a homemaker? Do they intend to have children in the near future?

- Who would do the housework and how would it be divided?

- The extent of emotional support.

- Whether the parties see the relationship as long term.

All of these are matters arising from r.1.15A when applied to *the future*. The current nature of the relationship may be relevant but it is only one factor and may not be determinative. [20]

No impediment to the marriage in Australian law (cl.300.221A)

Clause 300.221A requires that there be no impediments to the marriage under Australian law.

There is no judicial authority on the meaning of 'legal impediment to the marriage'. Consistent with the ordinary meaning, the approved form for a 'Declaration of no legal impediment to marriage'[21] indicates that a legal impediment encompasses those circumstances of the type set out in s.23B of the *Marriage Act 1961* (Marriage Act) which would render a marriage void[22] (i.e. a marriage between the parties never existed), such as where:

- *One of the parties is already married to someone else* – i.e. whether the parties are free to marry and any former marriages have been properly dissolved.

- *The parties are in a prohibited relationship* – such as a person and their parent, child, brother, or sister.[23]

- *The consent to marriage is not real consent* – because of duress or fraud, mistaken identity, or a party is mentally incapable of understanding the nature and effect of the marriage ceremony.

- *One of the parties is not of marriageable age* – The Marriage Act requires the parties to be of marriageable age,[24] but as there are separate requirements relating to the age of the parties in

[20] *Habbabe v MIMIA* [2006] FMCA 163 at [25]-[26].
[21] In accordance with s.42(1)(c)(ii) of the Marriage Act, couples must complete a 'Declaration of no legal impediment to marriage' form. The parties are required to declare that neither is married to another person, that they are not in a prohibited relationship, that they are both of marriageable age, and that there is no other circumstance that would be a legal impediment to the marriage. These forms are available through the Attorney-General's Department at https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Pages/Forms.aspx (accessed 4 December 2018).
[22] Marriage Act s.23B. Section 100 of the Marriage Act appears consistent with the notion that a legal impediment is similar to a basis on which the marriage would be void – it provides that a person shall not solemnise a marriage, or purport to solemnise a marriage, if the person has reason to believe that *there is a legal impediment to the marriage or* if the person has reason to believe *the marriage would be void*.
[23] Marriage Act s.23B(2) and s.23(2).
[24] They must generally be 18 years old but a court may authorise a person who is 16 or 17 years old to marry in exceptional circumstances: ss.11-12 of the Marriage Act.

the Subclass 300 visa criteria, age as an impediment to a marriage is unlikely to arise as a separate issue.[25]

Further commentary on the above see the MRD Legal Services Commentary: Valid Marriage.

Sponsorship and approval of the sponsorship (cl.300.213, 300.222)

The visa applicant must be sponsored at the time of application by their prospective spouse, who must be over 18 years of age.[26]

A sponsorship is evidenced by the sponsorship form or undertaking in the visa application form, signed by the sponsor. At time of decision that sponsorship must have been approved by the Minister (or the Tribunal on review) and must still be in force.[27]

The discretion to approve a sponsorship is subject to the limitations on sponsorship contained in r.1.20J, r.1.20KA, r.1.20KB and r.1.20KC. These are designed to limit serial sponsorship, prevent 'split applications' in the Parent visa stream, prevent sponsorship of a child by persons convicted of child sex offences, and prevent sponsorship by sponsors who have a significant criminal record or fail to provide a police check.

For more detail about these provisions refer to the MRD Legal Services Commentary: Limitation on Sponsorships – Partner Visas.

Where the visa applicant and sponsor marry after the visa application (r.2.08E)

Special provisions apply where the visa applicant and sponsor marry in the period *after* the visa application is made but *before* it is determined by the Minister/delegate, or *after* the Minister has refused the visa but *before* the Tribunal makes a decision on the review application. These provisions are found in r.2.08E.

Marriage after visa application but before Minister's decision

Where the visa applicant marries the prospective spouse *after* the visa application was made but *before* it is decided by the Minister, and the marriage is recognised as valid, the visa applicant is taken *also* to have applied for a Partner (Migrant) (Class BC) visa and a Partner (Provisional) (Class UF) visa on the day the Department receives notice of the marriage.[28] This means that in addition to the Prospective Marriage visa application, there are also Partner visa applications, but as the fee is taken to be paid against the Partner visa applications (r.2.08E(3)), the Prospective Marriage application would need to be withdrawn.[29]

Under normal circumstances, the Department would deal with the deemed applications for those visa classes. However, where the delegate has not taken the marriage into account in error and has only dealt with the Prospective Marriage visa application, the Tribunal has no power to deal with the deemed

[25] See discussion above under 'The parties must have turned 18 (cl.300.212A, 300.213)'.
[26] cl.300.213 as amended by SLI 2013, No.146, for visa applications made on or after 1 July 2013.
[27] cl.300.222
[28] r.2.08E(2)
[29] Procedural Instruction: Div2.2/Reg2.08E - Certain applicants taken to have applied for Partner (Migrant) (Class BC) and Partner (Provisional) (Class UF) visas at 8.2 The VAC (issued 17 November 2018).

applications and must make a decision on the application for review of the Prospective Marriage visa refusal. Given that cl.300.221 requires the applicant to continue to satisfy cl.300.215 at the time of the decision, i.e. 'the parties genuinely intend to marry', the Tribunal may be bound to affirm the decision as the parties are already married. The Tribunal would appear to have no power to remit the application for reconsideration with a r.2.08E(2B) direction (see below).[30] However, it may be appropriate in cases of this kind for the Tribunal to make findings on the timing and validity of the marriage and the timing of notice to the Department, noting the effect of r.2.08E (i.e. the applicant appears to have valid Class BC and UF visa applications before the Department).

