Federal Court of Australia - Full Court

SZOXP v Minister for Immigration and Border Protection [2015] FCAFC 69 (11 June 2015)

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FEDERAL COURT OF AUSTRALIA

SZOXP v Minister for Immigration and Border Protection

[2015] FCAFC 69

Citation:	SZOXP v Minister for Immigration and Border Protection [2015] FCAFC 69
Appeal from:	Minister for Immigration and Border Protection v SZOXP & Anor [2014] FCCA 565
Parties:	**SZOXP v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and MIGRATION REVIEW TRIBUNAL**
File number:	NSD 1277 of 2014
Judges:	**KENNY, MCKERRACHER AND EDELMAN JJ**
Date of judgment:	11 June 2015
Catchwords:	**MIGRATION** – requirements for de facto relationship – meaning of "do not live separately and apart on a permanent basis"
Legislation:	*Divorce and Matrimonial Causes Act 1857* (UK) 20 & 21 Vict. c. 85 s 7 *Divorce and Matrimonial Causes Act 1928* (NZ) *Family Law Act 1975* (Cth) ss 48(3), 49(2) *Marriage Act 1961* (Cth) *Matrimonial Causes Act 1929-1936* (SA) *Matrimonial Causes Act 1857* (UK) *Matrimonial Causes Act 1959* (Cth) s 28(m) *Matrimonial Causes Amendment Act 1938* (SA) *Migration Act 1928* (Vic) s 75(a) *Migration Act 1958* (Cth) ss 5CB, 5CB(1), 5CB(2), 5CB(2)(a), 5CB(2)(c), 5CB(2)(c)(i), 5CB(2)(c)(ii), 5CB(3), 5CB(4), 5F *Property Law Act 1974* (Qld) s 261 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) *Supreme Court Act 1935* (WA) s 69(6) *Supreme Court Act Amendment Act 1945* (WA) *Migration Regulations 1989* (Cth) r 2 *Migration Regulations 1991* (Cth) r 3A *Migration Regulations 1994* (Cth) rr 1.15A, 1.15A(2), 1.15A(3), 1.15A(5), 2.03A(2), 2.03A(3); Sch 2, cll 300.412, 300.411, 820.211, 820.221(1), 820.226 *Migration Regulations (Amendment) 1994* (Cth)

Cases cited:	*Ayling v Ayling* [1949] WALawRp 9; (1949) 51 WALR 61 *Campbell v Campbell* (1951) 51 SR (NSW) 158 *Clibbery v Allan* [2002] EWCA Civ 45; [2002] Fam 261 *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2013) 250 CLR 503 *Corbett v Poelnitz* [1785] EngR 8; (1785) 1 TR 5; 99 ER 940 *Crabtree v Crabtree* (1963) 5 FLR 307 *Flindell v Flindell* [1948] WALawRp 9; (1948) 50 WALR 9 *Hopes v Hopes* [1949] P 227 *Hunt v Hunt* [1862] EngR 253; (1862) 4 De G F & J 219; (1862) 45 ER 1168 *In the Marriage of Pavey* (1976) 25 FLR 450 *Inco Europe Ltd v First Choice Distribution* [2000] UKHL 15; [2000] 1 WLR 586 *KQ v HAE* [2006] QCA 489; [2007] 2 Qd R 32 *Lacey v Attorney General for Queensland* [2011] HCA 10; (2011) 242 CLR 573 *Li v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 14; (1992) 33 FCR 568 *Main v Main* [1949] HCA 39; (1949) 78 CLR 636 *Marshall v Rutton* [1800] EngR 171; (1800) 8 TR 545; 101 ER 1538 *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642 *Potter v Potter* [1954] HCA 52; (1954) 90 CLR 391 *Power v Power* [1944] VicLawRp 48; [1944] ALR 427 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 *Queensland v Congoo* [2015] HCA 17 *Ringsted v Lanesborough* (1783) 3 Doug 197; 99 ER 610 *Santos v Santos* [1972] EWCA Civ 9; [1972] Fam 247 *Sullivan v Sullivan* (1824) 2 Addams 299; (1824) 162 ER 303 *Taylor v Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 88 ALJR 473 *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15 *Warrender v Warrender* (1835) II Clark & Finnelly 488; [1835] EngR 297; (1835) 6 ER 1239 *Watkins v Watkins* [1952] HCA 60; (1952) 86 CLR 161
Texts cited:	Burn R, *Ecclesiastical Law* (4th ed, Strahan and Woodfall, 1781) Frier B and McGinn T, *A Casebook on Roman Family Law* (Oxford University Press, 2004) Jolowicz HF, *Roman Foundations of Modern Law* (Clarendon Press, Oxford, 1957) Lewis ADE and Ibbetson DJ (eds), *The Roman Law Tradition* (Cambridge University Press, 1994) Stone L, *Road to Divorce: England 1530-1987* (Oxford University Press, 1992)
Date of hearing:	20 May 2015
Place:	Perth (via Telephone Link to Brisbane) (Heard in Brisbane)
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	67
Counsel for the Appellant:	Mr M Black
Solicitor for the Appellant:	Pi-En Hsu

Counsel for the First Respondent:	Mr G Johnson SC and Mr P Bickford
Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	The Second Respondent entered a submitting notice save as to costs

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1277 of 2014**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZOXP** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	MIGRATION REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**KENNY, MCKERRACHER AND EDELMAN JJ**
DATE OF ORDER:	**11 JUNE 2015**
WHERE MADE:	**PERTH (VIA TELEPHONE LINK TO BRISBANE) (HEARD IN BRISBANE)**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Circuit Court of Australia made on 26 March 2014 be set aside and in lieu thereof order that the application to show cause dated 17 April 2013 be dismissed.
3. The first respondent pay the appellant's costs of the appeal, including the costs of the application in the Federal Circuit Court, fixed in the amount of $14,971.

