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THE PAIN OF LOVE: SPOUSAL IMMIGRATION AND DOMESTIC VIOLENCE IN AUSTRALIA—A REGIME IN CHAOS?

E. Odhiambo-Abuya[†]

Abstract: A fundamental step that the 1994 Australian Migration Regulations developed into the immigration framework was to grant certain concessions to non-Australian spouses and interdependent partners who suffer domestic violence at the hands of their Australian counterparts. Victims of domestic violence are eligible to apply for permanent residence notwithstanding the otherwise applicable two-year waiting period. To understand the domestic violence exception, this Article explores the jurisprudence that has emerged from courts and other immigration tribunals. The Article proposes that further legislative and policy changes should be made in order to seal identified “gaps,” and to provide clear guidance to interested parties, judges and tribunal members who hear such matters.

I. INTRODUCTION

Wives submit yourselves unto your own husbands, as unto the Lord. . . . Husbands love your wives, even as Christ loved the church, and gave himself for it[.] . . . So men ought to love their wives as their own bodies. *He that loveth his wife loveth himself. For no man ever hated his own flesh; but nourisheth and cherisheth it, even as the Lord the Church.*¹

International law recognizes the right to marry and have a family as a fundamental human right, since it is through this basic unit of society that the existence of human life rests. Formal recognition dates as far back as 1948 when the Universal Declaration of Human Rights² stated two important rights for this institution: First, that “men and women of full age . . . have the right to marry and found a family”; second, “that the family is the natural and fundamental group unit of society.”³ The Universal

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¹ *Ephesians* 5:22-29 (King James) (emphasis added).

² *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 187th mtg. at 22, U.N. Doc. A/810 (1948) [hereinafter UDHR].

³ *Id.* art. 16.

Declaration of Human Rights called upon member States to ensure that protection was granted to this institution, so that it—and society—could survive and continue.⁴ Subsequent international instruments, especially the 1966 International Covenant on Civil and Political Rights,⁵ and, more recently, the 1981 Convention on the Elimination of all Forms of Discrimination against Women⁶ have followed the Universal Declaration of Human Rights' footsteps.⁷

States, like Australia, that subscribe to the dualist legal system⁸ must legislatively incorporate an international treaty's principles and objectives

⁴ *Id.*

⁵ *International Covenant on Civil and Political Rights*, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR].

⁶ *Convention on the Elimination of all Forms of Discrimination against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), entered into force Sept. 3, 1981 [hereinafter CEDAW].

⁷ Article 16(1) of the CEDAW requires States Parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" and "ensure" equality between men and women with regard to the following rights:

- (a) [R]ight to enter into marriage;
- (b) [R]ight to freely choose a spouse and to enter into marriage only with their free and full consent;
- (c) [S]ame rights and responsibilities during marriage and its dissolution;
- (d) [Parental] rights in matters relating to their children . . . ,
- (e) [S]ame rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise these rights;
- (f) [S]ame rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children . . . ,
- (g) [S]ame personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) [S]ame rights . . . in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property . . .

Id. Similarly, the ICCPR recognizes that:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and found a family. . . .
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States parties to the present Covenant shall take all appropriate steps to ensure equality of rights and responsibilities to spouses as to marriage, during marriage and at its dissolution. In the case of dissolution.

ICCPR, *supra* note 5, art. 23.

⁸ This is different from nations, such as the United States, which follow the monist system dictating that once a Treaty is ratified its provisions automatically become part of the municipal law as "self-executing" treaties. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 50 (5th ed. 1998). A self-executing treaty is defined as "one that can be directly applied by courts or executive agencies without

into domestic law for it to have any local impact.⁹ Ratification of a treaty, without more, fails to create any rights, duties or legitimate expectation that a decision-maker should, or will, abide by its provisions.¹⁰ In Australia, the Marriage Act, 1961, read together with the Family Law Act, 1975, provides for the right to marry and found a family.¹¹ The spirit of both acts emphasizes the need to keep the family institution intact. While recognizing that disagreements may, and actually do, arise within this institution, the acts prescribe possible channels of resolution that spouses may explore—counseling, mediation, arbitration, conciliation, and/or reconciliation.¹² This is the case irrespective of whether an Australian citizen or permanent resident enters into a relationship as a spouse or interdependent partner with a fellow Australian or non-Australian, overseas or onshore. This Article focuses on the migration aspects of relationships between Australians and non-Australians.

Pursuant to the provisions of the Migration Act, 1958, and the Migration Regulations, (“Regulations”), introduced in 1994, spouses and interdependent partners of Australian citizens and permanent residents wishing to come into Australia may apply for a two year temporary visa.¹³ After this “probationary” period, they are eligible to apply for a permanent visa.¹⁴ The permanent visa is granted once the Department of Immigration

the need for further measures.” Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT’L L. 627, 627 (1986).

⁹ AUSTRAL. CONST. ch. I, pt. V § 51(xxix). Along the same lines, Judge McLelland in *Bluett v. Fadden* (1956) 56 N.S.W. St.R. 254, 262 (Austl.), argues:

[A] treaty does not by itself have legislative effect and cannot be the subject of judicial cognizance until it has received legal sanction and has been carried into operation by appropriate legislative action. *It is the legislation that creates the rights which are justiciable, [thus] the rights can only be said to arise under the legislation and [not] under the Treaty.*

Id. (emphasis added).

¹⁰ See *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 128 A.L.R. 353 (Austl.), in which the Ministry of Foreign Affairs, Senators Gareth Evans and Michael Lavarch issue a joint statement. See also *Australia’s Answers to Questions asked by the European Committee on Legal Co-Operation of the Council of Europe in a Survey of State Practice on Treaty-Making, October 1986*, 11 AUSTRALIAN Y. B. OF INT’L L. 500 (1991).

¹¹ Marriage Act, 1961, §§ 11-12 (Austl.).

¹² *Id.* §§ 9C-D; Family Law Act, 1975, pts. II and III (Austl.).

¹³ Migration Regulations, 1994, sched. 2, subclasses 309 (Spouse Provisional, applying from overseas), 820 (Spouse Provisional, applying onshore), 310 and 820 (for interdependent categories) (Austl.).

¹⁴ *Id.* subclass 100 (Spouse Permanent, applying from overseas), 110 and 814 (interdependent categories).

and Multicultural Affairs ("DIMA") is satisfied that the relationship is still "genuine and continuing."¹⁵

There are three exceptions to this general rule.¹⁶ The first exception is for partners that have been married for more than five years, or for two years or more and have a child as a result of the union. The second exception is relevant where the Australian spouse dies. The third exception applies where the non-Australian spouse or partner is domestically abused by their Australian counterpart. This Article focuses on the last category, victims of domestic violence. The domestic violence exception more or less "rescues" these victims from the pain, suffering, and risk of deportation they would otherwise face if they remained in abusive relationships.¹⁷ Even so, domestic violence claimants must satisfy specific legal tests required by the Regulations. This Article evaluates those tests. Notwithstanding the various concessions that have been introduced for victims of domestic violence, this Article argues that further legal and policy changes are necessary to fully protect victims of domestic violence.

Part II of this Article examines the Australian general rule on spousal immigration and the domestic violence exception. In evaluating the domestic violence exception, the primary focus is on the definition of "domestic violence," who is a "competent" witness in such claims, and the definition of "competent" evidence. Evaluating relevant statutory provisions and case law, Part III identifies and discusses shortcomings in this branch of Australian law. First, this Article argues that whether the term "domestic violence" is restricted to physical violence, or may also be applied to emotional and psychological abuse remains unsettled. Second, some decision-makers have been insensitive to foreign cultural values and beliefs, which prohibit the reporting of what might be seen by western eyes as constituting domestic violence. Overall, this insensitivity weakens victims' claims. Third, ignorance and the lack of knowledge about where victim can seek assistance undermine the claimants' chances of success. Fourth, decision-makers emphasize procedural technicalities at the expense of substance. Legitimate claims are eliminated as a result. Part IV concludes with specific policy and legal recommendations to improve the current legal status.

¹⁵ *Id.* Regs. 1.09A(2)(c)(ii) and 1.15(1A)(b)(ii); see also *Nassouh v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 788.

¹⁶ These exceptions are spelled out in the regulations governing the grant of permanent visas. See Migration Regulations, 1994, sched. 2, subclasses 100.221 (Spouse Permanent, applying from overseas) and 801.221 (Spouse Permanent, applying on-shore) (Austl.). For definition of the terms, "long-term spouse relationship" and "long-term interdependent relationship," see *id.* Reg. 1.03.

¹⁷ See MARY CROCK, IMMIGRATION AND REFUGEE LAW IN AUSTRALIA 77 (1998).

II. GENERAL MIGRATION RULES FOR SPOUSES AND DOMESTIC PARTNERS AND THE DOMESTIC VIOLENCE EXCEPTION

Under the Migration Act and Regulations foreign spouses can apply for temporary visas onshore in Australia, or from overseas. As a general rule, a permanent visa is issued after two years and once DIMA is satisfied that the relationship is relatively permanent. However, there is an exception to this general rule. Spouses and interdependent partners who are abused by their Australian counterparts need not stay in such relationships for two years before they become eligible to apply for permanent visas. However, for an individual to apply before this period expires, he or she must prove they suffered the claimed domestic violence.

A. *Coming to Australia: Onshore and Offshore Applications*

The Regulations prescribe two paths that foreign spouses wishing to immigrate to Australia can follow. Potential immigrants can lodge their applications offshore or onshore.¹⁸ Either way, a non-Australian spouse or partner must be sponsored, or nominated, by their Australian counterpart.¹⁹ The Regulations do not clearly state the requirements of nomination, defining a “nominator” simply as, “a person who nominates . . . another person.”²⁰ One may infer that “nominate” is synonymous with “sponsorship,” which requires financial support of the visa applicant for at least two years, based on Australian standards, once a spouse visa application is lodged.²¹

The financial requirement seems to presume that for at least two years a nominee is incapable of finding a reasonable and sufficient source of income, or that a nominee will require at least two years to gain financial stability. This does not mean, however, that sponsors who are not financially secure cannot bring their spouses or partners into Australia. The Minister of Immigration and Multicultural and Indigenous Affairs (“Minister”) can request an assurance of support, which can be provided by anyone, not necessarily the sponsor or guarantor.²² If this requirement is

¹⁸ Migration Regulations, 1994, sched. 1, items 1124B, 1129, 1120A, and 1214C (Austl.).

¹⁹ *Id.* sched. 2, subclasses 100.221(2)(b) and 801.221(2)(c).

²⁰ Migration Act, 1975, division 1.2(1.13) (Austl.).

²¹ *Id.* Division 1.4(1.2)(2)(c) of the Migration Act defines “sponsorship” to mean an “undertak[ing] to assist [an] applicant, to the extent necessary financially and in respect of accommodation, [for] at the [first] two years, immediately following the [lodging of a spouse or interdependent visa].” *Id.*

²² See generally Migration Regulations, 1994, subdivision 2.7.2 (Austl.).

met, a nominee is eligible to apply for a temporary visa depending on his or her physical location.²³ The married nominee may apply for a spouse²⁴ or a spouse provisional²⁵ visa. Interdependent partners, on the other hand, may apply for interdependency²⁶ or interdependency provisional²⁷ visa. A fiancée is eligible to apply for prospective marriage²⁸ and spouse²⁹ visas.