Similarly, where the marriage took place before the primary decision, but the Department was not notified, notifying the Tribunal at the review stage does not engage r.2.08E(2B) and the Tribunal must make a decision on the application for review of the Prospective Marriage visa refusal.[31]

Marriage after Minister's decision but before Tribunal decision

Where the visa applicant notifies the Tribunal that they have married the prospective spouse *after* the Minister has refused the visa but *before* the Tribunal finally determines the review application, and the marriage is recognised as valid, then r.2.08E(2B) applies.[32] Under r.2.08E(2B) the Tribunal **must** remit the application to the Minister with a direction that the application be taken also to be an application for a Partner (Migrant) (Class BC) visa and a Partner (Provisional) (Class UF) visa; and that the Class BC/UF applications are taken to be made on the day the visa application is remitted to the Minister.

It appears that the function of r.2.08E(2B) is to dispose of the merits review application, as the remittal of the visa application by the Tribunal marks the end of the merits review. Where this happens, although it is not entirely clear, it appears the deemed Class BC and UF visa applications are created by r.2.08E(2), which is engaged upon remittal to the Department, and not by the remittal direction itself.[33]

In these cases the Tribunal will need to make findings on the timing of the marriage and the validity of the marriage. Where the applicant appears to have undergone a 'traditional' marriage ceremony but the marriage was not registered, or where the Tribunal otherwise has concerns about the validity of the applicant's claimed marriage, it may still be appropriate for the parties to be considered against the Subclass 300 criteria. For further information on the validity of marriages see the MRD Legal Services commentary Valid marriage for the purposes of the Act.

[30] This is because the specific remittal power in r.2.08E(2B) only applies where r. 2.08E(2A) is first engaged, and a marriage which takes place between the visa application and the Minister's decision engages r.2.08E(2), not r.2.08E(2A).
[31] This is because r.2.08E(2A)(e) specifically limits the operation to marriages in the period after the primary decision is made. see also the Procedural Instruction - Div2.2/reg2.08E - Certain applicants taken to have applied for Partner (Migrant) (Class BC) and Partner (Provisional) (Class UF) visas at 9.3 Ineligible cases (issued 17 November 2018).
[32] r.2.08E(2A). The review application must also be valid: r.2.08E(2A)(d).
[33] The Act and Regulations only allow for a valid visa application where a visa application is made in accordance with the relevant requirements (such as Schedule 1 requirements), or where it is a deemed application for a prescribed class of visa that is taken under the regulations to be validly made: s.46(1) and (2). Subregulation 2.08E(1) prescribes Class BC and UF for the purposes of s.46(2), and r.2.08E(2) provides the circumstances that give rise to a deemed application being made. In contrast, r.2.08E(2B) does not of itself specify in terms that appear to meet s.46(2) that an application is taken to have been made; rather, it specifies that the Tribunal give a direction of that kind, and the legal effect of such a direction is unclear. However, where the Tribunal has remitted the application to the Department, it would normally be the case that the preconditions for a valid deemed application in r.2.08E(2)(a), (b) and (c) are met, as these essentially match the requirements in r.2.08E(2A)(a), (e) and (g) respectively. In contrast, the Procedural Instruction suggests that the operation of r.2.08E(2B)(b) enlivens the Class BC and UF visa applications, but the statutory basis for this is unclear: Procedural Instruction - Div2.2/ reg2.08E - Certain applicants taken to have applied for Partner (Migrant) (Class BC) and Partner (Provisional) (Class UF) visas at 5.2 Withdrawal of the visa 300 application (issued 17 November 2018).

Secondary applicants

The text of r.2.08E does not expressly deal with the position of secondary applicants, and the provisions appear to be drafted with only the primary visa applicant in mind.[34] Both r.2.08E(2)(b) and (2A)(e) refer to circumstances where *the applicant for the Prospective Marriage visa* marries the prospective spouse (a secondary applicant would not marry the prospective spouse).

On a technical reading, arguably a combined visa application by a secondary applicant would not give rise to a deemed application under r.2.08E(2) or a remittal direction by the Tribunal under r.2.08E(2B). On this reading, once the primary applicant who married the prospective spouse was deemed to have validly applied for the Class BC and UF visas, any secondary applicants who are dependent children would be able to apply to be added to those applications under the provisions of r.2.08A and 2.08B (for the permanent Class BC visa and provisional Class UF visa respectively). Although the primary applicant's visa application charge is taken to have been paid for the Class BC visa under r.2.08E(3), additional applicant charges may be payable for the secondary applicants: r.2.08A(1)(d) and r.2.08B(1)(d).[35] If there was a merits review application by a secondary applicant before the Tribunal, it would be open to the Tribunal to affirm the visa refusal decision in respect of the secondary applicants, for example on the basis that cl.300.321 (which requires the primary applicant to hold a Subclass 300 visa) was not met.