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

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JUDGE:	**KENNY, MCKERRACHER AND EDELMAN JJ**
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PLACE:	**PERTH (VIA TELEPHONE LINK TO BRISBANE) (HEARD IN BRISBANE)**

REASONS FOR JUDGMENT

THE COURT:

Introduction

1. The essence of this appeal involves a short question concerning the meaning of a particular provision defining a 'de facto relationship' in s 5CB(2)(c)(ii) of the *Migration Act 1958* (Cth). The particular requirement is that if the two people in the relationship do not live together then they must not 'live separately and apart on a permanent basis'.
2. The appellant, SZOXP, applied to the Minister for a Partner (Temporary) (Class UK) visa. A delegate of the Minister refused the application for reasons including that the appellant was not in a de facto relationship with his sponsor who was his fiancée (now wife) and who is an Australian citizen. The appellant applied for a review of that decision to the Migration Review Tribunal (the Tribunal). The Tribunal found that the appellant and his then fiancée met all the requirements for a de facto relationship in the *Migration Act*. The Tribunal held that there was no requirement in the *Migration Act* that the parties live together before a de facto relationship could be found to exist.
3. A judge of the Federal Circuit Court quashed this decision for jurisdictional error on the basis that the appellant and his fiancée had failed to meet the requirement that they do not "live separately and apart on a permanent basis". That requirement was said to be concerned with a situation where couples are living together but are temporarily separated with an intention to *resume cohabitation*. The appellant and his fiancée had not lived together prior to his visa application.
4. For the reasons below, we conclude that the decision of the Tribunal did not contain any jurisdictional error. The appeal should be allowed. Our conclusion is that there is no requirement that the couple previously live together in the definition of a "de facto relationship" or in the requirement that the couple "do not live separately and apart on a permanent basis". This conclusion is based upon the plain words of s 5CB of the *Migration Act*. It is reinforced by the legislative history of the section and the long history of the meaning of the phrase "live separately and apart" in ecclesiastical law and matrimonial law. The conclusion is also consistent with the purpose of the provision and is not an absurd result. In contrast, the implication proposed by the Minister is difficult to express in clear words; it would distort the meaning of the text; and it would give rise to potential inconsistencies with other provisions.
5. The reasons which follow are divided in the following way:

    (1) the relevant facts and background and the issue in this case;
    (2) the plain meaning of s 5CB of the *Migration Act*;
    (3) the legislative history of s 5CB of the *Migration Act*;
    (4) the history of the phrase "live separately and apart"; and
    (5) authorities relied upon by the parties.

The relevant facts and background and the issue in dispute

6. There was no dispute about the facts, as found by the Tribunal, and the background.
7. The appellant is a citizen of China. On 24 October 2012, he applied for a Partner (Temporary) (Class UK) visa under the *Migration Act*. The *Migration Regulations 1994* (Cth) Sch 2, cl 820.211 and cl 820.221(1) imposed various requirements including that at the time of application, and at the time of decision, the applicant is the spouse or de facto partner of a person who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.
8. The appellant said that he was in a de facto relationship with Ms Yang, an Australian citizen. A delegate of the Minister refused the appellant's application for a visa for reasons including that he was not in a de facto relationship with Ms Yang.
9. The appellant applied to the Tribunal for a review of the decision of the Minister. The Tribunal found that the appellant was in a de facto relationship with Ms Yang and that cl 820.211 and cl 820.221(1) were satisfied. The application was remitted with directions (set out in the conclusion to these reasons).
10. The Tribunal found that:

    (1) Ms Yang was an Australian citizen;
    (2) the appellant and Ms Yang were in a committed relationship from December 2011, and that their relationship was exclusive;
    (3) the appellant and Ms Yang had, as required at the time of the visa application, a mutual commitment to a shared life to the exclusion of all others, and the relationship was genuine and continuing;
    (4) the appellant and Ms Yang are devout Buddhists and share the same outlook on life;
    (5) the appellant and Ms Yang had chosen to follow specific teachings and interpreted the Third Precept of Buddhism to mean that they should not cohabit or have sexual relations before marriage;
    (6) the appellant and Ms Yang had not had a sexual relationship or cohabited before their marriage on 26 November 2012; and
    (7) the appellant and Ms Yang did not live together because they wanted to marry first, but they had not lived together after their marriage because the appellant had been in immigration detention.