B. *The Evidentiary Requirements to Prove a Domestic Violence Claim*

For a foreign spouse to be granted a permanent visa based on domestic violence, he or she must prove that that a “genuine and continuing relationship,” collapsed due to domestic violence perpetrated by their Australian counterpart. Courts determine whether a relationship was “genuine and continuing.” However, because they lack the necessary expertise, proof of whether domestic violence occurred is determined by experts.

1. *Establishing a “Genuine and Continuing Relationship”*

The purpose of the two-year waiting period for permanent visas is for DIMA to reassess whether the relationship with the foreign spouse is still in existence. This reassessment attempts to eliminate fraudulent applications that seek to deceive the immigration authorities.³⁰ In Australia, “marriage” means “the union between a man and a woman to the exclusion of all others, voluntarily entered into for life,”³¹ and includes de facto relationships.³² The “interdependent” category, for example, was created to accommodate same-sex relationships.³³ Regulation 1.09A, while requiring both partners to be at least eighteen years old and “not within a prohibited degree of

²³ *Id.* sched. 2, subclasses 309 (Spouse Provisio, applying from overscas) and 820 (Spouse Provisional, applying on-shore).

²⁴ *Id.* subclasses 100, 801, and 820.

²⁵ *Id.* subclass 309.

²⁶ *Id.* subclasses 110, 814, and 826.

²⁷ *Id.* subclass 310.

²⁸ *Id.* subclass 300.

²⁹ *Id.* subclasses 801 and 820.

³⁰ *Id.* Reg. 1.15 (1A)(b)(ii) (Austl.) (using the words “genuine and continuing”).

³¹ Family Law Act, 1975, § 43(a) (Austl.).

³² Migration Regulation, 1994, Reg. 1.15A(1A)(2)(e) (Austl.) (requiring a 12-month cohabitation period).

³³ Note the close relationship between the definitions of the terms “marriage,” *supra*, note 31, and “interdependent relationship,” *infra*, note 35.

relationship,”³⁴ defines the term “interdependent relationship” in similar terms as marriage, but with a slight change.³⁵

Multiple procedures guide the application process.³⁶ Generally, a delegate of the Minister first hears permanent visa applications and makes a decision.³⁷ To assess whether a relationship is “genuine and continuing” a delegate asks questions on the background and development of the relationship and the spouses’ plans once married.³⁸ The delegates inquiry includes questions related to where and how the applicant met their spouse, frequency of communications, past living arrangements with the spouse, personal gifts exchanged, and whether the applicant’s family is aware of the relationship and their reaction to it. Regarding future plans, the delegate may inquire where the applicant plans to live in Australia, details regarding the applicants prior relationships, whether the couple has prepared a will, and what gifts the couple has received from family.

An aggrieved party may appeal to the Migration Review Tribunal³⁹ (“MRT”), which bases its decision on both the facts presented and arguments the parties advance. The MRT may exercise two options. First, the MRT may confirm the delegate’s decision, effectively dismissing the appeal.⁴⁰ Second, the MRT may find for the applicant on pertinent points of law, and remand the matter for the Minister’s delegate to determine in accordance with the terms of the finding.⁴¹ If the MRT’s finding dissatisfies any party, it may go to a single judge of the Federal Court,⁴² and then to a

³⁴ Migration Regulation, 1994, Reg. 1.09A(3) (1994) (Austl.).

³⁵ An “interdependent relationship” is defined as a relationship whereby two people, irrespective of their sex, “have a mutual commitment to share life to the exclusion of any other spouse(s) . . . or . . . interdependent . . . partner(s).” *Id.* Reg. § 1.09A.

³⁶ See Migration Act, 1975, §§ 65, 338, & 349; AUSTRALIAN CONST. ch. III, § 75(v); Judiciary Act, 1903, §§ 44 and 48B (Austl.).

³⁷ Migration Act, 1975, § 65 and pt. 2, division 3AB (providing a code of procedures for dealing fairly, efficiently and quickly with visa applications). Immigration officials will usually interview applicants for spouse visas, but are not required to do so as a matter of law.

³⁸ Department of Immigration and Multicultural Affairs [hereinafter DIMA], *Procedures Advice Manual: Suggested Interview Questions for the Assessment of a Spouse/De Facto Relationship III* (on file with author).

³⁹ Migration Act 1958, § 338 (Austl.). Note the ability of the Minister to preclude review through the issuance of a Conclusive Certificate. *Id.* § 339.

⁴⁰ *Id.* § 349 (setting forth out the MRT’s powers).

⁴¹ *Id.* The Migration Act demonstrates that the power to issue a visa vests on the Minister, or its duly appointed delegate. *Id.*

⁴² This is so in spite of § 474 of the Migration Act, which states that decisions of the administrative tribunals are final and not subject to review. See *Plaintiff S 157/2002 v. Commonwealth of Australia* (2003) H.C.A. 2, WL 220455. Appeals now lie to a Federal Magistrate’s Court or to the Full Federal Court. See also Migration Act 1958, §§ 475A and 476 (Austl.).

full Federal Court.⁴³ The High Court is the final court for an appeal by a dissatisfied party.⁴⁴

Regulations 1.09A(2) and 1.15A(1) direct the use of a triple-tier test to establish whether a relationship is durable. Spouses must first show that "they have a mutual commitment to a shared life"⁴⁵ to the exclusion of all others. They must also show that "the relationship between them is genuine and continuing,"⁴⁶ and that "they live together," not "separately and apart on a permanent basis."⁴⁷ In short, spouses must show that the marriage is real and that it was not contrived to deceive immigration authorities. Similar conditions apply for de facto relationships.⁴⁸ Generally, in cases where a spouse withdraws his or her sponsorship or nomination, and their counterpart applies for a permanent visa on domestic violence grounds, a court or tribunal inquires whether the marriage was entered into voluntarily and to the exclusion of all others.⁴⁹

*Doan v. Minister for Immigration & Multicultural Affairs*⁵⁰ illustrates this point. Mr. and Mrs. Doan were married in 1995.⁵¹ Mrs. Doan nominated her husband for immigration.⁵² He was subsequently granted a spouse visa.⁵³ Two years later, she withdrew her nomination claiming their relationship had collapsed.⁵⁴ When the matter went to the MRT, one of the central questions considered was whether there was a genuine marriage between them.⁵⁵ The evidence revealed that Mr. and Mrs. Doan had met only three times before getting married.⁵⁶ The first time they met Mr. Doan's friend introduced them to each other. Thereafter, Mrs. Doan returned home while Mr. Doan spent the night at the friend's home.⁵⁷ Mr.

⁴³ For a description of judicial review by Australia's Federal courts, see JAMES CRAWFORD, AUSTRALIAN COURTS OF LAW (3d ed. 1993).

⁴⁴ AUSTL. CONST., ch. III, § 75(v); Judiciary Act, 1903, §§ 20 and 35 (Austl.).

⁴⁵ Migration Regulations, 1994, Reg. 1.09A(2)(c)(i) and 1.15A(2)(c)(i) (Austl.).

⁴⁶ *Id.* Regs. 1.09A(2)(c)(ii) and 1.15A(2)(c)(ii).

⁴⁷ *Id.* Regs. 1.09A(2)(c)(iii)(A)-(B) and 1.15A(2)(c)(iii).

⁴⁸ *Id.* Reg. 1.15A(2).

⁴⁹ See e.g., *Doan v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 909, LEXIS 319; *Nassouh v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 788, WL 1243386; *Leslie Alden Reggie* (2001) M.R.T.A. 4453; and *Colin Arend Damoze* (2000) M.R.T.A. 1099. If one of the reasons for entering into a marriage is to migrate or improve financial status, this does not mean that the marriage is not genuine. See e.g., *Dhillon v. Minister for Immigration, Local Gov't and Ethnic Affairs* (1994) 48 F.C.R. 107.

⁵⁰ (2000) F.C.A. 909, LEXIS 319.

⁵¹ *Id.* at *12.

⁵² *Id.* at *12, *13.

⁵³ *Id.* at *13.

⁵⁴ *Id.*

⁵⁵ *Id.* at *14.

⁵⁶ *Id.* at *15.

⁵⁷ *Id.* at *15, *16.

and Mrs. Doan's second meeting was two weeks later when they spent two days together.⁵⁸ They got married on their third meeting.⁵⁹

Mr. Doan's evidence was quite contradictory, suffering from fundamental internal flaws and inconsistencies regarding their marriage and the preceding period. More important, he was unable to satisfactorily answer basic questions ordinarily expected of a spouse. For instance, he could not recall the exact wedding date, telling the MRT that it was on January 14, 1995, a date that was inconsistent with the January 5, 1995 date on the wedding photos.⁶⁰ Nor was he able to state where Mrs. Doan lived despite an earlier claim that he moved in with her two days before the wedding and then lived at that address for at least two months after the wedding.⁶¹ From these facts alone, it is apparent why the MRT described Mr. Doan as "a most devious person who would not deliver a direct answer to questions"⁶² and concluded that the purported marriage was a "sham, the result of conspiracy by Mr. Doan and [Mrs. Doan] to deceive the authorities."⁶³ On appeal, Judge Lindgren, in the Federal Court, affirmed the MRT's decision.⁶⁴

2. *"Domestic Violence," Admissible Evidence and the Role of Experts*

Proving a domestic violence claim requires an individual to adduce two statutory declarations from experts, or competent persons. For the purposes of this Article, however, it remains important to analyze the definition of "domestic violence," which to date has not been substantively defined by legislation. The Federal Court has not offered much guidance in this regard and still remains divided on whether it can be extended beyond physical violence.

a. *"Domestic Violence"*

A non-Australian spouse or partner may obtain a permanent visa before the expiration of the two-year waiting period if he or she can

⁵⁸ *Id.* at *16.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at *15.

⁶³ *Id.* at *22.

⁶⁴ It might be of interest to contrast this case with the following MRT decisions where the Tribunal made adverse credibility findings, but based on domestic violence, still approved the case: Olivera Malek (2001) M.R.T.A. 247; Kideest Asrate Adera (2000) M.R.T.A. 3155; Miran Bozic (2002) M.R.T.A. 244; Ruth Suzanne Coad (2001) M.R.T.A. 943.

demonstrate that his or her Australian spouse or partner abused them.⁶⁵ Practically, what the abused spouse or partner must prove is that the marriage collapsed primarily because of the domestic violence. An applicant trying to utilize the domestic violence exception must show that the nominator or sponsor is the perpetrator of the violence.⁶⁶ Otherwise, the permanent visa application might fail.⁶⁷

Division 1.5 of the Act⁶⁸ outlines the substantive provisions regarding domestic violence in immigration. Notwithstanding the fundamental role Division 1.5 plays, and its repeated use of the term “domestic violence,” one of its shortfalls is its failure to concretely define this term. Problems aside, this Division does three things. First, Regulation 1.21(1) simply defines the term “violence” to include “a threat of violence,” which is not very helpful. Second, and perhaps more helpfully, Regulation 1.23(2)(b) provides some guidance by importing a mental element.⁶⁹ This Regulation concentrates on the likely subjective effects on a victim, formulating domestic violence as an act “that causes [a victim] to fear for, or . . . be apprehensive about, [his or her] personal well-being or safety.” Third, the Division gives direction regarding the kind of evidence required to prove a domestic violence claim.⁷⁰

Several sources, including legal dictionaries, related legislation, and judicial precedents, may be consulted to fill the statute’s definitional gaps. The Butterworths Concise Australian Legal Dictionary, for example, defines domestic violence as, “violence committed in or pertaining to a person’s

⁶⁵ Migration Regulations, 1994, sched. 2, subclasses 100.221(4)(c)(i), 110.221(1)(4)(c), 801.221(6)(c)(i), 814.221(8)(c), 820.221(3)(b)(i), 826.221(4)(b), and 831.221(4)(c)(i) (Austl.).