However, on a less technical reading that arguably gives better effect to the function of r.2.08E(2B) in disposing of the merits review proceeding, once the primary visa applicant marries, the 'application' in respect of which the Tribunal must give a remittal direction is the 'combined application' involving the secondary applicants.

Relevant decision templates/precedents

There are two decision templates/precedents specific to Subclass 300 reviews. These are:

- **Subclass 300 - general** – This template/precedent is suitable for most Subclass 300 cases as it addresses most criteria. There is one version of this template/precedent (1 July 2000 - present).
- **Subclass 300 - r.2.08E cases** – This template/precedent is suitable for reviews of decisions to refuse a Subclass 300 visa where the visa applicant and sponsor have married since primary decision. It should only be used where r.2.08E applies. Where the marriage is not valid, and r.2.08E does not apply, use the Subclass 300 Visa Refusal - General template/precedent instead. There is one version of the template/precedent (1 November 1999 - present).

[34] The departmental policy also does not discuss secondary applicants and refers to the purpose of the provision being 'to assist… applicants who marry their sponsor… It allows such persons to be deemed to have also an application for the offshore Partner (309/100) visas obviating any need for them to apply fresh for the Partner visas': Procedural Instruction - Div2.2/ reg2.08E - Certain applicants taken to have applied for Partner (Migrant) (Class BC) and Partner (Provisional) (Class UF) visas at 1.1 Purpose (Issued 17 November 2018).

[35] There is no visa application charge for the provisional Class UF visa (Sch.1 Item 1220A(2)), but there is for the combined Class BC visa (Sch.1 Item 1129(2).

Relevant case law

Judgment	Bench	Judgment Summary
Bui v MIAC [2009] FMCA 1096	Smith FM	
Bui v MIAC [2010] FCA 234	Cowdroy J	
Habbabe v MIMIA [2006] FMCA 163	Riethmuller FM	Summary
Pham v MIAC [2009] FMCA 287	Smith FM	
MIAC v Yucesan [2008] FCAFC 110; (2008) 169 FCR 202	Emmett, Stone and Edmonds JJ	Summary

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Regulations (Amendment) 1996	SR 1996, No.276	
Migration Amendment Regulations 1999 (No.13)	SR 1999, No.259	
Migration Amendment Regulations 2002 (No.2)	SR 2002, No.86	
Migration Amendment Regulations 2005 (No.3)	SLI 2005, No.133	LB
Migration Amendment Regulations 2005 (No.4)	SLI 2005, No.134	LB
Migration Amendment Regulations 2007 (No. 12)	SLI 2007, No. 314	LB
Migration Legislation Amendment Regulations 2009 (No.2)	SLI 2009, No.116	LB
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144	LB
Migration Amendment Regulations 2010 (No. 2)	SLI 2010, No.50	LB
Migration Legislation Amendment Regulations 2011 (No.2)	SLI 2011, No.250	LB
Migration Legislation Amendment Regulation 2012 (No 5)	SLI 2012, No.256	LB
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146	LB
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Last updated/reviewed: 30 January 2019

Valid Marriage

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Overview

To determine whether a marriage is valid for the purpose of the *Migration Act 1958* (Migration Act), consideration must be given to the *Marriage Act 1961* (Marriage Act), which is largely incorporated into the Migration Act for this purpose by s.12.[1] The Marriage Act defines marriage as the union of 2 people (of any gender) to the exclusion of all others, voluntarily entered into for life.[2] The Marriage Act requires marriages to be solemnised,[3] and has other requirements for their validity depending on whether they were solemnised under Australian or foreign law.

Generally, a marriage solemnised in Australia (i.e. in compliance with the requirements in the Marriage Act) is valid, unless it is void. A marriage is void where:[4]

- either of the parties is lawfully married to someone else
- the parties are within a prohibited relationship
- the consent of either of the parties is not a real consent
- either of the parties is not of marriageable age, or
- by reason of s.48 of the Marriage Act, the marriage is not a valid marriage, namely, where the formal requirements for marriages solemnised in Australia are not met.

Part VA of the Marriage Act provides for the recognition of foreign marriages.[5] Essentially, foreign marriages that are recognised under the law of the country in which they are solemnised will be recognised in Australia as valid, subject to five basic exclusions which are similar to the grounds on which marriages solemnised in Australia are void, namely:[6]

- either of the parties was married to someone else and that other marriage was recognised in Australia as valid