11. The Tribunal held that there was no requirement in the *Migration Act* that the parties live together before a de facto relationship can be found to exist. The Tribunal concluded that the requirements for a "de facto" relationship had been met.
12. The Minister sought judicial review in the Federal Circuit Court. The Federal Circuit Court held that the Tribunal had made a jurisdictional error in finding that there is no requirement in the *Migration Act* that the appellant and Ms Yang live together before a de facto relationship is found to exist. The primary judge considered that the requirement that a de facto couple live together arose because s 5CB(2)(c) contemplated a "resumption of cohabitation". Her Honour relied upon the decision of Hill J in *Li v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 14; (1992) 33 FCR 568. The appellant now appeals from the decision of the Federal Circuit Court.

13. In written submissions, senior counsel for the Minister helpfully expressed the issue in dispute on this appeal as follows: whether s 5CB(2)(c) of the *Migration Act* implicitly requires, at least in the case of persons who do not fall within s 5CB(2)(c)(i) and rely on s 5CB(2)(c)(ii), that the persons have previously lived together? In oral submissions his reference to an "implicit" requirement of section 5CB(2)(c) was properly expressed as an implied requirement.

Section 5CB of the Migration Act

14. Section 5CB of the *Migration Act* provides as follows:

> **De facto partners**
>
> (1) For the purposes of this Act, a person is the **de facto partner** of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.
>
> **De facto relationship**
>
> (2) For the purposes of subsection (1), a person is in a **de facto relationship** with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:
>
> (a) they have a mutual commitment to a shared life to the exclusion of all others; and
> (b) the relationship between them is genuine and continuing; and
> (c) they:
>
> (i) live together; or
> (ii) do not live separately and apart on a permanent basis; and
>
> (d) they are not related by family (see subsection (4)).
>
> (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.
>
> **Definition**
>
> (4) For the purposes of paragraph (2)(d), 2 persons are **related by family** if:
>
> (a) one is the child (including an adopted child) of the other; or
> (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
>
> (c) they have a parent in common (who may be an adoptive parent of either or both of them).
>
> For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

The plain meaning of s 5CB of the Migration Act applied to this case

15. The process of statutory interpretation requires that a statutory provision be given the meaning that the legislature is taken to have intended it to have: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *Lacey v Attorney General for Queensland* [2011] HCA 10; (2011) 242 CLR 573, 591 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
16. The meaning that the legislature is taken to have intended a provision to have, or the "attributed legislative intention" is a conclusion arising from the application of accepted rules of construction, both common law and statutory: *Queensland v Congoo* [2015] HCA 17 [36] (French CJ and Keane J) [116] (Kiefel J). Those rules of construction direct attention to the text, context, and purpose of the statutory provision: *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15 [42] (French CJ, Kiefel, Bell and Keane JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).
17. The application of rules of construction concerning context and statutory purpose are mediated through the text of the statute. Context, such as legislative history or extrinsic materials, is a guide to the meaning of the statute but it "cannot displace the meaning of the statutory text" and it is the meaning of the statutory text which is where the task of statutory construction begins and ends: *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2013) 250 CLR 503, 519 [39] (the Court).
18. Section 5CB(2) contains no express requirement that persons must have lived together, or be living together, in order to be in a de facto relationship. The provision of an alternative to living together in s 5CB(2)(c)(ii) suggests the contrary. Senior counsel for the Minister therefore submitted that there should be an implication of words into s 5CB(2)(c)(ii) so that the alternative in that subsection effectively included the words in italics:

> they *have previously cohabited and* do not live separately and apart on a permanent basis.

19. In *Taylor v Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 88 ALJR 473, French CJ, Crennan and Bell JJ said (at 483 [38], footnotes omitted):

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

20. Their Honours did not need to decide whether three factors addressed by Lord Nicholls in *Inco Europe Ltd v First Choice Distribution* [2000] UKHL 15; [2000] 1 WLR 586, concerning requirements before words could be added to legislation, were necessary and sufficient in *Taylor*. Those factors, referred to by French CJ and Bell J in *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642, 652 [9] are (i) the intended purpose of the statute, (ii) the failure of the draftsperson and parliament by inadvertence to give effect to that purpose, and (iii) the substance of the provision parliament would have made.
21. None of the three factors described in *Inco Europe* is present in this case. The implication sought by the Minister is also too much at variance with the language used by the legislature to be able to be made for five reasons.
22. **First**, there is nothing in the text of s 5CB(2) that would require, or even suggest, the implication that senior counsel for the Minister submitted should be made. Instead, the express provision in s 5CB(2)(c)(ii) of an alternative to living together appears to deny that previous or current cohabitation is required. The meaning of the phrase "do not live separately and apart on a permanent basis" is considered later in these reasons, but it suffices here to say that the phrase is used as an alternative to living together. This was not a matter of inadvertence. The Explanatory Memorandum to the *Migration Act* by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) which introduced s 5CB reiterated the relevant requirement in s 5CB(2) as including that the persons "live together, or do not live separately and apart on a permanent basis" ([781]). Further, there is no language in s 5CB(2)(c)(i) or s 5CB(2)(c)(ii) which directs attention to anything that occurred in any period of time *preceding* the time when the de facto relationship is to be considered.
23. **Secondly**, even if it is assumed, as senior counsel for the Minister asserted, that the purpose of the provision was intended to extend to people who were in a marriage-like relationship, there is no reason why people cannot be in a marriage-like relationship without having previously lived together. Section 5F of the *Migration Act* defines persons to be in a married relationship without any express requirement of having previously lived together. Rather, that definition, in very similar terms to s 5CB(2), provides that they must have a valid marriage and fulfil the same requirements as contained in s 5CB: a mutual commitment to a shared life to the exclusion of all others; the relationship between them is genuine and continuing; and they live together; or do not live separately and apart on a permanent basis.
24. **Thirdly**, there is no warrant for the implication submitted by senior counsel for the Minister based upon any absurdity of the effect of the legislation. Senior counsel submitted that without the implication there could be an absurd result that persons who intend to live together as friends or as flatmates could be found to be in a de facto relationship. But persons who merely intend to live together as friends or flatmates would not have a mutual commitment to a shared life to the exclusion of all others as required by s 5CB(2)(a).
25. **Fourthly,** the implication that was proposed by senior counsel for the Minister is immediately ambiguous. For instance, if there is an implication that the persons in the relationship must have previously cohabited, then should there be a further implication that when they previously lived together the requirements of mutual commitment to a shared life and a genuine and continuing relationship also existed at that time of living together? If so, should there be another implication that the period of living together was immediately before the persons began to live separately and apart? Is there any further implication for how long they must have lived together? Would it be sufficient, for instance, if the appellant and Ms Yang had lived together on a temporary basis for several days?
26. **Fifthly**, there is no warrant in the legislative history of s 5CB for the implication sought, nor is such an implication required by the established special meaning that the words "live separately and apart" had acquired when the legislation was enacted. As those matters were at the forefront of the submissions of the Minister, we consider them separately below.

