FEDERAL COURT OF AUSTRALIA

Deng v Minister Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1456

Appeal from:	*Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 2097 (5 July 2021)
File number(s):	NSD 800 of 2021
Judgment of:	**HALLEY J**
Date of judgment:	23 November 2021
Catchwords:	**MIGRATION** – mandatory cancellation of Woman at Risk (Class XB) (Subclass 204) visa – decision not to revoke mandatory cancellation pursuant to s 501CA(4) of the *Migration Act 1958* (Cth) (**Act**) – where primary considerations of protection of the Australian community, family violence committed by applicant and expectations of the Australian community outweighed primary consideration of best interests of minor children in Australia and other considerations – whether Administrative Appeals Tribunal (**Tribunal**) constructively failed to exercise its jurisdiction by failing to regard the applicant's health in considering any impediments to the applicant's removal – where evidence given regarding applicant's health inconclusive and qualified – whether Tribunal forgot or overlooked evidence – whether Tribunal acted on a misunderstanding of applicable law by finding the applicant had committed "family violence" – definition of "family violence" – definition of "family member" – definition of "de facto partner" and "de facto relationship" – where "members of a person's family" not limited to relatives and de facto partners – whether a person is "a member of a person's family" is a matter of fact – where Tribunal did not act on a misunderstanding of the applicable law – application dismissed
Legislation:	*Constitution* s 75 *Migration Act 1958* (Cth) ss 5CB, 5G, 476A, 499, 501, 501CA *Migration Regulations 1994* (Cth) reg 1.09A Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction no. 90 – Visa refusal and cancellation under s501 and revocation of a mandatory*

	cancellation of a visa under s501CA
Cases cited:	*FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 *FKP18 v Minister for Immigration and Border Protection* [2018] FCA 1555 *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112; [2014] FCA 674
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	174
Date of hearing:	29 October 2021
Counsel for the Applicant:	Mr D Hooke SC with Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr N Swan
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent submitted to any order of the Court, save as to costs

ORDERS

NSD 800 of 2021

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

ORDER MADE BY:	**HALLEY J**
DATE OF ORDER:	**23 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. The originating application be dismissed.

2. The applicant pay the first respondent's costs as agreed or taxed.

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

REASONS FOR JUDGMENT

HALLEY J:

1 This is an application made under s 476A(1)(b) of the *Migration Act 1958* (Cth) (**Act**). The applicant is seeking judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**) made on 5 July 2021, which affirmed a decision of a delegate of the first respondent (**Minister**) not to revoke the mandatory cancellation of the applicant's visa pursuant to s 501CA(4) of the Act.

2 Section 476A(1)(b) of the Act gives the Court jurisdiction to review the decision of the Tribunal. Section 476A(2) provides that the jurisdiction is the same as the jurisdiction of the High Court pursuant to s 75(v) of the *Constitution*. Consistently with that conferral of jurisdiction, the relief sought by the applicant in his originating application is a writ of certiorari quashing the decision of the Tribunal and a writ of mandamus remitting the matter to the Tribunal for determination according to law.

3 For the reasons that follow, I find that the Tribunal did not err in affirming the delegate's refusal to revoke the mandatory cancellation of the applicant's visa pursuant to s 501CA(4) of the Act.

BACKGROUND

4 The applicant is a 27 year old male from the country now known as South Sudan.

5 He first arrived in Australia in September 2006, with his mother, four brothers, two sisters and a child of his older sister, when he was 12 years old.

6 He is the youngest of his siblings. His family had previously lived in Kenya for several years in refugee camps after fleeing a part of Sudan which is now South Sudan. He believes that he left Sudan when he was between five and six years old.

7 The applicant was granted a Woman at Risk (Class XB) (Subclass 204) visa on 25 May 2006.

8 On 23 May 2019, the applicant's visa was mandatorily cancelled under s 501(3A) of the Act (**original decision**).

9 Section 501(3A) provides:

> (3A) The Minister must cancel a visa that has been granted to a person if:
>
> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph 7(a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

10 Subsections 501(6) and 501(7) relevantly provide:

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); …

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

…

(c) the person has been sentenced to a term of imprisonment of 12 months or more;

11 If a visa is cancelled pursuant to s 501(3A) of the Act, the former visa holder can seek to have the cancellation revoked pursuant to s 501CA. Section 501CA relevantly provides:

(1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.

…

(4) The Minister may revoke the original decision if:

…

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original test should be revoked.

12 On 1 July 2019, the applicant requested that the delegate of the Minister revoke the original decision pursuant to s 501CA(4) of the Act.

13 On 12 April 2021, the delegate of the Minister declined the applicant's request to revoke the original decision.

14 On 18 April 2021, the applicant sought a review of the delegate's decision not to revoke the original decision.

15 On 5 July 2021, the Tribunal affirmed the decision of the delegate not to revoke the original decision.

16 By an originating application dated 8 August 2021 and filed on 9 August 2021, the applicant seeks judicial review of the Tribunal's decision to affirm the decision of the delegate of the Minister not to revoke the original decision.

17 There is no dispute that the conditions leading to mandatory cancellation pursuant to s 501(3A) were met.

18 On 6 February 2019, the applicant was convicted of assaults occasioning bodily harm and was sentenced to 12 months' imprisonment. The applicant thus has a substantial criminal record pursuant to s 501(7)(c) for the purposes of the character test. At the time of the original decision, the delegate of the Minister was satisfied that the applicant was serving a sentence of imprisonment on a full time basis.

19 The issue before the Tribunal, therefore, was only whether there was "another reason" to revoke the original decision under s 501CA(4)(b)(ii) of the Act.