[1] Section 12 of the Act. See *Li v MIAC* (2007) 96 ALD 361 at [10] where the Court held that by virtue of s.12 of the Act, the requirement for a valid marriage calls for the application of the Marriage Act, subject to the one qualification in s.12. Although the Court was considering the definition of a 'married relationship' under r.1.15A(1A) as it was in force for applications made pre 1 July 2009, its reasoning is equally applicable to s.5F(2)(a). The Marriage Act sets out the requirements for a valid marriage in Australia generally, but it does not purport to define words and phrases for the purposes of other Commonwealth legislation such as the Migration Act: *Li v MIAC* (2007) 96 ALD 361 at [12]-[14].
[2] Marriage Act, s.5.
[3] Marriage Act, ss. 23A, 23B, 40, 41, 48, 73.
[4] Section 23 and 23B of the Marriage Act set out the grounds on which a marriage is void. Section 23B of the Marriage Act applies to all marriages solemnised in Australia after 7 April 1986 (i.e. when s.13 of the *Marriage Amendment Act 1985*, which inserted s.23B, commenced): *Marriage Amendment Act 1985*, s.2(2), Gazette No. S 153, 7 April 1986. Section 23 of the Marriage Act applies to all marriages that took place on or after 20 June 1977 and before 7 April 1986 (i.e. when s.13 of the *Marriage Amendment Act 1985* commenced).
[5] The object of Part VA is to give effect to Chapter II of the *Convention on Celebration and Recognition of the Validity of Marriages 1978*: see s.88A of the Marriage Act. This includes same-sex marriages solemnised outside of Australia and same-sex marriages solemnised by or in the presence of a foreign diplomatic or consular officer in Australia that are recognised as valid in the relevant overseas country. Section 88D(4), 88EA and the previous definition of *marriage* in s.5(1) of the Marriage Act as being a 'union of a man and a woman' prohibited the recognition in Australia of foreign same-sex unions. These provisions were repealed or amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (No. 129, 2017) with effect from 9 December 2017 and applicable to all live applications at that date where it is necessary for the Tribunal to determine whether or not 2 persons are in a *spouse* relationship.
[6] See ss.88B, 88C, 88D and 88E of the Marriage Act. If, in accordance with s.88D(2) of the Marriage Act, a marriage solemnised outside Australia is one which is required not to be recognised in Australia as valid, then it is 'void' within the meaning of that term as used in s.51 of the *Family Law Act 1975* (Family Law Act): *In the Marriage of Teves III and*

- the parties are within a prohibited relationship
- the consent of either of the parties is not a real consent
- where one party was domiciled in Australia at the time of the marriage - either of the parties was not of marriageable age
- the marriage is voidable under the law under which the marriage took place.

However, the Migration Act limits the scope of foreign marriages which are recognised in Australia as valid under the Marriage Act, by excluding the operation of s.88E of the Marriage Act in deciding whether a marriage is valid for the Migration Act.

This Commentary begins by discussing the exclusion of s.88E for Migration Act purposes, then considers the key grounds for invalidity of Australian and foreign marriages, the validity of proxy marriages, and what kind of evidence a person can provide to show they have a valid marriage.

The validity of a marriage will usually be relevant when determining whether a person meets the definition of 'spouse'.[7] This issue arises most commonly in applications for partner visas, but can also arise in any case where a relationship through marriage is in issue.[8]

This Commentary deals with marriages solemnised (i.e. duly performed) in Australia under Australian law and the recognition in Australia of foreign marriages (i.e. marriages duly performed overseas under the law of a foreign country).[9] If you have a question about any other kind of marriage (e.g. a marriage solemnised in Australia by a diplomatic or consular officer of a foreign country under the laws of that country, or a marriage of a member of the Australian Defence Force overseas under Australian law), you can contact MRD Legal Services.

Key issues

…as if s.88E of the Marriage Act were omitted (foreign marriages)

Section 12 of the Migration Act effectively provides that no foreign marriage which would be invalid under s.88C or s.88D will be recognised as valid in Australia for the purposes of migration legislation. It provides that a marriage is valid for the purposes of the Migration Act, as if s.88E of the Marriage Act were omitted. Section 88E provides that in addition to marriages recognised under s.88C and s.88D, marriages that would be recognised as valid under the common law rules of private international law shall be recognised in Australia as valid.

The effect of s.12 of the Migration Act is that only those foreign marriages to which s.88C applies, and which are not excluded by s.88D, may be recognised as valid. There is no scope to consider private international law to determine if foreign marriages which would be invalid under s.88D may

Campomayor (1994) 122 FLR 172 at [22]. Section 51 of the Family Law Act provides that an application for a decree of nullity of marriage shall be based on the ground that the marriage is void.

[7] The definition of spouse is contained in s.5F of the *Migration Act 1958* (the Act) for applications made on or after 1 July 2009, or in r.1.15A of the Migration Regulations 1994 (the Regulations) for applications made before that date.

[8] See for example, r.1.12 of the Regulations which defines 'member of the family unit' and r.1.12AA of the Regulations which defines 'member of the immediate family'. Both include reference to spouse, as defined in the legislation.

[9] In the Macquarie Dictionary Online, the meaning of 'solemnise' includes: 1. to observe or commemorate with rites or ceremonies. 2. to hold or perform (ceremonies, etc) in due manner. 3. to perform the ceremony of (marriage).

nevertheless be recognised as valid. Any residual basis for recognition of foreign marriages does not apply for the purposes of the Migration Act.