The legislative history of s 5CB

27. Section 5CB was inserted into the *Migration Act* by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*. The new provision commenced 1 July 2009.
28. The relevant part of the Explanatory Memorandum to the *Same-Sex Relationships Act* which introduced s 5CB explained that the new definition of 'de facto partner' in the *Migration Act* was modelled on the definition of 'de facto relationship' in subregulation 1.15A(2) of the *Migration Regulations 1994*. Discrimination was removed by allowing de facto partners to be of the same sex or of a different sex ([779]).
29. Prior to the introduction of s 5CB a nearly identical provision had existed, but with the difference that persons were required to be of the opposite sex. Regulation 1.15A(2) of the *Migration Regulations 1994*, upon which s 5CB was modelled, made provision for both married partners (which was included in s 5F of the *Migration Act*) and de facto partners in similar terms. In relation to de facto partners the regulation provided relevantly as follows:

> (2) Persons are in a de facto relationship if:
>
> (a) they:
>
> (i) are of opposite sexes; and
> (ii) are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and
> (iii) are not within a relationship that is a prohibited relationship for the purposes of subsection 23B (2) of the *Marriage Act 1961*; and
>
> (b) they are of full age, that is:

(i) if either of the persons is domiciled in Australia — both of them have turned 18; or
(ii) if neither of the persons is domiciled in Australia — both of them have turned 16; and

(c) the Minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
(ii) the relationship between them is genuine and continuing; and
they:
(A) live together; or
(B) do not live separately and apart on a permanent basis; ...

30. Regulation 1.15A(3) provided for factors to which the Minister should have regard in deciding whether two persons were in a married or a de facto relationship. These included financial aspects of the relationship, the nature of the household, the social aspects of the relationship, and the nature of the persons' commitment to each other.
31. Regulation 1.15A(5) provided that:

> If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.

32. When regulation 1.15A was introduced, by *Migration Regulations (Amendment) 1994* (Cth) the Explanatory Statement explained as follows: "The new regulation is intended to ensure that de jure and de facto spouses are treated equally and that the *Marriage Act 1961* (Cth) requirements for Australian marriages in relation to the parties' sex, relationship and age should also apply to de facto spouses".
33. The definitions of "de facto relationship" and "married relationship" in the *Migration Regulations 1994* were relevant to four classes of Partner visa: Migrant, Provisional, Residence, and Temporary: r 1.15A(3). The *Migration Regulations 1994* also provided for a class of visa concerned with "prospective marriage". The prospective marriage visa generally required that the applicant be outside Australia when the visa is granted: Schedule 2, cl 300.412 (cf cl 300.411).
34. The *Migration Regulations 1994* had themselves substantially changed the definition of de facto spouse from the *Migration Regulations 1991* (Cth). One pertinent respect in which they had changed the definition of de facto spouse from the *Migration Regulations 1991* was that they had removed a time requirement which had been included in the *Migration Regulations 1991* for the first time. As the Explanatory Statement to the *Migration Regulations 1991* observed, the "[1991] criteria are the same as those in the previous definition, but now include the additional criterion that the relationship should normally be of at least six months duration, unless there are exceptional reasons and compelling circumstances for reducing this period".
35. The *Migration Regulations 1991* had contained a definition of "de facto spouse" in r 3A as follows:

> (1) For the purpose of these Regulations, a person is the de facto spouse of another person if, at the time when an application for a visa or entry permit is made by either of the persons, they:
>
> (a) have lived together, during the immediately preceding 6 months (or such lesser period as is specified in a particular case, under subregulation (2)) on a genuinely domestic basis as spouses without being legally married to each other; and
> (b) are not of the same sex.
>
> (2) For the purposes of subregulation (1), the Minister may, on written application, specify a period of less than 6 months if the Minister is satisfied that:
>
> (a) there are exceptional circumstances affecting the persons; and
> (b) there are compelling reasons for specifying that lesser period.