⁶⁶ For instance, in *Malik v. Minister for Immigration and Multicultural Affairs* (2000) F.C.R. 291, Judge Wilcox stated:

[T]here is no suggestion of the wife having engaged in a course of conduct of intimidation, belittling, frightening or similar conduct towards the husband. There seem to be matrimonial differences, and then a break up of the marriage in the context of an accusation about bigamy. There is no suggestion of the applicant having been caused to suffer fear or apprehension.

Id. Similarly, Doan’s case collapsed because, according to Judge Lindgren “[T]here was no suggestion that Mr. Doan had been assaulted. The case presented by Mr. Doan was that he was humiliated by his wife’s continuing adultery in the home where he was living and that it caused the marital relationship to end.”

Doan v. Minister for Immigration and Multicultural Affairs (2000) F.C.A. 909, LEXIS 319.

⁶⁷ See *Malik*, (2000) F.C.R. 291, and *Doan*, (2000) F.C.A. 909.

⁶⁸ Migration Regulations, 1994, Regs. 1.21-1.30 (Austl.).

⁶⁹ This Regulation focuses on the effect of the violence upon the victim’s mind. The Regulation requires the act to cause the alleged victim to “*fear for* or to be *apprehensive* about, the alleged victim’s personal well-being or safety.” *Id.* Reg. 1.23(2)(b) (emphasis added).

⁷⁰ *Id.* Regs. 1.21-1.30.

situation.”⁷¹ This comes close to the criminal law perspective, which whilst stretching this dictionary definition, sees domestic violence as a “personal violence committed against a relative, spouse, or de facto spouse of the offender, a person who has or has had an intimate personal relationship with the offender, or a person living in the same household as the offender, but not merely as tenant or boarder.”⁷²

Traditionally, domestic violence claimants (mostly women) were required to prove they had suffered physical abuse at the hands of a perpetrator (predominantly male spouses).⁷³ In the absence of this physical element, claims would fail. However, this is not the case any more. Gender roles have switched, making it possible for both women and men to be perpetrators as well as victims of domestic violence. This renders untenable the conventional idea portraying men as perpetrators of domestic violence and women as victims.⁷⁴ Further, the domestic violence threshold is not confined to instances of physical abuse, but now also includes non-physical abuse.⁷⁵

*Leslie Alden Reggie*⁷⁶ is an example of such a case. Reggie’s wife abandoned her matrimonial home after admitting an infidelity and subsequently withdrew the sponsorship of her husband, who then applied for a permanent visa on domestic violence grounds.⁷⁷ As husband and wife, he submitted, they had engaged in unprotected sexual relations.⁷⁸ Her admission of infidelity, combined with the discovery that the men she had slept with “had a reputation [for] promiscuity,”⁷⁹ caused him to fear

⁷¹ BUTTERWORTHS CONCISE AUSTRALIAN LEGAL DICTIONARY 136 (2d ed. 2002).

⁷² See e.g., Crimes Act, 1900, § 4 (Austl.), and Crimes (Family Violence) Act, 1987, §§ 3(1) and 4(1) (Austl.). See also Domestic Violence (Family Protection) Act, 1989, § 11(1) (Austl.); and Domestic Violence Act, 1986, § 4A (Austl.), which state that any of the following acts, committed against a spouse, constitute domestic violence: physical injury, damage to property, threats, or harassment.

⁷³ For the evolution of domestic violence legislation in Australia, see RENATA ALEXANDER, DOMESTIC VIOLENCE IN AUSTRALIA: THE LEGAL RESPONSE (3d ed. 2002).

⁷⁴ The following cases are examples of how men have succeeded on claims based on domestic violence: *Leslie Alden Reggie* (2001) M.R.T.A. 4453; *Meroka v. Minister for Immigration and Multicultural Affairs* (2002) F.C.R. 251; *Miran Bozic* (2002) M.R.T.A. 244. See generally PHILIP W. COOK, ABUSED MEN: THE HIDDEN SIDE OF DOMESTIC VIOLENCE (1997).

⁷⁵ See e.g., *Reggie* (2001) M.R.T.A. 4453; and *Meroka* (2002) F.C.R. 251, where male applicants claimed they suffered psychological and emotional violence from their female partners. See also DOMESTIC VIOLENCE ADVOCACY CENTRE, OUR DREAM . . . STOPPING THE VIOLENCE 5-9 (1999) and FAMILY VIOLENCE PROFESSIONAL EDUCATION TASK FORCE, FAMILY VIOLENCE: EVERYBODY’S BUSINESS, SOMEBODY’S LIFE 62-64 (1991) (cataloguing the following as constituting domestic violence: emotional and or psychological abuse, economical abuse, spiritual abuse, stalking, threats of violence, financial abuse, social intimidation and harassment).

⁷⁶ (2001) M.R.T.A. 4453.

⁷⁷ *Id.* at 8.

⁷⁸ *Id.* at 5-6.

⁷⁹ *Id.* at 5.

contracting a sexually transmitted disease, which subsequently led to emotional and psychological distress.⁸⁰ Two experts, a clinical psychologist and general medical practitioner corroborated his evidence.⁸¹ The MRT expounded the meaning of domestic violence by cataloging examples of how domestic violence can be perpetrated.⁸² In the words of the Member: "Domestic violence is an abuse of power. It is the [course of conduct of] domination, coercion, intimidation . . . victimization, [belittling, frightening or similar conduct] of one person by another by physical, sexual or emotional means within intimate relationships."⁸³

A more authoritative view comes from the Federal Court in *Malik v. Minister for Immigration & Multicultural Affairs*.⁸⁴ In *Malik* the nominated spouse applied for a permanent visa after his marriage collapsed.⁸⁵ Judge Wilcox, after acknowledging the Regulations' failure to define the term "domestic violence", argued that "it is reasonable to accept that the term may cover cases where the damage suffered by an applicant is not physical."⁸⁶

More significantly, Judge Wilcox drew from Division 1.5, coining a hybrid definition of the term "domestic violence":

"Domestic violence" is conduct against the victim, usually a course of conduct, that causes the victim to have fear or apprehension about her or his personal well-being or safety. It is not sufficient that there be a conduct which has had the effect of causing diminution of a person's feeling of well-being. There must be conduct, of one party towards the other, which has the consequence of causing fear or apprehension.⁸⁷

This view has been subsequently affirmed.⁸⁸ It is also important to realize that by focusing on the victim, and thus setting a subjective test,⁸⁹ Judge Wilcox was reiterating Regulation 1.23(2)(b).⁹⁰

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 14.

⁸³ *Id.*

⁸⁴ (2000) F.C.R. 291.

⁸⁵ *Id.* at 1.

⁸⁶ *Id.* at 3.

⁸⁷ *Id.*

⁸⁸ See e.g., *Reggie*, (2001) M.R.T.A. 4453; *Olivera Malek* (2001) M.R.T.A. 247; *Meroka v. Minister for Immigration and Multicultural Affairs* (2002) 117 F.C.R. 251.

⁸⁹ The question courts ask is whether a "victim" has become fearful or apprehensive because of the violence committed.

However, not all Federal Court judges have taken such a broad view. Some have opted for a narrower view requiring the physical violence element to prove a domestic violence claim.⁹¹ In *Doan*, Judge Lindgren argued in disposing of the application:

It is true that the words “domestic violence,” as they occur in the letter . . . from [Mr. Doan’s solicitors] to the MRT, but in view of the fact that the Mr Doan’s statement did not refer to any physical violence, I think the MRT was entitled to treat the expression “domestic violence” . . . as referring to a sustained emotional affront done to their client by the Nominator. This construction is consistent with other material placed before the MRT on behalf of Mr. Doan by his solicitors that referred to “torture and humiliation” material, “agony” and “sadistic plan” in contexts which are clearly attempts to express indignation over the treatment that Doan received, rather than physical violence.⁹²

These decisions, from a single Federal Court judge, thus leave the issue unsettled, until a Full Federal Court or High Court resolves it. I express further sentiments on the issue in Part IV.

b. Evidence, Experts and Expert Evidence

Pursuant to the Regulations, a victim’s evidence, oral and documentary, is per se insufficient to prove a domestic violence claim.⁹³ Evidence must be corroborated by the oral testimony and statutory declaration⁹⁴ of at least two experts.⁹⁵ While the Regulations refer to these experts as “competent persons,” a complete “evidence dossier” should

⁹⁰ According to this regulation, “relevant domestic violence” is “violence committed against the alleged victim or his or her property that causes the alleged victim or a member of [his or her] family, to fear for, or to be apprehensive about, [his or her] personal well-being or safety.” Migration Regulations, 1994, Reg. 1.23(2)(b) (Austl.).

⁹¹ See e.g., *Doan v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 909, LEXIS 319.

⁹² *Id.* at *12.

⁹³ Regulation 1.25 requires a statutory declaration to be adduced by an alleged victim, or a person alleging that another person has suffered domestic violence. Migration Regulations, 1994, Reg. 1.25 (Austl.). Subsections (2) and (3) outline the contents of a statutory declaration, including full names and relationship between the victim and perpetrator, the allegation, and supporting evidence. *Id.*

⁹⁴ Regulation 1.24(1)(a)(ii) prescribes other alternative forms of secondary documentary evidence: court orders and police records. *Id.*

⁹⁵ *Id.* Reg. 1.24(1)(b).

contain three statutory declarations: one drawn by the victim and two by competent persons.⁹⁶ A victim may also be required to submit “a copy of a record of the alleged assault[s] committed” on their person or property⁹⁷ by the perpetrator. There is a further requirement that the record should be “a record kept by a police service”⁹⁸ in their ordinary course of business. This seeks to guard against doctored police records.

c. *Defining “Competent Persons”*

Regulation 1.21(1)(a) and (b) specify two situations in which a competent person may be called upon to adduce evidence: where the victim is a child⁹⁹ and where the victim is an adult.¹⁰⁰ The same persons who are eligible to adduce evidence under the adult category qualify equally in cases where the victim is a child.¹⁰¹ However, the child category goes a step further in introducing “an officer of the child welfare or child protection authorities” as an optional expert.¹⁰² Both situations draw their competent persons from medical and social welfare fields, which suggests that domestic violence victims require some medical and/or social welfare assistance and expertise, not only to prove their claims, but also to get them back on track. For both classes Regulation 1.21(1)(a) and (b) provide five categories of persons who are competent: registered medical practitioners, psychologists, nurses, social workers, and court counselors. Further, Regulation, 1.21(2) provides for an additional “competent officer”, for example:

- (a) manager or coordinator of:
 - (i) a women’s refuge; or
 - (ii) a crisis and counseling service that specializes in domestic violence; or
- (b) a position with:
 - (i) a decision-making responsibility for:
 - (A) a women’s refuge; or

⁹⁶ *Id.*

⁹⁷ Regulation 1.23(2)(b) divides the objects of domestic violence into two categories: the alleged victim and his or her property.