20 The applicant contends that, in affirming the delegate's decision, the Tribunal fell into jurisdictional error on two grounds, being:

(a) a constructive failure to exercise jurisdiction (**Ground 1**); and

(b) acting on a misunderstanding of the applicable law (**Ground 2**).

TRIBUNAL DECISION

21 The Tribunal commenced by setting out a brief background to the matter and summarising the relevant legislative provisions and considerations that it had to consider, including *Direction no. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**).

22 Direction 90 is a direction given by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs under s 499 of the Act.

23 The Tribunal stated that Direction 90 requires that consideration must be given to the four "primary considerations": protection of the Australian community from criminal or other serious conduct; whether the conduct engaged in constituted family violence; the best interests of minor children in Australia; and the expectations of the Australian community. The "other

considerations" that the Tribunal identified it must take into account pursuant to Direction 90 are: international non-refoulement obligations; extent of impediments if removed; impact on victims; and links to the Australian community by reference to the strength, nature and duration of ties to Australia and impact on Australian business interests. It then noted that the primary considerations should generally be given greater weight than the other considerations, and that one or more primary considerations may outweigh other primary considerations.

24 The Tribunal then summarised at [20] to [100] of its reasons the applicant's background and the circumstances of the offending that led to the cancellation of the applicant's visa. The Tribunal's summary of the applicant's offending included the following incidents of violence against women.

25 On 28 March 2012, the applicant arrived home and argued with his sister and she attempted to run away from him, after which he punched a wall, "smashing a hole in it" (**28 March 2012 Incident**). A protection order was subsequently made on 3 April 2012, requiring the applicant to be of good behaviour and not commit domestic violence (**April 2012 Protection Order**). In the hearing before the Tribunal, the applicant said that he had not heard this allegation before, and he denied knowing that the April 2012 Protection Order had been made. The Tribunal noted that the signature above the word "Respondent" looked "similar, although not identical, to the Applicant's signature that appears on other documents before me including his revocation request". In the course of the hearing when this issue was raised by the Tribunal, the applicant claimed that the signature on the April 2012 Protection Order was not his and he denied signing the document.

26 On 28 July 2013, the police applied for a protection order for Ms S against the applicant. The application was made following an incident on 23 July 2013. The Tribunal noted that the applicant and Ms S had engaged in a dispute over Ms S's phone, in the course of which the applicant had "grabbed the phone from Ms S", "twisted Ms S's arm behind her back and pulled it up" and "pushed her head into her bedroom wall". The Tribunal also noted that the applicant had hit Ms S in the stomach and smashed her phone on the road.

27 On 8 August 2013, a protection order was issued against the applicant (**August 2013 Protection Order**). The August 2013 Protection Order prohibited the applicant from following or approaching Ms S, and from entering or attempting to enter, or approaching within 100 metres of, where Ms S lives or works. The August 2013 Protection Order also ordered that the applicant be of good behaviour towards Ms S and not commit domestic violence against her.

In the hearing before the Tribunal, the applicant stated that he recalled the incident where he broke up with Ms S but denied knowing the August 2013 Protection Order had been made. He said that it had been a "clean breakup" and denied that he had attacked Ms S or threatened her.

28 The Tribunal also referred to an incident that occurred on 24 February 2014. The police report of the incident recorded that the applicant punched a female victim, Ms G, twice in the face after an encounter on the street. In his written materials provided to the Tribunal the applicant stated: "In complete honesty, I do not remember the events of this offence. At this time, I was heavily drinking alcohol and smoking marijuana." The applicant pleaded guilty to this offence. In the hearing before the Tribunal, however, the applicant claimed he did not punch Ms G and that she had hit him with a bottle.

29 A further protection order was made for Ms S against the applicant after an incident on 14 September 2014 in which the applicant tried to stop Ms S getting onto a bus (**September 2014 Protection Order**). A witness told the police that the applicant had his arms around Ms S and was hitting her hands, in addition to "physically assault[ing] [Ms S] several times". In the hearing before the Tribunal, the applicant denied assaulting Ms S at the bus stop, although he admitted to holding onto her to stop her getting onto the bus.

30 On 7 January 2015, the applicant contravened the September 2014 Protection Order when he committed a further assault on Ms S. The court brief prepared by the Queensland Police Service in relation to that assault recorded that:

> Upon arrival at about 11:20am, Police took up with the complainant and the defendant and began questioning them about the incident. The complainant stated that she and the defendant just had an argument.
>
> The complainant has then attempted to leave the situation when the defendant has then grabbed her by the hair and dragged her back and hit her on the left ear. The complainant then became very upset and proceeded down stairs and approached the front glass door. The complainant told police that she wasn't sure if she intentionally head-butted the door or accidentally fell into it as she was in a distressed state however: the complainant has impacted the glass door with her head cutting herself and breaking the door. The complainant has then crouched down near the door on the inside crying. The defendant has then placed one hand on her throat and squeezed beginning to choke her. The defendant has then used his other hand and begun choking her with both hands, the defendant has pinned the complainant against the wall and put his bodyweight against her neck choking her. Eventually the defendant has stopped choking the complainant and the complainant has called police to attend.
>
> Police attended the scene and observed the complainant in a very distressed state on the footpath with the defendant nearby. The complainant was crying and had blood clearly from a cut coming from her left forehead.
>
> Police observed that the complainant had cuts to her chest, a severe cut to the left of

> her forehead, bruising to her eye and a cut to her top lip. The comp states that these injuries were caused by the defendant and caused her pain and distress. The defendant was then arrested in relation to this and transported to the Brisbane City Watch house. When asked if he would partake in an Electronic Record of Interview the deft refused.