36. The *Migration Regulations 1991* had also substantially amended the treatment of de facto spouses in the *Migration Regulations 1989* (Cth). In the *Migration Regulations 1989,* the definition of 'spouse' in r 2 was as follows:

> (a) a person who has entered into a marriage recognised as valid for the purposes of the Act, where:
>
> (i) the marriage has not been ended by divorce or the death of one of the parties; and
> (ii) the parties are not living separately and apart on a permanent basis; or
>
> (b) a de facto spouse.

A 'de facto' spouse was defined in r 2 as being "a person who is living with another person of the opposite sex as the spouse of the other person on a genuine domestic basis although not legally married to the other person".

37. Several conclusions can be drawn from this legislative history.
38. **First**, in 1991 the *Migration Regulations 1991* introduced a new requirement that (other than in exceptional circumstances) de facto spouses must have lived together, during the six months immediately preceding the visa application, on a genuinely domestic basis as spouses without being legally married to each other. That requirement of a six month living period immediately preceding the visa application had not existed in the 1989 Regulations. It was removed in the *Migration Regulations 1994* which made substantial changes to the definition. There was no longer a period required for living together and instead there was a requirement that the parties live together or do not live separately and apart on a permanent basis.

39. This sequence of changes strongly militates against the submission by senior counsel for the Minister that s 5CB of the *Migration Act* and the *Migration Regulations 1994* (upon which it was based) manifested a legislative intention that the parties must have lived together for a period preceding the visa application. The opposite is revealed. A positive choice, and amendment, was made to remove the six month time period. A provision was instead included in the *Migration Regulations 1994* that living together at the same address for six months or longer was to be taken to be strong evidence that the relationship is genuine and continuing (although the opposite was not true merely because the parties had not been living at the same address for six months or longer). Evidence that the parties have been living together, and the period for which they were living together, will remain relevant under s 5CB of the *Migration Act* for the determination of whether the relationship is genuine and continuing.
40. **Secondly**, although senior counsel for the Minister placed some emphasis on the existence of a prospective marriage visa as part of the legislative context in which s 5CB was enacted, the prospective marriage visa included different requirements from those contained in other visas based on s 5CB and its predecessors. In particular, it included a requirement that the applicant be overseas at the time of grant of the visa. Further, nothing in the history of s 5CB suggests that the section was intended to exclude de facto couples who had become engaged to marry.
41. **Thirdly**, one evident purpose of the 1994 Regulations (upon which s 5CB of the *Migration Act* was based) was to align factors of sex, relationship, and age for de facto relationships with the relationships between spouses to a marriage. In this respect, senior counsel for the Minister accurately characterised a purpose of the 1994 Regulations and s 5CB of the *Migration Act* as extending to people who are living as in a marriage, notwithstanding that they have not been through a form of marriage, and (in relation to s 5CB) regardless of whether they are same sex couples.
42. It is this third point of legislative history that illustrates the importance of the phrase 'not living separately and apart on a permanent basis' which was borrowed directly from the long established use of that phrase in matrimonial law where the words were "well hallowed" (*Santos v Santos* [1972] EWCA Civ 9; [1972] Fam 247, 258).

The history of 'living separately and apart' in ecclesiastical and matrimonial law