⁹⁸ *Id.* Reg. 1.24.

⁹⁹ *Id.* Reg. 1.21(1)(b)(i) and (ii). In Australia, a person below sixteen years of age is a child or a minor for many legal purposes. See e.g., Children and Young Persons (Care and Protection) Act, 1998, § 3 (Austl.); Child Protection Act, 1974, § 2 (Austl.); and Children and Young Persons Act, 1989, § 3 (Austl.).

¹⁰⁰ Migration Regulations, 1994, Reg. 1.21 (1)(a)(i)-(vi).

¹⁰¹ *Id.* Reg. 1.21(1)(b)(i) (stating that “a person referred to in [Regulation 1.21 (1)](a)” is a competent person in relation to “domestic violence committed against a child”).

¹⁰² *Id.* Reg. 1.21(1)(b)(ii).

- (B) a crisis and counseling service that specializes 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 counseling service.

d. *Tendering "Competent" Evidence*

Under the Regulations, the accepted mode of tendering expert evidence is through statutory declaration.¹⁰³ Generally, statutory declarations are in writing and involve the declarer swearing that the stated information is correct to the best of his/her knowledge and truly represents the facts.¹⁰⁴ Since proving a domestic violence claim requires at least three witnesses, it follows that at any one time there will be three statutory declarations: one from the victim and two others from competent persons. The victim or a "person who alleges that another is the victim of relevant domestic violence,"¹⁰⁵ may make a "victim" declaration.¹⁰⁶ This differs from a "competent person" declaration, which cannot be delegated to a third party.¹⁰⁷ Notwithstanding this distinction, statutory declarations are similar in content—they must name the alleged perpetrator, set out the allegation, and outline the evidence on which it is based.¹⁰⁸ Further, Regulation 1.25(3) recognizes that in certain instances a victim, for one reason or another, intentionally or otherwise, is unable to swear to a statutory declaration.¹⁰⁹ Consequently, persons who make "delegated" declarations should not only state their full names, but also specify the existing relationship between themselves and the victim.¹¹⁰ Reasons for one's inability to make a declaration range from age (minors to very old persons) and health, to cultural beliefs and values that consider domestic violence a private issue

¹⁰³ *Id.* Reg. 1.24(1).

¹⁰⁴ See *Greech v. Bird* (1936) 56 C.L.R. 228, 243-44. See also Statutory Declarations Act, 1959, § 8 (Austl.).

¹⁰⁵ Migration Regulations, 1994, Reg. 1.25(3).

¹⁰⁶ *Id.* Reg. 1.25(1).

¹⁰⁷ *Id.* Reg. 1.26 (stating that such a Statutory Regulation "must be made by a competent person") (emphasis added).

¹⁰⁸ *Id.* Regs. 1.25(3) and 1.26.

¹⁰⁹ Thus, the Regulation permits "Statutory Declarations . . . made by a person who alleges that another person is the victim of relevant domestic violence." *Id.* Reg. 1.25(3).

¹¹⁰ *Id.* Reg. 1.25(3)(a) and (c).

that should not be publicly exposed.¹¹¹ For such cases, a third party may swear a declaration on behalf of the victim.

Considering the nature of domestic violence, victims would ordinarily be comfortable sharing their experience with a close friend or relative, rather than a complete stranger. This assumption may indicate that declarations made by persons who do not have a close relationship with the victim are less likely to be admitted in evidence. As for statutory declarations made by competent persons, in addition to the normal requirements, Regulation 1.26(c) requires that a competent person “must state that, in [his or her] opinion,” the alleged victim suffered domestic violence. To date, the Federal Court remains split on whether failure to state that the person suffered domestic violence annuls a statutory declaration.¹¹²

III. ANALYSIS: SOME “GAPS” IN THE CURRENT LEGAL FRAMEWORK

The current legal framework suffers from at least five shortcomings. First, the Migration Act and its Regulations have failed to concretely define “domestic violence.” Although the Federal Court is divided on whether physical violence must be present to prove a domestic claim, it has nonetheless created a working definition. Secondly, MRT members and federal court judges have remained insensitive to cultural practices that condone what would otherwise amount to domestic violence. This is especially true with spouses who come from African and Asian countries. Overall, such failure might prejudice an individual’s case. Related to the cultural argument is the third shortcoming, which are the day to day realities for immigrant spouses. Normally immigrants rely on their spouses for economic, social and emotional support. Thus, when an individual falls into the hands of an abusive spouse they might not know where to file a complaint. Fourth, notwithstanding the puzzle that immigration law is by itself, some courts and immigration tribunals have pursued procedure at the expense of substance. Finally, the law puts fiancées in the awkward position of stating that any abuse suffered before the marriage is insufficient to trigger the domestic violence provisions.

¹¹¹ Bozic, for instance, testified that he was “ashamed to ask for help or tell people of the” suffering he had undergone. *Miran Bozic* (2002) M.R.T.A. 244, at 4. Similarly, Doan, despite having found his wife in the midst of adultery, was reluctant to discuss the event with anyone, instead seeing it as a “private problem.” *Doan v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 909, LEXIS 319, at *12.

¹¹² See discussion *infra* Part IV(d).

A. Defining "Domestic Violence"

The discussion above focused on the definition of "domestic violence" through the prism of immigration law. Regulation 1.21(1) defines the word "violence" in simple inclusive terms to "include a threat of violence." Although this description might not appear very helpful on its face, it is prudent to consider that perhaps the legislature intended the word "violence" to have the same meaning it has in ordinary usage. So for immigration purposes, it is not only in instances of actual violence that the Regulations apply, but threats of violence may also trigger application of the Regulations as well. Be that as it may, Regulation 1.23(2)(b) deserves mention when discussing definitions. Sub regulation 2 is an explanatory note to sub regulation (1)(g), describing one of the instances when a person is determined to have suffered domestic violence. Of central importance is Paragraph 2(b), defining "relevant domestic violence." However, this paragraph is not contained within the general interpretation provisions, which raises questions about whether it is intended to play a broad definitional role.¹¹³ If the legislature so intended, then it would have been better to place it under the "interpretation" section of Division 1.5.¹¹⁴

"[R]elevant domestic violence" is defined as "violence against the alleged victim or his or her property that causes [him or her], or a member of the victim's family to fear for, or to be apprehensive about, the victim's personal well-being or safety."¹¹⁵ Three issues arise from this descriptive definition. First, by putting a victim's property on par with his or her life, the Regulations recognize the important role property plays in human life. Since we live in a capitalistic world, there are certain instances where victims may suffer equally from threats or acts of violence committed against their property, real and personal, as they would if their lives were targeted. Similarly, the Regulation references members of a victim's family. This derives from the assumption that threats or actual violence against a family member would have the same impact as if the victim him/herself were personally targeted. Finally, the Regulation prescribes a subjective test to be used in determining whether or not domestic violence has occurred.¹¹⁶

¹¹³ In this case, Regulation 1.21 of the Migration Regulations, titled "Interpretation," is the Interpretation part of provisions relating to domestic violence. Migration Regulations, 1994, Reg. 1.21 (Austl.). Defined under it are the following terms: competent person, statutory declaration and violence. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* Reg. 1.25(2)(b).

¹¹⁶ It is important to bear in mind that this evidence needs to be corroborated by at least two competent persons, who must conclude—on probative evidence—that domestic violence has occurred,

The focus is on the alleged victim or a member of his or her family. The central question to be asked is: did the actual violence, or threats, cause the victim or a member of his or her family to be fearful or apprehensive about his or her personal life, well-being, safety and/or property?

Regulation 1.23(1)(b) requires that “another person (the alleged perpetrator)” personally cause threats or violence to the alleged victim. This provision may be interpreted in a restrictive or liberal way. Under a restrictive approach, the perpetrator must act in person or this provision does not apply. On one hand, liberal critics might argue that the act of the agent who is directed to commit the violent act is attributed to the principal, as long as the principal/agent relationship can be established.¹¹⁷ For practical purposes, the liberal view makes more sense.¹¹⁸ Otherwise, Immigration Law would be much harsher than other areas of law. Courts and immigration tribunals should take the broader view if this issue becomes the subject of litigation.

As mentioned before, the Federal Court is divided on whether physical violence is a necessary component in a domestic violence claim. Notwithstanding this, judges such as Judge Wilcox in *Malik*,¹¹⁹ have attempted to formulate an appropriate working definition of “domestic violence” as “[a course of] conduct against the victim, . . . that causes [him or her] to have fear or apprehension about her or his personal well-being or safety.”¹²⁰

Similarly, Tribunal Member Butt in *Reggie*, after defining domestic violence simply as “an abuse of power,” described the term to mean “[the course of conduct of] domination, coercion, intimidation and victimisation of one person by another by physical, sexual or emotional means within intimate relationships.”¹²¹

effectively importing objectivity into the test. See also *Meroka v. Minister for Immigration and Multicultural Affairs* (2002) 117 F.C.R. 251.

¹¹⁷ A principal-agent relationship is a relationship involving authority or capacity in one person (the agent) to create or affect legal relations between another person (the principal) and third parties. *Int'l Harvester Co. of Australia Pty. Ltd. v. Carrigan's Hazeldene Pastoral Co.* (1958) 100 C.L.R. 644. The relationship is created either by the express or implied agreement of principal and agent, by the subsequent ratification by the principal of the agent's acts done on behalf of the principal, by operation of law, pursuant to statute, or by estoppel under the doctrine apparent (or ostensible) authority. See BUTTERWORTHS CONCISE AUSTRALIAN LEGAL DICTIONARY, *supra* note 71, at 17.

¹¹⁸ See also Domestic Violence (Family Protection) Act, 1989, § 11(2) (Austl.) (recognizing this reality, by stating that in claims of domestic violence “a spouse need not personally commit the act or threaten to commit it”).

¹¹⁹ *Malik v. Minister for Immigration and Multicultural Affairs* (2000) F.C.R. 291.

¹²⁰ *Id.* at 3.

¹²¹ *Leslie Alden Reggie* (2001) M.R.T.A. 4453, at 14.

B. *Conflicting Cultural Values and Beliefs*

In African¹²² and Asian¹²³ cultures, wife beating or chastising remains an accepted practice. In Africa, for instance, men dominate the household.¹²⁴ They cannot be challenged or questioned.¹²⁵ Women are

¹²² NAWAL EL SAADAWI, *WOMEN AT POINT ZERO* (1994) is a story about Firdaus, a woman the Egyptian female author met in prison. Firdaus describes the suffering she underwent in the hands of her husband:

On one occasion [my husband] hit me all over with his shoe. My face and body became swollen and all bruised. So I left the house and went to my uncle. But *my uncle told me that all husbands beat their wives, and my uncle's wife added that her husband often beat her*. I said my husband was a respected Sheikh, could not possibly be in the habit of beating his wife. She replied that it is men well versed with religion who beat up their wives. The precepts of religion permitted such punishment. A virtuous woman was not supposed to complain about her husband.