31 The applicant was subsequently convicted of assault occasioning bodily harm against Ms S in relation to this incident on 2 December 2015. In the hearing before the Tribunal, the applicant admitted to grabbing Ms S by the hair but denied the other violence.

32 On 4 October 2018, the applicant committed assault occasioning bodily harm and obstruct/assault police after the applicant flipped over a table at Ms V, then hit her across the face several times with open hands. The applicant resisted the police when they arrived to take him into custody, and tried to stop them from searching him. At the watch house, the applicant refused to answer questions and threatened to murder the interviewing police officer.

33 According to police records, on 20 March 2019 a further protection order was made against the applicant (**March 2019 Protection Order**). Ms V was named as the aggrieved person in the March 2019 Protection Order. There had been a verbal altercation which resulted in the applicant striking Ms V on the head. The applicant admitted in a document he had prepared in September 2020 that he and Ms V had "got into an argument and I slapped her". When asked about the incident before the Tribunal, however, the applicant denied that he had slapped Ms V. He claimed that he had only pleaded guilty because he was already in custody and had been advised by a lawyer to plead guilty in order to be released. The police record noted that Ms V did not have any visible physical injuries.

Primary Consideration 1: Protection of the Australian Community

34 The Tribunal outlined that cl 8.1 of Direction 90 requires decision makers to "keep in mind the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens". In determining the weight to be given to Primary Consideration 1, the Tribunal had regard to both the nature and seriousness of the applicant's conduct to date and the risk to the Australian community should the applicant commit further offences or engage in other serious conduct pursuant to cl 8.1(2) of Direction 90.

Nature and seriousness of conduct to date

35 The Tribunal observed that the applicant had engaged in violent crime against numerous people, mainly women, and that his offending was frequent. Between 2013 and 2019, the

applicant had committed 37 offences. The Tribunal did not discern a trend of increasing serious as it considered the offending to be serious to start with.

36 The Tribunal concluded that the cumulative effect of the applicant's repeated violent offending is that many members of the community were physically harmed, threatened and intimidated. The Tribunal stated that he had refused to comply with police directions and had breached protection orders and parole conditions. The Tribunal found that the sentences of imprisonment had not deterred the applicant from continuing to offend, and his behaviour demonstrated a disregard for the criminal justice system.

37 The Tribunal found that the relevant factors of cl 8.1.1(1) of Direction 90, in their totality, weighed heavily against revocation of the original decision.

Risk to the Australian community

38 In considering the risk to the Australian community, the Tribunal observed pursuant to cl 8.1.2 of Direction 90, and as outlined in cl 8.1.2(1), that regard had to be had to the nature of the harm to individuals in the Australian community should the applicant engage in further criminal or other serious conduct, and the likelihood of the applicant engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the applicant reoffending.

Nature of harm should the applicant engage in further criminal or other serious conduct

39 In assessing the nature of harm to individuals or the Australian community, the Tribunal considered that the assessment was informed by the nature of the applicant's offending to date, and by the provision in Direction 90 which stipulates that the Australian community's tolerance for harm becomes lower as the seriousness for potential harm increases. The Tribunal found that, should the applicant engage in further violent offending or serious conduct, the harm to individuals in the Australian community would include physical injury, psychological distress to direct victims, collateral distress to family members and loved ones of direct victims, loss of personal property and financial loss.

Likelihood of the applicant re-offending

40 The Tribunal noted that there was no independent, expert evidence about the risk the applicant would re-offend, so it would make an assessment based on the evidence before it. It outlined the applicant's acceptance into the Queensland Academy of Sports in 2011, and as stated by the applicant in his Personal Circumstances Form that his "life was going well until [he] had a

relationship breakdown" and that he had been "heavy drinking and using drugs, namely weed, ice etc. It was a really bad cocktail". The Tribunal noted that the applicant agreed that the main reason behind his criminal offending was his drug use and the company he was surrounded with.

41 The Tribunal accepted that the applicant had engaged in rehabilitation programs while in gaol and detention, and that some of this rehabilitation was directed at anger management. As will become relevant later in these reasons, the applicant received counselling sessions with the Queensland Program of Assistance to Survivors of Torture and Trauma (**QPASTT**), which the applicant described as having been beneficial mentally. The Tribunal also outlined that the applicant wants to help his nieces and nephews, and support his mother.

42 In considering the likelihood of the applicant reoffending, the Tribunal concluded at [144] of its decision:

> While I accept that the Applicant has taken some steps toward rehabilitation, it seems clear that more work is needed. First, his trauma counsellor, with whom he has only been engaged for two months, thinks he needs more counselling to address his tendency towards aggression. Second, his denial of most of the violence he has engaged in not only looks like an attempt to manipulate legal processes, but it also demonstrates unwillingness to take responsibility for his past behaviour. This does not give me confidence that the Applicant will consider himself responsible for his future behaviour in terms of avoiding drugs and obeying the law.

43 Although the Tribunal accepted that the applicant had not used drugs since being incarcerated, it noted he had not had the opportunity to demonstrate long-term sobriety outside the highly regulated and structured environment in prison and detention. The Tribunal considered that there was a moderate risk of the applicant committing further offences in the future of the kind that he had committed in the past.

44 The Tribunal concluded that the primary consideration of protection of the Australian community weighed very heavily in favour of not revoking the mandatory cancellation.

Primary Consideration 2 – Family Violence

45 The Tribunal noted that for the purpose of assessing the family violence consideration, decision makers are required to consider the matters set out at cl 8.2 of Direction 90.

46 Clause 8.2 of Direction 90 provides:

> (1) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness

of the family violence engaged in by the non-citizen (see paragraph (3) below).