43. The context in which the "well hallowed" phrase "living separately and apart" arose in the ecclesiastical law is as follows.
44. During the 17th century, a divorce in ecclesiastical law which dissolved the bonds of marriage, *a vinculo matrimonii,* could only be obtained in very limited circumstances. The alternative of divorce *a mensâ et thoro* ("from the table and the bed") did not truly dissolve the marriage: Burn R, *Ecclesiastical Law* (4th ed, Strahan and Woodfall, 1781) p 445. This divorce "from the table and the bed" was later relabelled a "judicial separation" by s 7 of the *Divorce and Matrimonial Causes Act 1857* (UK) 20 & 21 Vict., c. 85 (subsequently the *Matrimonial Causes Act 1857* (UK)) when Parliament legislated to terminate that ecclesiastical jurisdiction: *Clibbery v Allan* [2002] EWCA Civ 45; [2002] Fam 261, 274 [29] (Dame Elizabeth Butler-Sloss P).
45. The chaos of the Interregnum in the mid-17th century saw the abolition of the ecclesiastical courts without anything being put in their place: Stone L, *Road to Divorce: England 1530-1987*, (Oxford University Press, 1992) 149. Amidst this chaos, private separation agreements were created between a husband and a trustee for his wife (since a wife had no separate legal personality) as a means of giving some legal efficacy to the end, in practical terms, of the marriage. The agreements flourished, particularly because of their privacy for both parties and the (still limited) personal and financial independence that they afforded the wife. Over a lengthy period of time, parties challenged various standard clauses in these agreements, particularly those giving financial independence to the wife. Different approaches were taken by the ecclesiastical, common law, and equity courts to the validity of different clauses, although the wife's financial independence was, characteristically, the focus of Lord Mansfield as Lord Chief Justice and the focus of the later opposition of Lord Eldon as Lord Chancellor: *Corbett v Poelnitz* [1785] EngR 8; (1785) 1 TR 5; 99 ER 940; *Ringsted v Lanesborough* (1783) 3 Doug 197; 99 ER 610; *Marshall v Rutton* [1800] EngR 171; (1800) 8 TR 545; 101 ER 1538. The efforts of Lord Eldon and others to end resort to private separation agreements failed; such agreements were in widespread use when the 1857 Act was enacted and remained in use for some time afterwards.
46. The common form of these separation agreements usually included a clause recording that the parties had agreed "to live separately and apart from each other" for the future: *Sullivan v Sullivan* (1824) 2 Addams 299, 300; (1824) 162 ER 303, 304; *Warrender v Warrender* (1835) II Clark & Finnelly 488, 491; [1835] EngR 297; (1835) 6 ER 1239, 1240; *Hunt v Hunt* (1862) 4 De G F & J 219, 221; [1862] EngR 253; (1862) 45 ER 1168, 1169.
47. The context in which the clause recorded the parties' agreement to live "separately and apart" for the future was therefore the breakdown, in practice, of one household and the creation of circumstances where the husband and wife would live separate lives. The common use of the phrase "to live separately and apart from each other" for the future is unlikely to have been invented entirely afresh in the mid-17th century separation agreements. It may have been borrowed from the long established Roman principle for dissolution of marriage: *Divortium non est nisi verum, quod animo perpetuam constituendi dissensionem fit* (D 24.2.3 (Paul)). Loosely, this translates as "A true divorce does not take place unless there is an intention to live apart permanently". Importantly, the Roman principle of "living apart" or "remaining apart" was not concerned with physical living arrangements. It was concerned with whether the spouse remained a part of the Roman household. So a marriage would not be dissolved if a spouse fell into "enemy hands", even indefinitely, so long as it was known that the spouse remained alive: D 24.2.6 (Julian). See also Frier B and McGinn T, *A Casebook on Roman Family Law* (Oxford University Press, 2004) 156-157, 163 and Jolowicz, HF *Roman Foundations of Modern Law* (Clarendon Press, Oxford, 1957) 152-153. Although we do no more than point to the possible relationship between Roman law and the use of "separate and apart" clauses in separation agreements, we also note that contemporary ecclesiastical lawyers were skilled in law based on Roman texts (as shown in the discussion of marriage in Burn's *Ecclesiastical Law*: see [44] above); and that late 16th and early 17th century English common lawyers showed greater familiarity with Roman texts than their predecessors, prompted perhaps by a lack of useful texts on English law: Ibbetson D and Lewis A, "The Roman law tradition" and Lewis A, "What Marcellus says is against you': Roman law and Common law" in Lewis ADE and Ibbetson DJ (eds), *The Roman Law Tradition* (Cambridge University Press, 1994) ch 1, 9-10 and ch 12, 199, 206-207.
48. The concept of a separation based on agreement was given legislative force in 1928 when New Zealand passed legislation which created a right to divorce, one ground of which was based upon a separation agreement. The New Zealand *Divorce and Matrimonial Causes Act* 1928, s 10(i) provided that a ground upon which to seek divorce was that "the petitioner and the respondent are parties to

an agreement for separation, whether made by deed or other writing or verbally, and that such agreement is in full force and has been in been in full force for not less than three years".

49. The New Zealand model was developed and adapted in Australia by a number of States. One of them was South Australia in the *Matrimonial Causes Amendment Act 1938* (SA), amending the *Matrimonial Causes Act 1929-1936* (SA). Another was Western Australia, with the enactment of the *Supreme Court Act Amendment Act 1945* (WA), inserting a new s 69(6) into the *Supreme Court Act 1935* (WA). That sub-section was also modelled on the terms of a separation agreement. It provided for a ground for dissolution of marriage where "the husband and wife have lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition and it is unlikely that cohabitation will be resumed". In moving the second reading for the enactment of this provision, the Member for West Perth not only referred to the South Australian legislation but also spoke of the manner in which the Western Australian legislation had developed the New Zealand model: Western Australia, Legislative Assembly, *Debates* (3 October 1945) Vol 116, p 996.
50. In *Main v Main* [1949] HCA 39; (1949) 78 CLR 636, the High Court of Australia considered the meaning of s 69(6) of the *Supreme Court Act 1935-1947* and the requirement of "living separately and apart". The issue in that case was whether the conditions in the section had been satisfied. Mrs Main's husband had been paralysed and had lived in separate care accommodation for more than five years. The High Court held that the requirements of the section had been satisfied. In a joint judgment, Latham CJ, Rich, and Dixon JJ said that the provision was a 'notable extension of the previous law' and that (at 641-642):

> The two words "separately and apart" show that physical separation is necessary and that it is not enough that there has been a destruction of the *consortium vitae* or matrimonial relationship while the spouses dwell under the same roof. In matrimonial law the expressions like "live separately", "separated", and "separation" are commonly used to indicate that the conjugal relation no longer exists between the parties to the marriage. Although usually the existence of the conjugal or matrimonial relationship or *consortium vitae* means that the spouses share a common home and live in the closest association, it is not inconsistent with absences from one another, even for very long periods of time. It rests rather on a real and mutual recognition by the husband and wife that the marital relationship continues to subsist and a definite intention to resume the closer association of a common life as soon as the occasion or exigency has passed which has led to an interruption regarded by both as temporary.