Id. at 44 (emphasis added). See ADEOLA JAMES, *IN THEIR OWN VOICES: AFRICAN WOMEN WRITERS TALK* (Adeola James ed., 1991), for a compilation of interviews between the Editor and selected African women writers. In an interview with Buchi Emecheta, a prolific female Nigerian Writer, Emecheta, argues: "The good woman, in Achebe's portrayal, is the one who kneels down and drinks the dregs after her husband. In the *Arrow if God* when the husband is beating the wife, the other women stand around saying, 'It's enough, it's enough.'" *Id.* at 42.

¹²³ See AMINA MAMA, *THE HIDDEN STRUGGLE: STATUTORY AND VOLUNTARY SECTOR RESPONSES TO VIOLENCE AGAINST BLACK WOMEN IN THE HOME* 63-64 (1989). At Amina Mama's interview with Sangita, a 22-year old Asian woman married and living with her husband in Britain, Sangita describes her husband's character three months after they were married:

He used to kick me, punch me—he used to throw me about the room. He used to pull my hair to pieces. . . . No broken bones, but I've had black eyes and I've got scars, loads of scars to prove, because he used to have quite long nails—he'd just grab hold of me and the skin would sort of come away. . . . When I refused to have sex with him, he'd say to me—Are you sleeping with another person? You must be. He was so suspicious. He'd often say to me—You must be sleeping with other men. And he'd sort of force himself on me. . . . Yes, it was very painful.

Id. Smita, a Pakistani, describes the violence she underwent in the hands of her Pakistani husband, to include:

Kicking, pushing, threats of using a knife. He pushed me against the radiator once—he would push me against hard objects. Punching and kicking. I actually ran out of the house and my nose was bleeding. . . . When I was six months pregnant he pushed me down the stairs. And then he wasn't around when I'd had the baby. There was no caring in him at all; there was no love, there was no care.

Id. at 65.

¹²⁴ MAMA, *supra* note 123, at 81. At Mama's interview conducted with Iyamide, Iyamide claims the following of the African male: "You know African men—they think you are a slave. Especially when they are older than you. They want to make their power over you." *Id.* Patience, a Nigerian, describes her plight, in the hands of her African husband:

Last Easter he took me and stripped me in front of his friends. He was beating me, punching me and pushing me about. I had come in from the kitchen because I heard him

considered subordinate to their husbands.¹²⁶ Any attempt to defy the husband's authority is punished,¹²⁷ while any kind of reliance on a woman

saying some nasty things in front of his friends trying to be funny by making fun of me. So I came out from the kitchen and I told him he would regret the things he was doing. As I was going out he started rough-handling me—shouting and pushing me. As he was doing all that my zip had come down, and my breast was coming out—I didn't even notice—I was busy trying to restrain things so as not to display anything to those people. He started slapping my breast and shouting "Cover yourself!" All in front of his friend and the wife, while they were looking on.

Id. at 83. Zubeda Dangor describes the traditional status of women in Africa:

Men are perceived as the head of the household: "Society gives power and condones their behavior and our parents encourage men to be superiors." Women are taught to be submissive to males. A woman "has to always please her man. Her role is that of mother and wife only. The man is given more decision-making responsibilities."

Zubeda Dangor et al., 4 WOMEN ABUSE IN SOUTH AFRICA: AN EXPLANATORY STUDY 6 (1998).

¹²⁵ See Saud Ibrahim Abdi, *Religious and Cultural Laws Used to Deny Women Their Rights*, in HEINRICH BOELL FOUNDATION, GENDER GAPS IN OUR CONSTITUTIONS: WOMEN'S CONCERNS IN SELECTED AFRICAN COUNTRIES (2002). Abdi quotes Suzanne Jambo, of the New Sudanese Indigenous NGOs Network, affirming that: "[a Southern Sudanese woman] is a wife for whom dowry/bride price was paid and therefore who has no voice in her matrimonial home. She is a silent partner that endures so much without complaints for divorce is a taboo." *Id.* at 61.

¹²⁶ See JAMES, *supra* note 122, at 29 (discussing an interview with Zaynab Alkali, a Nigerian female author and University Lecturer). Paradoxically, Alkali attributes her inspiration for writing to: "[T]he general attitude of the society towards the female, commonly referred to as the 'weaker sex.' I am irked by the fact that most women have been trained to see themselves as 'weak' and 'incapable' of attaining the highest peak of intellectual development." See also JAMES, *supra* note 122, at 35-36 (discussing an interview with a prolific female Nigerian Writer, Emcheta). Emcheta argues:

[H]alf of my novels the problem rests with the women. They are so busy bitching about one another, they even say the women are acting just as is expected. But when you deal with foreign women . . . all you have is to give a talk and they appreciate you and express solidarity with you. But it isn't so in our own country. The usual reaction "So she has written a book? I know who did it for her, [her husband]."

Id. Similarly, at an interview with Ellen Kuzwayo a South African writer, Kuzwayo explains the plight of an African woman:

I have every reason to believe that every woman, every black woman, particularly in Africa, is fully aware of [the double ill fate suffered by a black South African woman]. . . . We've always been stereotyped and I think it is this stereotyping that had given the black woman an extra burden, as a black and as a woman.

Id. at 55. Finally, at an interview with Asenath Odago, a Kenyan play wright, Odago admits:

I am fortunate, . . . that when I got married my husband never tried to put me down, he always allowed me [to put my best effort forward in everything I did]. I say 'allowed' because in our society if a husband is against your progress you cannot get anywhere to develop as a person.

Id. at 124.

equals "wife control," which is equated with weakness.¹²⁸ Notwithstanding westernized influences, these cultural practices still exist.¹²⁹ What may otherwise appear to be domestic violence in the eyes of the westernized world, remains an "internal matter."¹³⁰ Such matters are only exposed in extreme cases, for instance, where life or limb is threatened. Even then, only adult male members of the extended family are eligible to adjudicate them. Discussing such matters with outsiders is considered taboo.¹³¹

Since these cultural values and beliefs are not easy to shed, foreign spouses often carry them into their marriages and interpersonal relationship with Australians.¹³² Precedents such as *Reggie*, *Doan*, *Meroka*, *Kaur Manjeet*¹³³ and *Bozic* demonstrate how cultural practices and beliefs prohibit the reporting of acts that would otherwise be considered "domestic

¹²⁷ Dangor, *supra* note 124, at 4 (arguing that: "[African] men who abuse their partners design and implement power and control tactics over their victims with the intention of keeping them in their place (i.e., the traditionally subordinate position of wives in the institution of marriage . . .)").

¹²⁸ In South Sudanese Communities, "[a]uthority, decision making and control is in the hands of the man as being the father and . . . head of the family." Abdi, *supra* note 125, at 64. See also MINEKE SCHIPPER, SOURCE OF ALL EVIL: AFRICAN PROVERBS AND SAYINGS ON WOMEN (1991), at 86-90 (quoting some African proverbs depicting male-female power play in African families). For instance, "Woman's intelligence is like that of a child." (Benin, Senegal, West Africa); "A woman and an invalid man are the same thing." (Gikuyu, Kenya); "A woman is like a goat: she is tethered where the thistles grow." (Rwanda, Rwanda); "If a man is not obeyed by his wife, he must beat her thwack!" (Swahili, East Africa); "The arrogant woman is controlled by strokes." (Rundi, Burundi; Rwanda, Rwanda); "Women have no mouth." (Beti, Cameroon); "No woman is called upon to speak." (Rwanda, Rwanda); "A woman in trousers? What is dangling inside?" (Fon, Benin); "A wife is a piece of cloth; beat it and cover it at the same time." (Mongo, Zaire); "Never marry a woman with bigger feet than your own." (Sena, Malawi/Mozambique); "Only a shameful woman takes her husband to court." (Ganda, Uganda); "Beat your wife regularly; if you don't know why, she will." (West Africa, possibly of Arab origin). *Id.*

¹²⁹ For an excellent discussion of instances where culture prohibits immigrants from reporting instances of what would otherwise constitute domestic violence, see Jae Yop Kim & Ky-taik Sung, *Conjugal Violence in Korean American Families: A Residue of the Cultural Tradition* 15 J. OF FAMILY VIOLENCE 331 (2000) (focusing on Korean American families); and Rhea V. Almeida & Ken Dolan-Delvecchio, *Addressing Culture in Batterers Intervention: The Asian Indian Community As An Illustrative Example*, 5 VIOLENCE AGAINST WOMEN 654 (1999).

¹³⁰ *Doan v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 909; Leslie Alden *Reggie* (2001) M.R.T.A. 4453; and *Miran Bozic* (2002) M.R.T.A. 244.

¹³¹ Abdi, *supra* note 125, at 54, puts the picture in perspective:

It is considered taboo [in Somaliland] to discuss family matters outside the house and only family members get involved in solving disputes that arise between husband and wife. On the other hand, society believes that the husband has a right to discipline his wife and domestic violence is seen as a disciplinary act, and not an abuse. *There are hardly any cases taken to court.*

(Emphasis added)

¹³² See e.g., *Reggie* (2001) M.R.T.A. 4453; *Doan*, (2000) F.C.A. 909; *Meroka*, (2002) 117 F.C.R. 251; *Kaur Manjeet* (2001) M.R.T.A. 2657; and *Bozic*, (2002) M.R.T.A. 244.

¹³³ (2001) M.R.T.A. 2657.

violence". In *Kaur*, for instance, the visa applicant, an Indian national, stated in testimony that:

[W]hen she spoke with her friends and family in native language, [the Australia permanent resident husband] got upset, started banging doors and . . . throwing things. [H]e would not discuss their problems. [T]he sponsor left their house in March 1999 and she went after him because she was afraid of the breakdown of [her second] marriage, [which] her family had objected to . . . because of the racial, religious and cultural differences. [S]he married the sponsor because she thought that he would have been open-minded and would take her first son as his own. [S]he did not go to domestic violence and other agencies for assistance as they were strangers. [H]er cultural background inhibited her in taking formal action against the sponsor as she considered this would be disloyal and she wanted try to make her marriage work.¹³⁴

Two other witnesses who testified, Mr. Gulshan Bedi (the applicant's brother) and Ms. Sunani Gupta (a friend) corroborated this evidence.¹³⁵ Reporting her husband's behavior, according to Mr. Bedi, would be considered "culturally inappropriate,"¹³⁶ while Ms. Gupta described it as "inimical to Indian culture."¹³⁷ Similar situations are replicated in *Reggie*¹³⁸ and *Bozic*.¹³⁹ In *Reggie* the visa applicant, a Malaysian national, did not seek external assistance because of the "humiliation and shame"¹⁴⁰ he would otherwise have suffered.¹⁴¹ *Bozic* admitted that he was "ashamed to ask for help or tell people"¹⁴² of the abuse he suffered from his wife.¹⁴³

The *Doan*¹⁴⁴ and *Meroka*¹⁴⁵ cases also emphasize this phenomenon. In *Meroka* the visa applicant, a Kenyan national formerly married to an Australian citizen, explained his plight as:

¹³⁴ *Id.* at 4.