For example, in *Nygh v Kasey,*[10] an Australian permanent resident went through a form of marriage according to the normal Roman Catholic rites in a Catholic Church in Thailand. No civil registration of the marriage occurred. Under local (Thai) law, this meant that the marriage was not recognised as valid. The Court held that, in the circumstances of this case, the marriage was valid in accordance with the common law rules of private international law and in accordance with s.88E of the Marriage Act should be recognised as a valid marriage in Australia.[11] Nevertheless, the effect of s.12 of the Migration Act is that such a marriage would not be valid for the purposes of that Act, because the omission of s.88E means that the validity of a foreign marriage is to be determined by s.88C and s.88D of the Marriage Act. If, as in this case, the marriage was not recognised as valid:

- under local law[12] or
- under the law of a foreign country, a diplomatic or consular officer of which solemnised or attended the marriage ceremony[13]

the marriage could not be recognised for the Migration Act. There would be no scope to go on to consider whether the common law rules of private international law provided an alternative basis for recognition in Australia.

Not lawfully married to some other person

For a person to be party to a marriage with a person, he or she must not be lawfully married to someone else.[14] If someone enters into a marriage while still lawfully married to another person, the new marriage will either be considered void or not be recognised in Australia as valid.[15] If a party has been validly and legally married to someone else, this earlier marriage can only be legally ended by the divorce or death of the previous spouse.[16] Generally, a foreign divorce is recognised as valid in Australia if it is a valid divorce under the law of that foreign country where the divorce was effected.[17]

This may be an issue when considering an application for a prospective marriage visa and one of the parties is still married to another person outside of Australia. In such a case it would be necessary to determine whether the previous marriage was considered to be valid under Australian law. If the previous marriage is not valid under Australian law the visa applicant and the sponsoring partner would be free to marry. If the marriage was valid, it would then be necessary to determine whether the previous marriage had legally ended by divorce or that the divorce would be legally effective by the time the parties intend to marry.

[10] *Nygh v Kasey* [2010] FamCA 145 (Faulks DCJ, 2 March 2010). The case considered Part VA of the Marriage Act, not migration legislation.
[11] *Nygh v Kasey* [2010] FamCA 145 (Faulks DCJ, 2 March 2010) at [89]. Note that the Court's reasoning in finding that the marriage was valid according to private international law has been described as 'problematic with regard to the requirements, as well as the consequences, of the common law exception to applying the *lex loci celebrationis* [law of the place of celebration] to the formal validity of a foreign marriage: Sirko Harder, 'Recent Judicial Aberrations in Australian Private International Law', *Australian International Law Journal*, Vol. 19 2012, p.177. Nevertheless, the facts are useful for illustrating the effect of that finding, if not the reasons for it.
[12] Marriage Act, s.88C(1)(a), s.88C(2)(a).
[13] Marriage Act, s.88C(1)(b), s.88C(2)(b).
[14] ss.23(1)(a), 23B(1)(a) and 88D(2)(a) of the Marriage Act.
[15] Sections 23(1)(a) and 23B(1)(a) of the Marriage Act for marriages solemnised in Australia. Section 88D(2)(a) of the Marriage Act for foreign marriages that are recognised under the local law where the marriage was solemnised.
[16] See *The Laws of Australia* [17.4.10]: Family Law > Divorce > Introduction> Definition (Thomson Reuters Westlaw AU).
[17] s.104(3) of the *Family Law Act 1975*. Note, however, that certain residency, domicile, nationality, natural justice and public policy requirements must be met before a foreign divorce can be recognised: Family Law Act, s.104(3), s.104(4).

Polygamous marriage occurs where persons have two or more de jure marital relationships concurrently. Australian law does not permit polygamous marriage in Australia.[18] However, polygamous marriage is permitted in various other countries. For the purpose of the Migration Act, only the first marriage in a polygamous situation may be recognised as valid in Australia given the operation of s.88D(2)(a) of the Marriage Act.[19] Any marriage concurrent with the first marriage is incapable of being recognised as valid even if it is the only on-going marital relationship (e.g. in circumstances where the 'first spouse' has died or divorced), because at the time the marriage took place one of the parties was legally married to another person.

Prohibited relationship

A marriage is either void[20] or will not be recognised in Australia as valid[21] if the parties are within a prohibited relationship. A prohibited relationship is a marriage between:

- a person and an ancestor (e.g. a parent, grandparent) or descendant (e.g. child) of the person or
- a brother and a sister (including half-blood siblings).[22]

Any relationship specified above includes a relationship created through adoption.[23] For example, an adopted child cannot marry their adoptive parent or siblings created by adoption. Where blended families have been created through the marriage of two adults who both have children from previous relationships, step-brothers and sisters are only prohibited from marrying each other if one of them was formally adopted by the spouse of their parent (i.e. their step parent). If there was never a legal adoption of step-children then the prohibited relationship does not arise.

An adoption will not have the effect of removing the prohibition on marrying a natural sibling[24] (i.e. where a legal adoption has the effect that a child ceases to be a legal child of her or his natural parents, the child is still prohibited from marrying her or his parent or sibling). Similarly, once a prohibited relationship has been established through adoption, it remains, even if the adoption ceases to be effective.[25]

Marriages between cousins, nieces and uncles or nephews and aunts are not excluded under Australian law.