(2) This consideration is relevant in circumstances where:

a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or

b) there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.

(3) In considering the seriousness of the family violence engaged in by the non-citizen, the following factors must be considered where relevant:

a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;

b) the cumulative effect of repeated acts of family violence;

c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:

i. the extent to which the person accepts responsibility for their family violence related conduct;

ii. the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);

iii. efforts to address factors which contributed to their conduct; and

d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-citizen's migration status, should the non-citizen engage in further acts of family violence.

47 The Tribunal was satisfied that the applicant had committed "family violence" against his sister and on multiple occasions against his intimate partner, Ms S. The Tribunal otherwise observed that in its consideration of Primary Consideration 1, it had addressed the matters it was required to address under Primary Consideration 2, and it applied, rather than repeated, that analysis to its treatment of this consideration.

48 The Tribunal also observed:

> I add that inherent in family violence is abuse of power and violation of trust. The Australian community places significant value on the sanctity of a person's home. A person should feel safe in their home. Similarly, a person should feel safe with their partner. The psychological, emotion and social impacts of family violence are insidious

> and serious. The Direction stipulates that the Australian Government, on behalf of the Australian community, has a very low tolerance for this kind of abuse.

49 The Tribunal concluded that Primary Consideration 2 weighed heavily against revocation of the original decision.

Primary Consideration 3 – Best Interests of Minor Children

50 The Tribunal noted that for the purpose of assessing the best interests of minor children, decision makers are required to consider the matters set out at cl 8.3 of Direction 90.

51 After considering the evidence advanced with respect to the best interests of minor children, including evidence with respect to the applicant's older sister's three sons and his younger sister's four daughters, the Tribunal made the following findings.

52 The Tribunal was satisfied that the applicant's involvement to date in the lives of his sisters' children had been positive except in connection with the 28 March 2012 Incident in front of two of the children of his older sister.

53 The Tribunal considered that the applicant's involvement in the lives of his sisters' children in the future would be beneficial overall, probably more for the second son of his older sister, but not to any great extent.

54 The Tribunal concluded that the best interests of his nephews and nieces weighed to a limited extent in favour of the revocation of the original decision.

Primary Consideration 4 – Expectations of the Australian Community

55 The Tribunal then considered the expectations of the Australian community. The Tribunal noted that for the purpose of assessing the expectations of the community, decision makers are required to consider the matters set out at cl 8.4 of Direction 90.

56 The Tribunal stated that in assessing the weight to be attributed to this consideration, it was necessary to have regard to the following matters:

- the Applicant moved to Australia when he was 12 years old. He is now 27 years old;
- the Applicant committed his first criminal offence seven years after moving to Australia;
- the Applicant has engaged in crimes of violence, including violence against women and violence against police officers in the performance of their duty. He has engaged in family violence;

- some of the Applicant's offences are very serious;
- there is at least a moderate risk that he will re-offend;
- his offending history demonstrates a disregard for the laws regulating the community that he seeks to re-enter;
- between 2006 and 2011 the Applicant was involved in his Church's choir, and for several years he was involved in the Queensland sporting community;
- the Applicant held gainful employment for around three years. He occasionally helped his sister in her child-minding business; and
- if he is removed to South Sudan, it will adversely affect his mother and siblings (addressed below under Other Considerations), and some nieces and nephews (addressed above under Primary Consideration 3).

57 For present purposes, it is significant that the factors identified by the Tribunal included that the applicant had engaged in "family violence". In context, this would appear to be a reference to findings that the Tribunal had made with respect to Primary Consideration 2 with respect to the incidents involving his older sister and Ms S.

58 The Tribunal found that the applicant had breached the trust of the Australian community and the nature of the applicant's offending was such that the Australian community would expect that he should not hold a visa. It concluded that Primary Consideration 4 weighed heavily in favour of non-revocation of the original decision.

Other Considerations

59 The Tribunal then turned to consider the four "Other Considerations" set out in cl 9.1 to 9.4 of Direction 90.

International non-refoulement obligations - cl 9.1

60 The applicant claimed that if he was removed to South Sudan, his life would be "in serious danger due to being classified as an 'outsider'", and that all he knew was that "there are still tribal wars and serious dangerous violence and harm".

61 The country information to which the Tribunal had regard in assessing the international non-refoulement obligations consideration was a Department of Foreign Affairs and Trade (**DFAT**) report published in October 2016 (**DFAT Report**). The DFAT Report noted that Christianity was the dominant religion in South Sudan and referred to instances of killings and serious societal violence against civilians in conflict affected areas, and to the torture of perceived members of the opposition movement by the government.

62 The Tribunal was not satisfied that there would be a real chance that the applicant would be harmed on the basis of his religion (although it does not appear that the applicant claimed he would be), given he was a Christian, or that there was more than a remote chance that he would suffer serious harm on the basis of his ethnicity or any other reason personal to him.

63 The Tribunal accepted, however, that the applicant would be at risk of generalised violence and crime in South Sudan but noted that it was open for him to apply for a protection visa if the original decision was not revoked.

64 The Tribunal noted that the applicant claimed to be stateless because when he left Sudan, South Sudan did not exist. The Tribunal, however, was not satisfied that the applicant would be denied citizenship of South Sudan given the applicant's evidence that he is a member of the Dinka ethnic community. The Dinka community is one of the ethnic communities of South Sudan that automatically acquires South Sudanese citizenship by operation of art 8(1) of the *South Sudanese Nationality Act 2011*, according to Mike Sanderson, 'Statelessness and Mass Expulsion in Sudan: A Reassessment of International Law' (2014) 12(1) *Northwestern Journal of International Human Rights* 74, to which the Tribunal referred.