¹³⁵ *Id.*

¹³⁶ *Id.* at 5.

¹³⁷ *Id.*

¹³⁸ *Reggie* (2001) M.R.T.A. 4453.

¹³⁹ *Miran Bozic* (2002) M.R.T.A. 244.

¹⁴⁰ *Reggie*, (2001) M.R.T.A. 4453, at 14.

¹⁴¹ *Id.* According to the general medical practitioner who examined him, Dr. White: "[Reggie] consulted him on 13 September 2001 and stated that 'he has had a fear of having contracted a sexually transmitted disease but humiliation and shame prevented him from seeking any assistance. . . ." *Id.*

¹⁴² *Bozic* (2002) M.R.T.A. 244, at 4.

¹⁴³ *Id.*

¹⁴⁴ *Doan v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 909, LEXIS 319.

continuously being harassed, constantly being yelled at & derogative statements given—e.g. you black bastard “you’re lucky to have married me,” social isolation—turning the phone off, unable to speak to colleagues, work [mates] or university lecturers, removing items, time restrictions example time given hours documented on white board placing hours, if he was late would be questioned where have you been were you talking to women etc. monitoring where about requiring to explain himself every minute of the day, continuously questioning do you need that, no you don’t . . . get out of the kitchen, I’ll cook, I’m not eating that, did you have TV in Kenya—your watching this, . . . you will attend [this] function, I will tell you who is suitable for you to speak to, your job—open the car doors, working a double shift [and] driving [me] home as stated its your job¹⁴⁶

Indeed the humiliation and shame resulting from such words makes it quite difficult to come out to seek assistance, even from fellow Africans. Likewise, Mr. Doan, a Vietnam Citizen, despite having found his wife in the midst of adultery, was reluctant to discuss the event with anyone.¹⁴⁷ Instead, he saw it as a “private problem”¹⁴⁸ that ought to be solved domestically.¹⁴⁹

¹⁴⁵ *Meroka v. Minister for Immigration and Multicultural Affairs* (2002) 117 F.C.R. 251.

¹⁴⁶ *Id.* at 7.

¹⁴⁷ *Doan*, (2000) F.C.A. 909, LEXIS 319, at *12. After finding his wife in the midst of adultery, Mr. Doan states:

When I was calm down I understood that I could not make a murder, so I did not do anything because of the conscience of man. But who could think for my circumstance at that time. What should I do? Calling the police to do what? I knew that it was our private problem. So I did not do anything but I asked my wife why she did like that. She kept quiet.

Id.

¹⁴⁸ *Id.*

¹⁴⁹ Mr. Doan further testified:

I knew that it was our private problem. So I did not do anything but I asked my wife why she did like that. She kept quiet. . . . For two weeks I tried to stay in the house, I was hoping she would wake up and save our marriage. But she just did not care about me at all.

Id. Similarly, Mrs. Kaur testified that she did not go to domestic violence or other like agencies for assistance because they were “strangers.” *Kaur Manjeet* (2001) M.R.T.A. 2657, at *6. Her desire was to make the marriage “work.” *Id.*

Not until his wife kicked him out of their matrimonial house and he was in need of a place to stay was he forced to explain the circumstances to his best friend.¹⁵⁰

Although in all the cases, save for *Doan* where the applicants succeeded on the respective points of law they raised, failure to report instances of abuse is likely to prejudice a victim's case.¹⁵¹ If a spouse was really abused, why did he or she not report it immediately? This is precisely the question a culturally insensitive decision-maker would pose. This form of questioning disregards cultural barriers and beliefs. To avoid occasioning injustice, judicial practice requires judges and tribunal members to be sensitive to these factors when writing decisions. While it is a futile to catalogue these many cultural values and beliefs, courts and tribunals need to be made aware of and consider this evidence as a starting point.

C. *The Effects of Fear of a Foreign Land and the General Lack of Information on Domestic Violence Claims*

Cultural barriers are augmented by a non-Australian spouse's fear of being in a foreign land.¹⁵² Immigrating to a foreign country is not an easy task. After separation from the family comfort zone, an immigrant may be required to change his or her life substantially and adopt a new one. Changes include making new friends, learning a new language and mannerisms, and adapting to the food, transport system, and weather, among other things.¹⁵³ Adapting to life in Australia as an immigrant spouse has recently become more complicated because anti-immigrant sentiment has become more pervasive.¹⁵⁴ Africa, in contrast, has an "open door and open

¹⁵⁰ Mr. Doan testifying that "she [Mrs. Doan] throw my clothing out of my room and told me to go." *Doan* (2000) F.C.A. 909, LEXIS 319, at *20.

¹⁵¹ E.g., *id.*

¹⁵² See *infra* and accompany text to note 153.

¹⁵³ Uma Narayan, "Male-Order" Brides: *Immigrant Women, Domestic Violence, and Immigration Law*, in PATRICE DIQUINZO & IRIS MARION YOUNG, *FEMINIST ETHICS AND SOCIAL POLICY* 143 (Patrice Diquinzo & Marion Young eds., 1997) concurs:

The experience of immigration is often a difficult one for both men and women, involving moving great distances from the familiar contexts of one's homeland to the rigors of life in a foreign country, where they face not only the disempowering familiarities of the new context, but also prejudice and discrimination.

¹⁵⁴ *Victorian Council for Civil Liberties Incorporated v. Minister for Immigration and Multicultural Affairs* (2001) F.C.A. 1297 (Sept. 11, 2001). The "*Tampa*" case as it is popularly referred, is a classic case demonstrating the general attitude of Australians towards refugees, a specific category of migrants. The *Tampa* saga refers to the problem of unauthorized boat arrivals, which began in August 2001 with Australia's refusal to accept over 433 people rescued at sea by a Norwegian registered container ship, MV

heart policy.”¹⁵⁵ Since society in Australia is more closed to immigrants in general, partners from the developing world may become wholly dependent on their sponsors or nominators, not only for financial support, but social and psychological support as well.¹⁵⁶

The lack of material and emotional support to immigrants in Australia may exacerbate situations of domestic violence. For example, a sponsoring or nominating spouse could threaten to withdraw sponsorship unless his or her spouse subordinates themselves.¹⁵⁷ In fact, one of the reasons that a body of jurisprudence is developing in this area is because some threats have been actualized and the nomination or sponsorship withdrawn.¹⁵⁸ This leaves

Tampa. Subsequently, a standoff ensued between Australia and Norway, the former insisting the “rescues” be returned to Indonesia—their original port of departure, while the latter argued that Australia had a moral obligation to take them in. Australia, after all, was where the rescuees indicated they wished to go in order to seek asylum as refugees. While public interest litigants—among them the Victorian Council for Civil Liberties Incorporated and the Human Rights and Equal Opportunities Commission—brought proceedings against the Government, the standoff was resolved at an international level, via what has become known as the “Pacific Solution.” Under the “Pacific Solution,” they are instead trans-shipped to neighbouring Pacific States such as Nauru and Papua New Guinea, for processing. Canberra argues that measures such as this will deter illegal migrants or “queue jumpers.” See also *Minister for Immigration and Multicultural Affairs and Others v. Victorian Council for Civil Liberties Incorporated and Others* (2001) F.C.A. 1329 (Sept. 18, 2001); and the final appeal to the High Court: *Minister for Immigration and Multicultural Affairs and Others v. Victorian Council for Civil Liberties Incorporated and Others* (2001) F.C.A. 1865 (Dec. 21, 2001).

¹⁵⁵ Chris J. Bakweshaga, in HOWARD ADELMAN & JOHN SORENSON, *AFRICAN REFUGEES: DEVELOPMENT AND REPATRIATION* 3 (1994). Though describing the situation in traditional African societies, the same words to a large extent apply today:

In traditional [African] societies, where regional or national frontiers were changeable, some asylum seekers who crossed into neighboring regions or countries were welcomed by kin. Assistance given to them was informal and unpublicized. Available resources were shared equitably between asylum seekers and host communities, and a few distinctions were made between them.

Id. Corrina Reinke argues that this custom is somewhat diluted as African Nations are “stretched beyond [their] limit when thousands or hundreds of thousands of refugees arrive.” Corrina Reinke, *The African Refugee Problem: Social, Political and Legal Aspects*, in 13 *INSTITUTE OF PUBLIC INTERNATIONAL LAW AND INTERNATIONAL RELATIONS OF THESSALONIKI, THE REFUGEE PROBLEM ON UNIVERSAL, REGIONAL AND NATIONAL LEVEL* 873, 874 (1987).

¹⁵⁶ The level of dependency may be less in major towns and cities that have a variety of entertainment and social options, than in small or country towns. Narayan, *supra* note 153, at 145 (attributing heightened vulnerability of abuse among immigrant women to “dependent immigration status” especially “economically, psychologically and linguistically”). See generally, Christopher J. Bakwesegha, *Forced Migration in Africa the OAU Convention*, in *AFRICAN REFUGEES: DEVELOPMENT AID AND REPATRIATION* (H. Adelman, & J. Sorenson, eds. 1994).

¹⁵⁷ Meroka’s wife, for instance, made threats to have him deported. *Meroka v. Minister for Immigration and Multicultural Affairs* (2002) F.C.A. 482, at 5.

¹⁵⁸ E.g., *Doan v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 909, LEXIS 319, at *9; *Miran Bozic* (2002) M.R.T.A. 244, at 3; *Leslie Alden Reggie* (2001) M.R.T.A. 4453, at 5; *Malik v. Minister for Immigration and Multicultural Affairs* (2000) F.C.R. 291; and *Olivera Malek* (2001) M.R.T.A. 247.

the nominated or sponsored spouse in fear of deportation. Nor do some spouses possess skills or qualifications recognized by the Australian labor market or speak English.¹⁵⁹ In addition, because immigrants generally lack the necessary social network, they may encounter difficulty finding even part-time employment, especially where the nominator or sponsor is reluctant to help them do so.

These problems are made worse where the applicant falls into an abusive relationship. In addition to cultural barriers and general ignorance of their rights, victims might not even know where to lodge a complaint. Victims may become frustrated and reluctant to pursue the matter, and may fear being branded a “pest” by the foreign authorities. To illustrate this point are the words of a woman who suffered domestic violence at the hands of her Australian spouse:

I was still shy, easily frightened and a bit naive when I arrived here. For example, when I ask[ed] him to teach me how to use the washing machine, he would get angry with me. He would shout at me, “You’re stupid; you do not know anything. . . .” If only it was just words; he would complement this with violence. He struck me often on the head with his heavy hands If I ask him to repeat or explain some words, he would scream and slap me on the neck again. He also repeatedly called me a liar. . . . When it came to lovemaking, he would force me to perform obscene acts he saw on video. He treated me like a plaything or animal If I did not agree, he would hit me I lived those days with the fear that he might kill me. I tried everything to placate him. The one thing constant was fear.¹⁶⁰

Where there is a friend or a relative willing to assist an abused individual the trauma suffered is likely to be reduced.¹⁶¹ Because of legal

¹⁵⁹ Narayan succinctly summarizes this position: “Dependent immigration status legally prohibits [spouses] from seeking employment. Many lack fluency in English, a factor that impedes their ability to negotiate the routines of everyday life without the [spouse’s] assistance.” Narayan, *supra* note 155, at 145.