Real consent

A marriage is either void[26] or will not be recognised in Australia as valid[27] if the consent of either of the parties is not real consent because:

- it was obtained by duress or fraud

[18] s.94 of the Marriage Act.
[19] s.12 of the Migration Act and s.88D(2)(a) of the Migration Act.
[20] Sections 23(1)(b) and (2) and 23B(1)(b) and (2) of the Marriage Act for marriages solemnised in Australia.
[21] ss.88C and 88D of the Marriage Act.
[22] s.23B(2) and s.23(2) of the Marriage Act.
[23] ss.23B(3) and (5) and ss.23(3) and (5) of the Marriage Act.
[24] s.23B(4) and s.23(4) of the Marriage Act.
[25] s.23B(5) and s.23(5) of the Marriage Act.
[26] Sections 23(1)(d) and 23B(1)(d) of the Marriage Act for marriages solemnised in Australia.

- that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed, or
- that party is mentally incapable of understanding the nature and effect of the marriage ceremony.

Duress must be oppression or coercion to such a degree that consent vanishes.[28] It need not necessarily involve a direct threat of physical violence so long as there is sufficient oppression, from whatever source, acting upon a party to vitiate the reality of their consent.[29]

A mistake as to the effect of the ceremony (where the parties understood that the ceremony was a marriage ceremony but however believed that the marriage was not a valid marriage under Australian law) is not a mistake as to the nature of the ceremony.[30] Further, an arranged marriage will not, by virtue of the fact it has been arranged, be considered invalid.

The question of a person's capacity to marry is not a question that is determined solely by medical evidence, but is a question for the Tribunal to determine on the totality of the evidence before it, both medical and lay evidence.[31]

Marriageable age

Marriageable age in Australia is 18 years of age.[32] In addition, a person between 16 and 18 years of age may apply for a Court order authorising her or him to marry a particular person.[33]

Marriages solemnised in Australia are void where either of the parties is not of marriageable age.[34]

Certain marriages that become valid after a party reaches 16 years of age

Foreign marriages involving a person not of marriageable age may be valid in the country where the marriage was solemnised under the local law. Under the Marriage Act, a foreign marriage involving a person not of marriageable age can be recognised in Australia as valid in certain circumstances depending on whether any of the parties to the marriage were domiciled in Australia at the time of the marriage.

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[27] Section 88D(2)(d) and s.23B(1)(d) of the Marriage Act for foreign marriages that are recognised under the local law where the marriage was solemnised.
[28] *Kreet and Sampir* (2011) 252 FLR 234, citing *In the Marriage of S* (1980) 42 FLR 94, at [39]. The Court considered duress in the context of an arranged marriage.
[29] *In the Marriage of Teves III and Campomayor* (1994) 122 FLR 172 at [44]. See also *Robert & Golden* [2011] FamCA 443 at [27]. In that case, duress was established on unchallenged facts involving a threat *not* to terminate a pregnancy unless the marriage occurred, although the Court noted it was a borderline case.
[30] *Official Trustee in Bankruptcy v Edwards* (1997) 139 FLR 104 (Simos J, Supreme Court of NSW Equity Division). It is also possible in Australia to have a second and valid marriage ceremony in limited circumstances: s.113 of the Marriage Act. See also *In the Marriage of V K and V Kapadia* (1991) 103 FLR 470, where the parties were married in Fiji, underwent a second marriage ceremony in Australia and it was held that the second marriage was not valid.
[31] See *Kumar v MIAC* [2009] FMCA 649 (Riley FM, 9 June 2009) where the applicant argued that earlier marriages were void for lack of consent because he was 'mentally incapable of understanding the nature and effect of the marriage ceremony'. The applicant submitted a psychologist's opinion that the applicant had a level of disability that rendered him incapable of entering into a valid marriage. The Court held that the Tribunal was entitled to consult the Fact Sheet on Intellectual Disability and to inform itself on the matters as it saw fit. The Tribunal's attribution of limited weight to the psychologist's report was found not to be unreasonable, as there were several deficiencies with that report.
[32] s.11 of the Marriage Act.
[33] s.12 of the Marriage Act.
[34] ss.23(1)(e) and 23B(1)(e) of the Marriage Act.

For foreign marriages involving a person not of marriageable age (i.e. under 18 years of age), if **one** of the parties was domiciled in Australia at the time of marriage, the marriage shall not be recognised as valid in Australia: s.88D(2)(b) of the Marriage Act.[35]

However, if **neither** party was domiciled in Australia at the time of marriage, the marriage shall not be recognised as valid 'at any time while either party is under the age of 16 years': s.88D(3) of the Marriage Act.[36] Moreover, the wording of s.88D(3) of the Marriage Act suggests that where both parties were domiciled outside Australia at the time of marriage, the marriage will be recognised as valid in Australia once both parties reach 16 years of age, notwithstanding that one or both parties was not 16 at the time of the marriage.[37]

The difference in wording between s.88D(2)(b) and s.88D(3) of the Marriage Act suggests that s.88D(2)(b) provides a stricter rule for where one party was domiciled in Australia at the time of marriage, such that unlike s.88D(3), where either of the parties was domiciled in Australia at the time of the marriage, the foreign marriage cannot be recognised as valid in Australia even where both parties subsequently reach the marriageable age.