65 The Tribunal concluded that the applicant would be at risk of generalised violence and crime in South Sudan and that the non-refoulement consideration weighed to a limited extent in favour of revocation.

Impediments to removal – cl 9.2

66 The Tribunal next considered impediments to removal.

67 The Tribunal noted that in assessing this consideration it was required to take into account:

(a) the non-citizen's age and health;

(b) whether there are any substantial language or cultural barriers; and

(c) any social, medical and/or economic support to that non-citizen in that country.

68 The Tribunal stated that the applicant was a 27 year old man who is able bodied and does not claim to have any diagnosed medical or mental health conditions.

69 The Tribunal made the following further substantive findings:

(a) his ability to speak Dinka and his fluency in English would assist him but his inability to speak Arabic could create a language barrier in some situations;

(b) he has no memory of his early life in what was then part of Sudan and he is not familiar with the customs and practices in South Sudan;

(c) the applicant did not have any familial support or social support in South Sudan; and

(d) it will be very difficult for the applicant to establish himself in South Sudan and maintain basic living standards.

70 The Tribunal concluded that the impediments to removal consideration weighed heavily in favour of revocation of the original decision.

Impact on victims – cl 9.3

71 The Tribunal noted that there was no evidence before it of any impact that the applicant's continued presence in Australia would have on any victims of the applicant's criminal behaviour and therefore this consideration was neutral.

Links to the Australian Community – cl 9.4

72 The Tribunal noted that in its assessment of the links to the Australian community consideration it was required to have regard to the strength, nature and duration of the applicant's ties to Australia and the impact of any removal of the applicant on Australian business interests.

73 The Tribunal had regard to the length of time the applicant had spent in the Australian community (some 13 years if time spent in prison or detention is not included), and his employment working in an automotive assembly line and making canvases for an art gallery.

74 It also had regard to his involvement with the Ipswich City Anglican Church, his semi-professional playing career with the Brisbane City Football Club and a South Sudanese football team in the Refugee Cup, and his time at the Queensland Academy of Sport for long jump and triple jump. The Tribunal, however, noted that the applicant had not produced any letters of support from any of these organisations. It was therefore not satisfied that the applicant has strong ties with any of these past pursuits, but noted that this was not to say that the applicant did not have some positive social relationships in the community.

75 The Tribunal noted that the applicant claimed he was very close to his siblings but observed that only one brother wrote a letter of support, and that no one in his family was aware, at the time the Tribunal made its decision, of his drug use or of the nature and extent of his criminal offending.

76 The Tribunal was not satisfied that the applicant had particularly close ties to any of his family members but did accept that the applicant was part of a cohesive family unit.

77 The Tribunal was satisfied that the applicant's family, particularly his mother, would suffer some emotional hardship if the applicant is returned to South Sudan but was not satisfied that the health or financial position of his mother or siblings would be impacted.

78 The Tribunal concluded that the applicant's social and familial links, and the impact on his family of his removal would weigh moderately in his favour under cl 9.4.1(2)(b) of Direction 90.

79 The Tribunal noted that the applicant had not claimed that his removal from Australia would adversely affect any Australian business interests and therefore this issue could not be given any weight under cl 9.4.2 of Direction 90.

Determination of the Tribunal

80 The Tribunal ultimately affirmed the decision of the delegate of the Minister. It concluded that, to the extent that Primary Consideration 3 and Other Considerations (cls 9.1, 9.2 and 9.4) weighed in favour of revocation of the original decision, they could not, even when combined, outweigh the weight that it had given to Primary Considerations 1, 2 and 4.

REVIEW GROUNDS

Ground 1 – Constructive failure to exercise jurisdiction

Introduction

81 The first ground of review relied upon by the applicant is that the Tribunal constructively failed to exercise jurisdiction in that it failed to comply with the requirement in cl 9.2(1)(a) of Direction 90 to have regard, inter alia, to the applicant's health in the context of considering the extent of any impediments to the applicant's removal.

82 Ms Boyd-Ford prepared a report for the Tribunal on behalf of the applicant and was cross examined. She is a counsellor at QPASTT. The applicant seeks to contrast the findings made by the Tribunal with respect to the evidence of Ms Boyd-Ford in considering the risk of the applicant reoffending and the absence of any references to her evidence in the Tribunal's assessment of the applicant's health and state of mind when making findings in relation to impediments to removal.

83 The Tribunal made the following findings with respect to Ms Boyd-Ford's evidence in the context of the risk of the applicant reoffending as part of its consideration of Primary Consideration 1 in Direction 90, the protection of the Australian community:

> 140. There is a letter before me, dated 28 May 2021, from Ms Boyd-Ford who is a counsellor at QPASTT. She holds a Bachelor of Psychological Science and a Masters of Counselling. She has four years of experience working in trauma-informed mental health services providing services to asylum seekers and refugees. She said the Applicant initially self-referred to the service in May 2020, however there was some delay, and he had completed five counselling session [sic] to date. **In his self-referral, he had reported experiencing intense/persistent emotional distress, aggressive behaviour or persistent anger, and some other symptoms.** Ms Boyd-Ford's report did not address the Applicant's risk of reoffending but rather **the Applicant's treatment in terms of dealing with past trauma.**
>
> 141. Ms Boyd-Ford gave evidence in the hearing. She was asked about a recommendation she made in her letter, that **the Applicant continue to engage with QPASTT and focus on trauma experiences and their impact on his mental health and personal relationships, along with ongoing engagement with specialised drug and alcohol services**. She said she meant that the Applicant would engage separately with specialised drug and alcohol services, adding that she would recommend that somebody else work on that **while she focused on trauma processing**. She said that moving back into the community would bring up stressors and that individual, tailored support would give the Applicant the best opportunity for recovery.
>
> 142. By the time of the hearing, Ms Boyd-Ford had been counselling the Applicant for around two months, and they had had around eight counselling sessions. When asked if the counselling had touched on domestic violence, aggression or controlling behaviour, she said it had but it would be beneficial to do more in-depth work as they had only begun to work on that. She said while **her therapy is aimed at the Applicant's trauma**, the impact of trauma is normally interpersonal, so part of trauma work is looking at interpersonal relationships, dynamics and trust. Trauma counselling will address the way the Applicant reacts and the way he perceives relationships. She said the Applicant **was in the early stages of dealing with aggression and domestic violence, and they are "sort of unpacking it and exploring it at the moment"**. She added that something that signifies a person's willingness to work on their interpersonal relationships is their engagement in the therapeutic relationship and that the Applicant had attended all his appointments and always been open and wanting to participate.
>
> 143. Ms Boyd-Ford confirmed that the Applicant could continue QPASTT counselling in the community on an indefinite basis and that the service is free.
>
> (Footnotes omitted and emphasis added.)

84 Ms Boyd-Ford's evidence was considered by the Tribunal in the context of its consideration of the likelihood of the applicant engaging in further criminal or other serious conduct but not referred to in the Tribunal's consideration of impediments to the applicant's removal.

Submissions

85 The applicant advances the following submissions in support of Ground 1.

86 *First*, the specific findings made by the Tribunal concerning Ms Boyd-Ford's evidence in addressing risks of the applicant reoffending establish that the applicant suffered intense and persistent emotional distress and trauma experiences and that more work was needed concerning the applicant's rehabilitation.

87 *Second*, the Tribunal failed to have regard to Ms Boyd-Ford's report in considering impediments to removal and referred to her oral evidence before the Tribunal in which she stated that the applicant required ongoing engagement with specialist drug and alcohol services, and that individual and tailored support would always give someone the best opportunity for recovery.

88 *Third*, regardless of any claim the applicant might have made that he did not have any diagnosed medical or mental health conditions, cl 9.2(1)(a) is a mandatory consideration and evidence from an independent and authoritative source should be given appropriate weight. The applicant also submitted in this context that the Tribunal itself had made findings that the applicant had "ongoing rehabilitation needs" and the applicant had "not demonstrated long-term sobriety in the Australian community". The applicant submitted that these findings were held against the applicant in considering prospects of reoffending but "largely forgotten" when the Tribunal considered impediments to removal.

89 *Fourth*, the evidence before the Tribunal and the findings that it made concerning the applicant's health problems with alcohol and drug abuse were "entirely ignored" by the Tribunal in its consideration of impediments to removal.

90 *Fifth*, notwithstanding that the Tribunal held that three primary considerations weighed very heavily against the applicant, his drinking problems, drug issues and mental health challenges were relied upon by the Tribunal in its consideration of the risk of reoffending. The applicant further submitted that when one considers that the applicant's alcohol dependency, drug addiction and mental health issues might intrude not just on his health but also upon his ability to obtain work or otherwise settle in South Sudan, these matters taken as a whole carry with them a realistic possibility that the Tribunal might have reached a different decision.

91 The Minister advances the following principal submissions in response to Ground 1.

92 *First*, the Tribunal's reasons must be read fairly, in context, and as a whole. It does not follow that, because the Tribunal referred to Ms Boyd-Ford's evidence earlier in its reasons but did not expressly mention the evidence when dealing with impediments to removal, it should be taken to have overlooked the evidence for the purposes of the latter consideration.

93 *Second*, the content of Ms Boyd-Ford's evidence is relevant in assessing whether Ground 1 has been established.

94 *Third*, the finding by the Tribunal that the "applicant does not claim to have any diagnosed medical or mental health conditions" is accurate and his oral evidence before the Tribunal was that his mental health was "good".

95 *Fourth*, the observation by the Tribunal that the applicant had not yet demonstrated "long-term sobriety" outside detention was not a finding that he would simply revert back to drug or alcohol abuse upon release or removal to South Sudan — at most the Tribunal was pointing to a risk of this occurring.

96 *Fifth*, the Tribunal was plainly aware of Ms Boyd-Ford's recommendation that the applicant continue with trauma counselling and engage with drug and alcohol services. The Minister submits that there is no reason to suspect that it had forgotten this when it was considering impediments to removal. The Tribunal's findings that there was "extremely poor access to healthcare" in South Sudan and that the "standard of medical care and other services is very poor in South Sudan" are apt to encompass services such as the trauma counselling and drug and alcohol services referred to by Ms Boyd-Ford. The Tribunal has, in substance, acknowledged that access to such services would be "extremely poor" and if accessed, the standard would be "very poor".

97 *Sixth*, Ms Boyd-Ford did not express any opinion on any likely adverse consequences to the applicant on account of his "alcohol and drug dependency and mental health issues" if he was removed to South Sudan.

98 *Seventh*, even if the Tribunal erred in failing to have specific regard to Ms Boyd-Ford's evidence in its consideration of impediments to removal, any such error would not be material. The Tribunal had proceeded on the basis that the availability and quality of medical services was poor and that this, combined with other factors, had led to the conclusion that this would make it "very difficult" for the applicant to maintain basic living standards, and this weighed

"heavily" in favour of revocation. There was thus no realistic possibility of a different decision being made.

Consideration

99 A constructive failure to consider matters in a ministerial direction may give rise to jurisdictional error: *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417; [2012] FCA 288 at [65] (Bromberg J); *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112; [2014] FCA 674 at [34]-[35] (Mortimer J) and the cases cited therein; *FKP18 v Minister for Immigration and Border Protection* [2018] FCA 1555 at [34] (Kenny J).