51. The provision in the Western Australia legislation was subsequently duplicated in s 28(m) of the *Matrimonial Causes Act 1959* (Cth). That section was considered in *Crabtree v Crabtree* (1963) 5 FLR 307. In that case, the Full Court of the Supreme Court of New South Wales considered whether a husband and wife who lived in the same house could nevertheless live "separately and apart" within s 28(m) of the *Matrimonial Causes Act.* The Full Court held that they could. Sugerman and Dovey JJ (at 311) explained that the High Court in *Main* had not been concerned with a circumstance where two spouses lived "separately and apart" under the same roof, and that their Honours had not denied that this was possible. Sugerman and Dovey JJ (309) approved the formulation of Bucknill LJ in *Hopes v Hopes* [1949] P 227, 234, saying that the test was whether "although husband and wife are living in the same dwelling, ... there is such a forsaking and abandonment by one spouse of the other that the court can say *that the spouses were living lives separate and apart from one another*" (emphasis added). This same passage had also been quoted with approval by Street CJ (Owen J agreeing) in *Campbell v Campbell* (1951) 51 SR (NSW) 158, 160.
52. In *Crabtree*, Sugerman and Dovey JJ recognised that their conclusion was incongruous with the ordinary meaning of the words "separately and apart". But their Honours held that Parliament intended the words to bear the meaning that had become familiar in matrimonial law, and so a husband and wife could live "separately and apart" in the same house (at 310). That established meaning was supported by the decision of the English Court of Appeal considering this phrase: *Hopes v Hopes* [1949] p 227. It was supported by authority considering the phrase "separately *or* apart": *Ayling v Ayling* [1949] WALawRp 9; (1949) 51 WALR 61; cf *Flindell v Flindell* [1948] WALawRp 9; (1948) 50 WALR 9. And the conclusion was also supported by authority concerning circumstances of "wilful desertion" for 3 years or more under s 75(a) of the *Marriage Act 1928* (Vic): *Power v Power* [1944] VicLawRp 48; [1944] ALR 427; *Watkins v Watkins* [1952] HCA 60; (1952) 86 CLR 161; *Potter v Potter* [1954] HCA 52; (1954) 90 CLR 391.
53. The conclusion that parties could live "separately and apart" even if residing in the same house was given express statutory force in the *Family Law Act 1975* (Cth) s 49(2): "The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other". See *In the Marriage of Pavey* (1976) 25 FLR 450, 456 – 458 (the Court).
54. Several conclusions can therefore be drawn from this long history of the phrase "live separately and apart" at the time that this phrase was first introduced into the *Migration Regulations 1989*.
55. **First**, the phrase denoted both a physical and a mental element. Although there was dispute about whether the phrase was a composite one embodying both elements (*Santos v Santos* [1972] EWCA Civ 9; [1972] Fam 247, 258) or whether "separate" embodied a mental element and "apart" embodied a physical element (*Crabtree v Crabtree* (1963) 5 FLR 307, 319 – 320 (Nagle J), ultimately, that dispute was only a semantic one: *Crabtree v Crabtree* (1963) 5 FLR 307, 312 (Sugerman and Dovey JJ).
56. **Secondly**, the mental element was independent of whether the parties lived in the same house. The mental element involved the intention of the parties to live separate lives following the destruction of the marital relationship (*consortium vitae*).
57. **Thirdly**, although the physical element required some physical separation of the parties, the ultimate question was not whether the parties were physically living together in the same house. Even living in the same house could involve the parties being "separate and apart". The focus on the physical element was upon whether their physical behaviour involved "living lives separate and apart from one another". That could occur in the same house. Conversely, it might have been possible for a husband and wife who maintained separate residences to fail to meet the physical element if, as a whole, their lives were lived as a single household.
58. **Fourthly**, the reference to 'cohabitation' in s 69(6) of the *Supreme Court Act 1935-1947* (WA) and also in s 28(m) of the *Matrimonial Causes Act* was not treated as having altered this physical element to require 'habitation' in separate houses rather than as separate households. Those provisions, as considered by the High Court in *Main v Main*, and the Full Court of the Supreme Court of New South Wales in *Crabtree v Crabtree* provided:

> ... where the husband and wife have lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition *and it is unlikely that cohabitation will be resumed.* (Emphasis added).

Much the same requirement was included in s 48(3) of the *Family Law Act 1975*, which provided that there could be no dissolution of marriage if the court were satisfied that there was "a reasonable likelihood of cohabitation being resumed".

59. The conclusions relevant to s 5CB(2)(c)(ii) of the *Migration Act* that can be drawn from the history of the phrase "live separate and apart" are therefore that:

> (1) both the physical and mental elements of the phrase were concerned with a husband and wife who were living their *lives* separate and apart from each other as separate households;
> (2) the phrase therefore did not require that the parties live in different homes but rather focuses upon whether they lived their lives separately as separate households;
> (3) conversely the phrase "not living separately and apart on a permanent basis" focuses upon whether the parties will not live as separate households on a permanent basis;
> (4) even when legislation was enacted which included the requirement that it be "unlikely that cohabitation will be resumed", the Full Court of the Supreme Court of New South Wales had held that living in a separate house was not required; and
> (5) later legislation in 1975 that included the satisfaction requirement of no reasonable likelihood that cohabitation will be resumed also included an express provision that the "parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence".