Meaning of 'domicile'

'Domicile' is not defined under either the Marriage Act or the Migration Act.[38] In considering the domicile of parties to divorce proceedings in *Ferrier-Watson v McElrath,*[39] Holden and Jerrard JJ discussed key principles identified in *Nygh's Conflict of Laws* that may be relevant when determining a person's domicile[40]. These principles include but are not limited to:

- the meaning of domicile is the pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have attached to it by the law may be determined;[41]

- two basic assumptions underlie the above statement: that every person must have a domicile and that a person cannot simultaneously have more than one;[42]

- different rules apply in common law to the acquisition and loss of domicile for different types of domicile: a domicile of origin is that which is ascribed to each individual at birth by force of law; a domicile of dependence is the domicile of a person who lacks the capacity to acquire domicile for themselves and is determined by reference to another person such as a husband or parent; and a domicile of choice is one which a person of independent capacity acquires as the result of a voluntary choice of a new place of residence;[43] and

[35] See also sections 10(2)(b), 11 and 12 of the Marriage Act.
[36] s.88D(3) of the Marriage Act.
[37] See also Departmental policy which states that such a marriage will become recognised once the youngest party turns 16: PAM3 — Migration Act > PAM – Act-defined terms instructions > PAM – s.5F – Spouse - Underage marriages at [14.3] (re-issue date 23/11/2013).
[38] For guidance on the meaning of related, but different, concepts including 'usually resident' and 'settled' in Australia: see MRD Legal Services Commentary: Settled and "Usually Resident".
[39] (2000) 155 FLR 311.
[40] *Ferrier-Watson v McElrath* (2000) 155 FLR 311 at [74]-[75].
[41] *Nygh's Conflict of Laws* at [13.5] citing *Williams v Osenton* 232 US 619 (1914) at 620.
[42] *Nygh's Conflict of Laws* at [13.5].
[43] *Nygh's Conflict of Laws* at [13.10].

- a person acquires a domicile of choice in a country by being lawfully present there with the intention of remaining in that country indefinitely. The two elements of physical presence and intention must occur at the same time.[44]

Their Honours considered as correct the point made in *Nygh's Conflict of Laws* that if the intention by a person to remain indefinitely exists when he or she is lawfully present in a country, then the length of that lawful presence is immaterial when determining whether they have acquired a domicile of choice. The requirement is one of presence, not residence.[45]

These principles should be considered along with relevant legislation when determining a person's domicile. The Commonwealth, States and Northern Territory have enacted uniform Domicile Acts.[46] These Acts are not a Code, and the common law applies as modified by them.[47]

The *Domicile Act 1982* (Cth) provides that a person's intention to establish a 'domicile of choice' in a country is the intention to make his/her home indefinitely in that country.[48] Residence in a country should be understood as the best, or very good, evidence of the required intention, but it is not the only means of establishing or proving it.[49] Furthermore, the domicile a person has at any time continues until he/she acquires a different domicile.[50] A person can have only one domicile at a time.[51]

Formal requirements for marriages solemnised in Australia

There are a number of formal requirements for marriages solemnised in Australia. These are identified in Division 2 of Part IV of the Marriage Act, which applies to all marriages solemnised in Australia by an authorised celebrant.[52] An authorised celebrant is defined to mean a minister of religion, an authorised officer of State and Territory marriage registries or a (civil) marriage celebrant.[53] In general terms the formal requirements include:

- the marriage is solemnised by or in the presence of an authorised celebrant[54]
- a completed notice of intent to marry form to be given to the authorised marriage celebrant who is to conduct the marriage within 18 months of the proposed marriage and no later than one month before[55]
- certain documents such as birth certificates and declarations that there is no legal impediment to the marriage are required to be provided to the marriage celebrant[56]
- religious ceremonies may be solemnised in any form regarded as sufficient by the relevant religious organisation[57]

[44] *Nygh's Conflict of Laws* at [13.19].
[45] *Ferrier-Watson v McElrath* (2000) 155 FLR 311 at [80], referring to *Nygh's Conflict of Laws* at [13.19].
[46] *Domicile Act 1982* (Cth) (which also applies in the Australian Capital Territory: s.3(6)), *Domicile Act 1979* (NSW), *Domicile Act 1979* (NT), *Domicile Act 1981* (Qld), *Domicile Act 1980* (SA), *Domicile Act 1980* (Tas), *Domicile Act 1978* (Vic); *Domicile Act 1981* (WA).
[47] *Ferrier-Watson v McElrath* (2000) 155 FLR 311, per Holden and Jerrard JJ at [71], Finn J agreeing at [5].
[48] s.10 of the *Domicile Act 1982* (Cth).
[49] *Ferrier-Watson v McElrath* (2000) 155 FLR 311, per Holden and Jerrard JJ at [83], Finn J agreeing at [5].
[50] s.7 of the *Domicile Act 1982* (Cth).
[51] *Logue v Hansen Technologies Ltd* (2003) 125 FCR 590 at [28].
[52] s.40 of the Marriage Act.
[53] s.5 and Part IV of the Marriage Act.
[54] s.41 of the Marriage Act.
[55] s.42(1)(a) of the Marriage Act.
[56] s.42(1)(b)-(c) of the Marriage Act.