100 Cl 9.2(1)(a) of Direction 90 relevantly provides:

> (1) Decision-makers must consider the extent of any impediments that the noncitizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:
>
> a) the non-citizen's age and health;

101 The Tribunal made the following findings at [200] concerning the applicant's health when considering impediments to removal:

> The Applicant is a 27-year-old man who is able bodied and does not claim to have any diagnosed medical or mental health conditions. He said he has not seen a psychiatrist since he was admitted to the Ipswich Mental Health Unit in 2015. He described his mental health as good and he said the only medication he takes at the moment is medication that helps him sleep when he is feeling particularly stressed.
>
> (Footnote omitted.)

102 I am not satisfied that the Tribunal's failure to refer to the evidence of Ms Boyd-Ford in its reasoning with respect to the applicant's health when considering impediments to removal constituted a constructive failure to exercise jurisdiction.

103 *First*, the applicant did have regard to the applicant's health when considering impediments to removal, as demonstrated by its findings at [200].

104 *Second*, the findings made by the Tribunal at [200] accurately reflected the evidence given by the applicant. The following exchange between the Tribunal and the applicant is instructive:

> MEMBER: All right. And how is your mental health at the moment?
>
> WITNESS: I'd say my mental health it's good. It's in better stage at the moment after I spoke to – after I go when I got counselling and because I been in custody for this

long a time, so it's really – it's in the best possible.

MEMBER: Okay. Are you on any medication at the moment?

WITNESS: Pardon? No, I'm not on any medication.

MEMBER: Okay.

WITNESS: No.

MEMBER: All right.

WITNESS: I don't take medications.

MEMBER: All right.

WITNESS: The only medications that I take it's just something to help me to sleep.

MEMBER: I see.

WITNESS: Just not to think, yes, just something to help me sleep.

MEMBER: And how often do you need to take that?

WITNESS: Almost every night but sometime when I don't feel like it – during the weekdays I don't really take it because I get up in the morning and I train and stuff like that and I don't want it to make me feel like I need to sleep more, so I don't take it. It's just sometime when I'm thinking. Like the past week or so, yes, I been taking it because I really was – I was really stressed about today.

MEMBER: Okay, so is it a case that when you're stressed about something that, you know, your mind's thinking about it and you can't sleep and that's when you need the medication?

WITNESS: Yes.

MEMBER: Okay.

WITNESS: It's like the room can be dark, I turn everything off and I want to sleep but my mind – my eyes are closed and my mind just troubles.

MEMBER: Yes. Yes, because of the stress of what you're going through.

WITNESS: Yes.

105 In the course of his cross examination, the applicant gave the following evidence with respect to his admission to the Ipswich Mental Health Unit in 2015:

> So when they took me to Ipswich Mental Health, I lasted three days there and the psychiatrist came and saw me and the psychiatrist came and saw me and tell me, "Mate, you don't belong here. Get out of here." I was like, "How can I get out?" He said, "I'm going to put my signature there. You don't belong here and you go out." And then I went out but there's one truth that he told me that I, like, I never, I never – I can't forget it, it's like he told me, he looked at me and he said, "Hey, you know what I think every time I see a drug dealer?" And I tell him, "What?" He was like, "I feel like going to them and shaking their hand and saying thank you for paying my bills." I said, "What do you mean?" He's like, this is the way he said, he said, "They mess your head up and you come and see me."

When did the psychiatrist tell you that? What year?---Around 2015.

2015?---Yes.

Have you seen a psychiatrist since then?---No.

106 *Third*, the evidence given by Ms Boyd-Ford with respect to the applicant's mental health and drug dependence was inconclusive and qualified, as demonstrated in the following exchange in the course of her cross-examination:

> You're a counsellor, is that right?---Yes.
>
> Is it the case that you're not a psychologist?---That's correct.
>
> In layman's terms, what's the difference between a counsellor and a psychologist?---I guess I am not registered to a psychological body but I do therapeutic work, it's just not registered in the same way and there's a slight difference with the degrees. I didn't do an Honours year but I completed a Masters of Counselling on top of a Bachelor of Psychological Science.
>
> From reading your report, it appears that you identified that the applicant has symptoms of trauma but you haven't diagnosed him with any mental health condition; is that right?---Correct, as I'm not a psychologist, I cannot diagnose.
>
> I understand. You've only seen Mr Deng in relation to detention; is that right?---Yes.
>
> So, I take it that you're not in a position to be able to tell the tribunal your experience observing him in the community?---That's correct.
>
> …
>
> Towards the bottom of page 5, you recommended that Mr Deng continue to engage with QPASTT and focus on trauma experiences and their impact on his mental health and his personal relationships, along with ongoing engagement with specialised drug and alcohol services. Can you see that there?---Yes.
>
> Do I understand that to mean there's two recommendations, continue to engage in counselling with QPASTT and separately engage with specialised drug and alcohol services?---Yes, I - I believe in recovery to need a wraparound support system and, as I'm not a substance use specialist, I would recommend that someone else works on that side of issues, while I focus on trauma processing.
>
> I understand. In relation to the trauma processing aspect, do you have any idea for how long Mr Deng will need to continue to engage in counselling with QPASTT for the trauma issue?---It can - it's really based on the individual and their other circumstances. It's not something that has a mould that need, unfortunately. We do reviews every 10 sessions and sort of plan and set goals around that but, yes, I can't put an exact session number on it.
>
> What about engagement with drug and alcohol services, any idea how long he'll have to do that for?---No, I can't comment on that.