60. Against this history of the meaning of the phrase "not live separately and apart on a permanent basis" it would have been a radical change in meaning if the introduction of this phrase in the definition of "spouse" in the *Migration Regulations 1989* and its eventual repetition in the *Migration Act* s 5CB(2)(c)(ii), without even a reference to resumption of "cohabitation", were to bear a meaning that the two persons must physically reside in the same premises for at least a temporary period in the past.

Other authorities relied upon by the parties

61. In written and oral submissions the court was referred to decisions involving the construction of different legislation. Those decisions concerned a legislative definition of "de facto partner" in the *Property Law Act 1974* (Qld) s 261. The legislative definition is substantially different from the definition with which this case is concerned in s 5CB(2) of the *Migration Act*. The *Property Law Act* includes no provision comparable to the subsection which is of central concern in this case (s 5CB(2)(c)(ii)). The section of the *Property Law Act 1974*, and the associated provision in the *Acts Interpretation Act 1954* (Qld) also has a different legislative history and was enacted at a different time.
62. However, one comment made by the Court of Appeal in a case concerning the *Property Law Act* applies in this case, as it does generally. That is that the expression "de facto" when defined in legislation is not limited by the "genesis of the expression in popular speech": *KQ v HAE* [2006] QCA 489; [2007] 2 Qd R 32, 37 [18]. Similarly, dictionary definitions of "de facto" do not assist in understanding the meaning of the detailed definition of "de facto" in s 5CB.
63. One other decision upon which some reliance was placed in submissions, and which was heavily influential in the conclusion reached in the Federal Circuit Court should be mentioned. That decision is *Li v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 14; (1992) 33 FCR 568.
64. In *Li*, the applicant sought judicial review of a decision by the Minister to cancel her visa and therefore prevent her entry to Australia. The applicant had lived with her husband but they had become separated as a result of political circumstances. They initially decided to resume cohabitation in the future but the husband later decided to separate permanently from the applicant. He informed the Minister's department of his decision and the applicant's visa was cancelled. The applicant alleged that she had been denied natural justice. The application was dismissed by Hill J who concluded that natural justice had not been denied. In the course of his Honour's recitation of the facts, he set out the definition of "spouse" from the *Migration Regulations 1989* which included the requirement that "the parties are not living separately and apart on a permanent basis" and said (at 576):

> The applicant and her husband were not, of course, physically living together; they were separated as a result of the exigencies of the Chinese political situation. However, that separation, at least when it began, was not "permanent" ... in that it would seem there was the intention that they would resume cohabitation in the future. The intention relevant must of necessity be the intention of both husband and wife. If the parties to a valid marriage live separately, the question of whether that separation is permanent depends upon their mutual intention. It will not be to the point that the wife hopes or even intends that the separation will be but temporary; if the husband has a different intention, the separation will be permanent.

Several points can be made about this passage from the decision in *Li*. First, in his Honour's description of the parties' intention to resume cohabitation he was not construing the Regulation to suggest that the parties must have previously lived together. Secondly, there was no issue in that case, and no submission made, about the precise construction of the phrase "living separately and apart on a permanent basis" and certainly no issue or submission about whether previous cohabitation was required. Thirdly, and fundamentally, in his Honour's reference to "the intention that they would resume cohabitation in the future" his Honour was simply describing the facts.

Conclusion

65. The appellant's construction of s 5CB of the *Migration Act*, which does not require that the parties physically reside in the same premises prior to the application, is supported by the plain meaning of the section. It is consistent with other provisions of the *Migration Act*, notably the definition of spouse in s 5F. It avoids the ambiguities and the difficulties associated with an implication of

the additional words into s 5CB(2)(c)(ii) sought by the Minister. It is supported by the section's legislative history. And it is supported by the well hallowed meaning of the phrase "living separately and apart" as that phrase had been established at the time the section and its predecessors were enacted.

66. The application by the Minister before McKerracher J for leave to bring this appeal out of time, and the appeal itself, were conducted by the Minister on the assumption that this question was not moot. In other words, although the appellant is now married to his former fiancée, Ms Yang, the assumption (apparently based in the existence of alternatives in cl 820.221 for "spouse" or "de facto" and the near-identical definition of the relevant parts of the definition of "spouse" in s 5F and "de facto" in s 5CB(2) of the *Migration Act*) was that the determination of the question on this appeal would effectively determine the rights of the appellant.
67. The appeal should be allowed and the orders made in the Federal Circuit Court set aside. The effect of this decision is that the decision of the Tribunal is reinstated as follows:

> The Tribunal remits the application for Partner (Temporary)(Class UK) visa and a Partner (Residence)(Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations;
- cl.820.221(1) of Schedule 2 to the Regulations; and
- cl 820.226 of Schedule 2 to the Regulations.
- r.2.03A(2) of the Regulations; and
- r.2.03A(3) of the Regulations.

I certify that the preceding sixty-seven (67) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 11 June 2015