Along the same vein, judging from the English grammatical expressions used when adducing evidence, immigrants such as Mr. Doan might experience difficulties finding employment in Australia. See discussion, *supra*, accompanying notes 147, 149 and 150.

¹⁶⁰ Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, pt. IV.10.12, available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/69/vol11/ALRC69ch10.html> [hereinafter ALRC Report].

¹⁶¹ In *Doan*, (2000) F.C.A. 909, LEXIS 319, at *12 and *Bozic*, (2002) M.R.T.A. 244, at 4 Doan and Bozic were taken in by friends after their spouses kicked them out of the matrimonial home.

complications, the best solution for this problem is policy intervention by the Australian Government. Australian Embassies and Consulates abroad should issue pamphlets or brochures that contain resources and information on domestic violence to spouses and partners wishing to immigrate into Australia.¹⁶²

D. *Insistence on Procedure at the Expense of Substance*

The complexity of Australian immigration law can create a barrier to any immigrant, especially to those being abused. Any understanding of immigration law requires navigating complex legislation. Getting a copy of the Migration Act and its Regulations is not very difficult, but going through its 507 Sections and eight parts can be a tedious exercise. Often, sections must be read with other sections that inevitably reference other subsections and sub-subsections.¹⁶³ The same applies to the Regulations, with further division into paragraphs and subparagraphs.¹⁶⁴ So to understand, for

¹⁶² See *infra* Part IV.

¹⁶³ If a spouse wishes to apply for a permanent visa based on domestic violence grounds, the judicial process begins by, first, lodging his or her application with the Minister's delegate. But preceding this, he or she must read and grasp the following sections of the Migration Act: § 65 (1)(a) and (b) (decision to grant or refuse a visa); § 66 (1)-(5) (notification of decision); § 67 (way visa is granted); § 68 (when visa takes effect); § 69 (effect of compliance or non-compliance); §§ 52-64 (code of procedure for dealing fairly, efficiently and quickly with visa applications); § 501(1)-(12) (refusal or cancellation of visa on character grounds; and § 40(1)-(2) (circumstances for granting visas). Migration Act, 1958 (Austl.). Second, if a spouse is aggrieved by the delegate's decision she or he may appeal to the MRT once they have referred to sections: § 348(1)-(2) and § 349(1)-(4) (MRT's power to review); § 337 (Interpretation section); § 338(1)-(9) (outlining the types of decisions the MRT can review); § 347(1)-(5) (application proper); § 351(1)-(7) (Minister's power to substitute a MRT decision with a favorable decision on "public interest" grounds), and § 349(a) and (b) (Minister's powers to issue a Conclusive certificate affirming a decision from the MRT). Third, if he or she is still dissatisfied he or she may appeal to the Federal Court, which requires a reading of sections: § 475A (jurisdiction of the Federal Court); § 484 (exclusive jurisdiction of the Federal Court); § 474(1)-(5) (Privative clause; this section is important since it distinguishes between decisions that are "final and conclusive", and those that can be "appealed against", "reviewed", "quashed" or "called in question in any court"); § 476(1)-(6) (limiting powers of the Federal Court in relation to Privative clause decisions); § 477(1)-(3) (time limits); and § 478 (persons with capacity to make applications). Finally, the High Court, the final court for a dissatisfied party, which to know and comprehend matters of jurisdiction, requires reading of the following sections of the Judiciary Act 1903: § 20 (appeals from judges of federal jurisdiction); § 35 (appeal from courts of States); § 3 (Interpretation); and § 25 (powers of court to extend to whole Commonwealth); and § 47(V) (original jurisdiction of High Court) of the Australian Constitution.

¹⁶⁴ To illustrate this point, I begin by looking at the Migration Regulations, Table of Provisions, which lead me to Division 1.5, Regulations 1.21-1.27, and titled "Special Provisions relating to domestic violence." Migration Regulations, 1994 (Austl.). Regulation 1.21 (the "Interpretation" Regulation) fails to define "domestic violence." *Id.* Instead, it defines the term "violence" to "include threats of violence." *Id.* Flipping through the pages, I come across into Regulation 1.23, which outlines the elements of a domestic violence claim. *Id.* Subparagraph (2)(b) comes to rescue, albeit introducing a new term: a reference to relevant domestic violence is a reference to violence against the alleged victim or his or her property that

instance, the process of applying for a permanent visa under the domestic violence exception, one must review several parts of the Act and its Regulations. This task is difficult, even for experience counsel. The task may be impossible for an immigrant who may be unaware of the Act's existence, unable to obtain the latest edition, and lacking the skills to follow or understand it.

Unfortunately, some courts and immigration tribunals have adopted the narrow view that a failure to observe any of the myriad statutory requirements is fatal to a visa application, notwithstanding a collapsed marital relationship. In *Thi Lan Du v. Minister for Migration and Multicultural Affairs*,¹⁶⁵ one of the issues before the court was the scope of Regulation 1.26(c), which requires that statutory declarations made by competent persons state the opinion that the alleged victim suffered domestic violence.¹⁶⁶ Declarations from Dr. Tran and Mrs. Knox, a registered Psychologist were offered as evidence. Dr. Tran stated, "Thi Lan Du attended our surgery at Campsie on 21/2/97 with multiple bruises which were allegedly caused by domestic violence (assaulted by husband)."¹⁶⁷ In summary and recommendation Mrs. Knox stated, "[Du] certainly expressed sentiments and a psychological condition that was consistent with an individual who has suffered from domestic violence and a marital breakdown."¹⁶⁸

After acknowledging this evidence Judge Mathews argued:

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. *Id.*

But is this what Parliament intended the definition of "domestic violence" to be; or is an individual left to infer that "relevant domestic violence" means the same as "domestic violence"? No other Regulation, in Division 1.5 or otherwise, attempts to define the term. Although I am left wondering, my legal mind tells me that it is possible to find a working definition from other sources such as other related legislation (for examples, see *infra* note 187), judicial precedents, or a Law Dictionary. But the question is would a layman think likewise? Domestic violence claims should be proved by statutory declarations, one sworn by the victim and the other by two competent persons (Regulation 1.25(1), (2) and (3) read together with Regulation 1.26 (a)-(f)). However, as with the case with "domestic violence," the interpretation section of the Regulations, Regulation 1.21, fails to define what the term "statutory declarations" means. But, unlike in the former case, it makes reference to a second legislation, the Statutory Declarations Act, 1959 (Austl.), and declares that the term "statutory declaration" "means the same as statutory declaration under the Statutory Declarations Act, 1959, [(Cth)]." Subregulation (2) and (3) outline the contents of a "victim" declaration. Statutory Declarations Act 1959, Subregulation (2) and (3) (Austl.). This time around, Regulation 1.21 defines the term "competent person" in subregulations (1)(a) and (b), which should be read together with subregulation (2). Regulation 1.27 should also be borne in mind since it addresses statutory declarations that are inadmissible in evidence in courts and immigration tribunals.

¹⁶⁵ (2001) F.C.A. 1115.

¹⁶⁶ *Id.* para. 15.

¹⁶⁷ *Id.* para. 10.

¹⁶⁸ *Id.* para. 12.

The Regulations are in specific and preemptory terms. It is not sufficient compliance . . . with these Regulations for a competent person simply to note the consistency between a person's presentation and their account of domestic violence, or even [its] occurrence. The Regulations require that the competent person express an opinion in very specific terms, namely, as to whether relevant domestic violence . . . has been suffered by a person.¹⁶⁹

Technically the judge was correct since Regulation 1.26 states that a competent person "must state that, in [his or her] opinion, relevant domestic violence . . . has been suffered by" an alleged victim; yet the opinion lacked practicality by failing to consider all surrounding circumstances. Interpreting statutes may not be easy, but it is an art that requires decision-makers to exercise prudence.¹⁷⁰ Notwithstanding the fact that the declarations failed to meet the exact regulatory directive, they did not strike far from the purpose. Reading the literal words of the two experts combined, what else could they refer to, other than that Mrs. Du was a victim of domestic violence caused by Mr. Du? It also seems harsh to expect a medical practitioner to depart from a statement of observation and arrive at a different conclusion.

As a result of the *Du* court's strict adherence to the statutory requirements to prove domestic violence some subsequent statutory declarations have been tailored to fit within this "Mathews box" to avoid casting victims into this technical pitfall.¹⁷¹ In *Cakmak, Fikri* ("*Cakmak*

¹⁶⁹ *Id.* para. 18.

¹⁷⁰ See Judge Mason in *K & S Lake City Freighters, Ltd. v. Gordon & Goten, Ltd.* (1985) 157 C.L.R. 309, 315, criticizing the narrow literal approach to statutory interpretation: "Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the 1st instance."

While Dennis Lemieux, *Judicial Deference in Canadian Administrative Law: The Pragmatic and Functional Approach*, *Puschpanathan v. Canada*, 54 ADMIN. L. REV. 757, 757 (2002) acknowledges: "The supreme court of Canada has rendered hundreds of pages of decisions dealing with the standard of review applicable to public agency and tribunal interpretation errors. The determination of the right standard of review is a nightmare for trial judges as well as practitioners and law students."

On the other hand, Robert Gregory, *Overcoming Text in Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 451, argues: "Most battles of statutory interpretation play out like a fixed game of cards. . . . The court holds the ultimate trump card."

For an overview of statutory interpretation in select European states and the United States of America, see D. NEIL MACCORMICK & ROBERTS S. SUMMERS, *INTERPRETING STATUTES: A COMPARATIVE STUDY* (1991).

¹⁷¹ *Cakmak, Fikri* (2001) M.R.T.A. 0699 (Feb. 27, 2001) [hereinafter *Cakmak 1*], and *Cakmak, Fikri* (2001) M.R.T.A. 0699 (Feb. 27, 2001) [hereinafter *Cakmak 2*] are MRT examples.