- if the marriage is not solemnised by or in the presence of a minister of religion, then vows must be made by both parties at the ceremony[58]
- at least 2 adult witnesses are to be present at the ceremony[59]
- the authorised marriage celebrant is required to explain the nature of marriage, with the exception of where the marriage is solemnised by or in the presence of a minister of religion.[60]

Section 48(1) of the Marriage Act provides that a marriage solemnised otherwise than in accordance with the preceding provisions of Division 2 (that is, ss. 40–47) is not a valid marriage.[61] However, s.48(2) provides that non-compliance with some requirements stated above will not invalidate the marriage.[62] For example, a marriage is not invalid for non-compliance with the requirements relating to giving notice and prescribed declarations under s.42.[63] Nor is it invalid by reason that the person solemnising it was not an authorised celebrant if, at the time the marriage was solemnised, either party to the marriage believed that person was lawfully authorised to solemnise it and both parties intended to become thereby the lawfully wedded spouse of the other.[64]

Proxy marriages

Proxy marriage is a marriage celebrated through an agent of the bride or groom, who acts as his or her proxy in a marriage ceremony, without the personal attendance of one or both of the parties.

In some countries marriage by proxy is permitted. If a proxy marriage is valid under the law of a foreign country where the marriage was solemnised and none of the exclusions in s.88D(2) apply, the proxy marriage could be recognised in Australia as valid.

Although the Marriage Act does not clearly state that proxy marriage is prohibited in Australia, there are indications throughout the relevant provisions in the Marriage Act that parties to a marriage must attend the ceremony and give their consent in person. For example, s.42(8) of the Marriage Act requires that an authorised celebrant (including a minister of religion) shall not solemnise a marriage unless he or she is satisfied that the parties are the parties referred to in the notice of intention to marry and s.50(2) requires that parties to the marriage sign the marriage certificate immediately after the solemnisation of the marriage, which suggests parties must sign personally.[65]

[57] s.45 of the Marriage Act.
[58] s.45(2) of the Marriage Act.
[59] s.44 of the Marriage Act.
[60] s.46 of the Marriage Act.
[61] By implication, non-compliance with the following sections of the Division (ss.49-51) has no impact on validity.
[62] Section 48(2) of the Marriage Act essentially provides that a marriage is not invalid by reason of failure to give notice (s.42), failure to make a declaration, produce a certificate or any other contravention of s.42, failure to have the required witnesses or explanation of marriage by the celebrant (ss.44 & 46) or the failure to have the consent of parents for the marriage of a minor (s.13). Furthermore, s.48(3) provides that a marriage is not invalid by reason that the person solemnising it was not authorised to do so.
[63] s.48(2)(a)-(d) of the Marriage Act.
[64] s.48(3) of the Marriage Act.
[65] The Department's guidelines are based on an interpretation that a proxy marriage is not permitted in Australia. Specifically, PAM3 - Migration Act > PAM – Act-defined terms instructions > PAM – s5F - Spouse at [10] (re-issue date 23/11/2013) states that 'Australian law requires that consent be given by both parties in person'.

Evidence of a valid marriage

Generally, a marriage certificate establishes that a marriage has been properly solemnised. A duly solemnised marriage may nevertheless be void for one of a number of reasons set out in the Marriage Act (see above). A genuine marriage certificate, not fraudulently obtained, would, in the absence of information suggesting the marriage is void, generally be strong evidence of a valid marriage for the purposes of the Migration Act.[66]

Foreign marriages

Section 88G of the Marriage Act provides that a document purporting to be either the original or certified copy of a certificate or record of a foreign marriage is, for all purposes, *prima facie* evidence of the facts stated in the document and of the validity of the marriage to which the document relates, provided that it is purported to have been issued by the relevant authority of that foreign country who has the authority to issue it. The effect of s.88G is that, unless there is evidence to suggest that the key requirements for a valid marriage are not met, a foreign marriage certificate issued by the relevant authority of that country is *prima facie* evidence that the marriage is valid under the local law. If there is any doubt, enquiries can be made to the consular offices of that country in Australia.

In terms of customary or religious marriages where a certificate of marriage may be absent, if the marriage is considered valid under the law of that country where the marriage was celebrated, and none of the exclusions in s.88D(2) apply, the foreign marriage is recognised in Australia. Enquiries in relation to the marriage laws of a particular country can be directed to the Department's Country of Origin Information Services section.

Marriage solemnised in Australia

Section 50 of the Marriage Act requires that the marriage certificate shall be on the prescribed form and signed by the celebrant, the parties and the two witnesses.[67] If the marriage certificate is on the prescribed form, it is *prima facie* evidence that there is a valid marriage unless there is evidence to indicate otherwise. On the other hand, if the marriage certificate is not on the prescribed form, there is no *prima facie* evidence that there is a valid marriage under the Marriage Act, and the Tribunal should consider the issue further.

Relevant Legislation

Marriage Amendment (Definition and Religious Freedoms) Act 2017	No. 129, 2017

[66] Marriage Act, s.88G sets out evidentiary considerations relating to foreign marriage certificates or records.
[67] r.40(1) of the Marriage Regulations 1963 specifies that Form 15 is the prescribed form. Form 15 contains wording to the effect that the marriage is solemnised in accordance with the provisions of the Marriage Act.

Relevant Case Law

Official Trustee in Bankruptcy v Edwards (1997) 139 FLR 104	
Ferrier-Watson v McElrath [2000] FamCA 219; (2000) 155 FLR 311	
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Last updated/reviewed: 22 March 2018