1”)¹⁷² and *Cakmak, Fikri* (“*Cakmak 2*”)¹⁷³ supplementary declarations were adduced, by the same competent persons—Dr. Halil Munir and Hanife Guducu, psychologists, that met the “expression of opinion” requirement. In a “revised” declaration, Dr. Munir stated:

Please refer to my previous statutory declaration dated 6 October 2000. Further consultation with Mr. F. Cakmak, I confirmed that in my opinion [he] is suffering from anxiety/depression symptoms secondary to his marriage breakdown and to the verbal/physical abuse. He was a victim of domestic violence and this has caused him to be concerned for his well being and safety.¹⁷⁴

The psychologist expressed similar sentiments, though merely rearranging the Doctor’s words:

I refer to my previous statutory declaration 9/5/00 and in order to avoid any doubt I confirm the contents and *in my opinion Mr. Fikri Cakmak, has been a victim of domestic violence*. The violence he has suffered has caused him to be concerned for his own personal well being and safety.¹⁷⁵

Nonetheless, some Federal Court judges, such as Judge Ryan in *Meroka*, laudably declined to follow this rigid view.¹⁷⁶ Because of the conflicts between courts, the burden now rests on a full Federal Court or High Court, to declare the correct legal position. In *Meroka*, Judge Ryan adopted a wider perspective in forming a decision regarding the admissibility of statutory declarations made by competent persons.¹⁷⁷ The Judge examined the standard document, Form 1040, prescribed by the DIMA to be completed by competent persons.¹⁷⁸ This Form is titled “Statutory Declaration under the Domestic Violence Provision of the Migration Regulations” and contains various sections requiring a competent person to complete after assessing a victim. After acknowledging the contents of this form, the judge summarized the law in the following words:

¹⁷² See *Cakmak 1*, (2001) M.R.T.A. 0699.

¹⁷³ See *Cakmak 2*, (2001) M.R.T.A. 4656.

¹⁷⁴ *Cakmak 1*, (2001) M.R.T.A. 0699, para. 38.

¹⁷⁵ *Cakmak 2*, (2001) M.R.T.A. 4656, para. 38.

¹⁷⁶ See *Meroka v. Minister for Immigration and Multicultural Affairs* (2002) F.C.A. 482.

¹⁷⁷ See *id.*

¹⁷⁸ *Id.* para. 18.

I do not consider that the competent person need[s] [to] state expressly that in his or her opinion relevant domestic violence has been suffered. The requisite statement of opinion may be conveyed by implication having regard to the way in which the standard form directs the attention of the competent person to the definition of “domestic violence” in Reg.1.23(2)(b). The implication arises in the context of that direction from the insertion in the respective spaces provided of the name and date of birth of the victim and the full name of the person believed to have perpetrated the domestic violence.¹⁷⁹

I find this wider view more persuasive and practical when compared with the narrower view Judge Mathews advanced in *Du*,¹⁸⁰ particularly because it is a more practical in approach.

E. Legal position of Fiancées

More legal complications exist for Australian immigrants who are not yet married to an Australian citizen before their arrival. Although the Migration Act allows them to follow their counterparts into Australia,¹⁸¹ two immigration concerns arise. First, the law requires the intended marriage to be formed within nine months from the date of entry of the foreign spouse.¹⁸² Second, perhaps more shocking, if a fiancée suffers domestic violence before marriage, he or she cannot invoke the domestic violence exception.¹⁸³ They can only invoke these provisions “if they have already married their sponsor.”¹⁸⁴ This requirement effectively precludes fiancées from using the domestic violence exception. Any abuse or violence suffered before marriage proceedings are completed is irrelevant. Some studies show

¹⁷⁹ *Id.* para. 34.

¹⁸⁰ *Du v. Minister for Immigration and Multicultural Affairs*, (2000) F.C.A. 115, para. 18.

¹⁸¹ Migration Regulations, 1994, sched. 2, subclasses 300 (Prospective Spouse, applying from overseas) and 831 (Prospective Spouse, applying on-shore) (Austl.).

¹⁸² See also DIMA, MIGRATING TO AUSTRALIA: PROSPECTIVE MARRIAGE MIGRATION FIANCÉ(E), at http://www.immi.gov.au/allforms/f_fiancé.htm#eligibility (last modified Feb. 17, 2003) (requiring prospective spouses to prove they “have met and are personally known to each other”).

¹⁸³ Migration Regulations, 1994, subclasses 300 & 820 (Austl.).

¹⁸⁴ DIMA, FACT SHEET 38, at <http://www.immi.gov.au/facts/38domestic.htm> (last visited Apr. 4, 2003). See also Migration Regulations, 1994, sched. 2, subclass 309.221(3)(b) (Austl.)

that even at this early stage some spouses are still abusive.¹⁸⁵ In the words of one Filipino woman:

I trusted him wholly because I didn't know the situation here. I trusted that we would get married here because he took me from the Philippines in a decent manner . . . weeks passed and I kept on wondering because he wasn't making a move to organize our wedding. By this time, I was already pregnant. It seemed he had forgotten everything. Once when I asked, his reply cut through me like lightening, 'I don't know. I changed my mind. I do not want to marry you any more.' It was as if the skies caved in on me I wanted to die Even if I wanted to go back to the Philippines, I couldn't face my parents and I was jobless and everything You know how conservative our place [is]. They wouldn't understand; it's like you're the one at fault. You will be humiliated in your family's and people's eyes because they would think you've tainted the honor which is so valued there.¹⁸⁶

IV. CONCLUSION

Domestic violence is an all too common occurrence in Australian homes, irrespective of whether one or both of the spouses is a "local."¹⁸⁷ Even so, domestic violence victims, whether local or foreign, find it difficult to report such incidents to the authorities.¹⁸⁸ According to the jurisprudence that has built up in Australia, only when victims are faced with deportation, or when the situation becomes otherwise intolerable, do victims open up and

¹⁸⁵ ALRC Report, *supra* note 160, para. 10.23. In the same paragraph, it cites the Iredale Report, which noted that "some men have been heard to boast about having a housekeeper, cleaner, cook and sexual partner . . . at the cost of a one-way airfare." *Id.*

¹⁸⁶ *Id.* For a more detailed discussion of abusers using immigration status to subordinate their victims, see *supra* Part IV.

¹⁸⁷ Described by the New South Wales Department of Community Services, as "the most common form of assault in Australia today." For this reason, most states in Australia have legislated against this social evil. See e.g., Domestic Violence (Family Protection) Act, 1989 (Austl.); Domestic Violence Act, 1994 (Austl.); Domestic Violence Act, 1999 (Austl.); and Domestic Violence Act, 1986 (Austl.). For statistics, see DOMESTIC VIOLENCE AND INCEST RESOURCE CENTRE, AUSTRALIAN STATISTICS ON DOMESTIC VIOLENCE, at <http://www.dvirc.org.au/resources/Statistics.htm> (last modified Mar. 17, 2003) [hereinafter DOMESTIC VIOLENCE AND INCEST RESOURCE CENTRE].

¹⁸⁸ DOMESTIC VIOLENCE AND INCEST RESOURCE CENTRE, *supra* note 187, at 1, quotes a survey conducted by the Australian Bureau of Statistics in 1996, which pointed out that out of the 6300 female interviewees who had been physically assaulted in that year, only "19% reported the incident to police" while 18% "had never told anyone about the incident."

seek external assistance. Reasons for this failure to report include cultural factors and the sheer trauma of immigration itself. This is especially true for those coming from the Third World. The DIMA has a long series of questions used to assess the genuineness of relationships between Australians and non-Australians ranging from the background and development of the relationship to their plans for married life.¹⁸⁹ Although some may assume it is simple for an immigrant to answer such questions, they may intimidate even the most genuine partner or spouse. Further, some spouses may be unable to answer some of the questions, such as, "where will you live in Australia," raising doubts in the mind of an immigration official while simultaneously reducing the applicant's credibility and chances of obtaining a visa. Even in cases where an individual succeeds in obtaining a temporary visa and later suffers domestic violence, the initial negative view created by the overseas government official may override the desire to report instances of abuse to the same authorities. The Australian Law Reform Commission recognized that "women from different cultures may be especially reluctant to approach the police, particularly where they are afraid of being deported."¹⁹⁰

Beyond legal revisions, this problem requires a shift in the Australian government's immigration policy. For example, Government officials working in overseas offices need specialized training in personal and human relations, in which they learn not to discourage prospective immigrants with valid grounds for application. Such training should be structured to provide sufficient knowledge to adopt and retain a more positive and approachable attitude. Thus, in cases where a prospective immigrant finds an approachable official overseas, a more positive impression may be created about Australian government officials generally. In turn, this may encourage an abused spouse to report instances of abuse if ever they occur overseas. Commendably, Canberra has addressed this concern. Today, each DIMA Regional Office has one Domestic Violence Officer with specialized training.¹⁹¹

Part of the problem foreign spouses face is lack of information concerning where to lodge complaints or seek relevant assistance. The answer is simple: provide the requisite information.¹⁹² An appropriate time

¹⁸⁹ See DIMA, Procedures Advice Manual, *supra* note 38.

¹⁹⁰ ALRC Report, *supra* note 160, para. 10.19.

¹⁹¹ *Id.* para. 10.20.

¹⁹² However, as Uma reminds:

[S]uch information [should be translated] in the appropriate languages and ensure that immigrant[s] . . . obtain [it]. In order for this to happen the [Government],

to do so would be at the visa issuing stage. Immigrants should be given an information packet on Australia. Generally, this packet should contain information on the lifestyle, institutions, agencies, and centers offering assistance. Although a domestic violence victim needs to act on his or her intention to report abuse, having the knowledge of where and how to report it encourages victims to come forward to the authorities. To have sufficient information for the reporting victim, the packet should contain: details of police and fire stations; foreign embassies and consuls; ethnic groupings; hospitals, clinics and other health institutions; courts, tribunals and quasi-judicial institutions; domestic violence and community services; employment and recruitment agencies; financial institutions; education and learning institutions and a summary of their rights as under Australian law. It should be written in simple, easy-to-understand English. Measures taken by the Philippine government in this regard are commendable.¹⁹³ Since 1989, the Government has required all persons intending to emigrate as spouses or prospective spouses to attend counseling at the Commission on Filipinos Overseas about such matters as cultural differences, their rights, and available support and welfare services¹⁹⁴ in their country of destination. These efforts are complemented by DIMA's Manila Office, which requires proof of attendance to these counseling sessions before a visa application is processed.

The legal position of individuals who have immigrated to Australia as fiancées or prospective spouses remains problematic. Despite the reality of domestic violence occurring in such relationships, the legislature has failed to address this problem effectively if at all. More specifically, the law fails to recognize that there is little or no difference between domestic violence inside or outside marriage for immigrant victims. It is easy to imagine that both married and unmarried victims have similar challenges to getting citizenship. Based on this assumption, it would be proper to amend this part of the legislation to bring it to terms with reality. Effectively, this will make fiancées eligible to benefit from the domestic violence concessions currently offered to their married counterparts under immigration law.

I end with the words of Uma Narayan, which while specific to the U.S. case, apply to Australia as well:

Immigrant Communities [and Agencies] need to deal with their denial of domestic violence, and to support actively a range of programs and institutions to assist battered immigrant [spouses].

Uma, *supra* note 153, at 143, 156.

¹⁹³ ALRC Report, *supra* note 160, para 10.41.

¹⁹⁴ *Id.*

A nation that prides itself on being a nation of immigrants ought to take pride in protecting persons who are involved in the processing of acquiring permanent immigration status and in becoming its citizens. An immigration policy that was truly sensitive to issues of domestic violence [should] structure its regulations and priorities in such a manner that afforded the maximum of protection to the interests of battered immigrant [spouses].¹⁹⁵

The identified “gaps” and changes proposed are manageable and could be implemented through amending the current legislation. Such amendments would reduce the constraints forcing immigrant spouses and fiancées to remain in abusive relationships.

¹⁹⁵ Uma, *supra* note 153, at 156.