107 *Fourth*, any suggestion that the Tribunal had overlooked or forgotten the evidence of Ms Boyd-Ford is difficult to reconcile with the specific language used by the Tribunal at [200] of its reasons. The Tribunal refers to the applicant not claiming to have any "diagnosed" medical or

mental health conditions. In context, it would appear to be seeking to draw a sharp distinction with any "undiagnosed" medical or mental health conditions alluded to by the applicant or Ms Boyd-Ford. Rather than forgetting or overlooking Ms Boyd-Ford's evidence, the Tribunal, in assessing the applicant's health for the purpose of its consideration of impediments to removal, was focusing on "diagnosed" medical or mental health conditions.

108 *Fifth*, it does not follow that the Tribunal necessarily erred if it expressly referred to the evidence of Ms Boyd-Ford in addressing risk of reoffending considerations but did not expressly refer to it when considering impediments to removal. It cannot be assumed that the relevance of Ms Boyd-Ford's evidence to the "health" of the applicant in assessing the risks of reoffending, would be the same as in considering impediments to removal.

Materiality

109 Further, in the event that I am mistaken as to whether the applicant has constructively failed to exercise jurisdiction in the manner alleged by the applicant, it would be necessary to consider the materiality of the alleged error.

110 The applicant bears the burden of establishing to the satisfaction of the Court, on the balance of probabilities, that there was a realistic possibility that a different decision could have been made had the Tribunal "not forgotten or overlooked" Ms Boyd-Ford's evidence: see *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 at [39]-[40] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

111 I am not persuaded that had the Tribunal "not forgotten or overlooked" Ms Boyd-Ford's evidence, that there was a realistic possibility that the Tribunal could have made a different decision.

112 *First*, the evidence of Ms Boyd-Ford was inconclusive and would need to be weighed against the more specific evidence from the applicant expressly relied upon by the Tribunal.

113 *Second*, I accept that if, contrary to my findings, the Tribunal had "forgotten or overlooked" Ms Boyd-Ford's evidence, it is likely that some additional weight may be have been given to the impediments to removal consideration. However, the Tribunal had already given significant weight to the impediments to removal consideration, finding that it weighed heavily in favour of revocation of the original decision, in particular as a result of its finding that access to and the standard of healthcare was very poor in South Sudan.

114 *Third*, I do not accept that there was a realistic chance that any increased weight that the Tribunal might have given to the impediments to removal consideration could have led to a different decision given the combined weight given by the Tribunal to Primary Considerations 1, 2 and 4.

115 The first ground has not been established.

Ground 2 – Misunderstanding of the Applicable Law

Introduction

116 The second ground of review relied upon by the applicant was that the Tribunal acted on a misunderstanding of the provisions of cl 8.2 of Direction 90 in finding that the applicant had committed "family violence" against an intimate partner, Ms S, on multiple occasions.

117 Cl 4.1 of Direction 90 provides the following definition of "family violence":

> ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:
>
> a) an assault; or
>
> b) a sexual assault or other sexually abusive behaviour; or
>
> c) stalking; or
>
> d) repeated derogatory taunts; or
>
> e) intentionally damaging or destroying property; or
>
> f) intentionally causing death or injury to an animal; or
>
> g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
>
> h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
>
> i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
>
> j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

118 The term "family member" is not defined in Direction 90.

119 The Tribunal is required to form a state of satisfaction as to whether there was "another reason why" the original decision should be revoked, reasonably and on a correct understanding of the

law: *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 at [63] (Thawley J) and the authorities cited therein. By reason of s 499(2A) of the Act, the Tribunal must comply with Direction 90 in the application to review the original decision.

Submissions

120 The applicant advances the following principal submissions in support of Ground 2.

121 *First*, there was no evidence that Ms S was a "family member" for the purposes of Direction 90, and the evidence did not rise higher than Ms S was the applicant's "girlfriend for a time".

122 *Second*, s 5G(2) of the Act provides that a person's family includes a de facto partner and that the literal dictionary definition of family in the Cambridge and Collins Dictionaries is "a group of people who are related to each other, such as a mother, a father, and their children". On neither approach, the applicant submitted, is a non-citizen's girlfriend a member of the person's family because the status of a girlfriend, in and of itself, is not co-extensive with a de facto partner.

123 *Third*, the protection order application made by Queensland Police on 28 July 2013 (**Protection Order Application**) recorded that the applicant and Ms S (referred to throughout as the "aggrieved") were not in a de facto relationship, the applicant and Ms S were a couple and in an intimate "boyfriend/girlfriend relationship", the applicant had been living with Ms S and her mother for two to three weeks before the alleged incident, and Ms S referred to the applicant as her boyfriend.

124 *Fourth*, in its consideration of an alleged assault by the applicant on 14 September 2014 and an assault occasioning bodily harm on 7 January 2015, the Tribunal did not make any finding that the applicant and Ms S were in a de facto relationship.

125 *Fifth*, the Tribunal did not expressly consider the definition of family violence in cl 4(1) of Direction 90 and simply assumed, without any actual consideration, that the applicant met the description of "family member" in cl 4(1). It erroneously concluded that, because the applicant and Ms S were "intimate", that this met the description of a family member of a non-citizen for the purposes of cl 4(1) of Direction 90.

126 *Sixth*, the Tribunal's misconstruction of the expression "family violence" also infected its analysis of the primary consideration of the protection of the Australian community under cl 8.4 of Direction 90, as the criteria of "family violence" is included in cl 8.4(2)(a).

127 *Seventh*, the Tribunal's misapprehension of the law could have realistically resulted in a different outcome. The error infected the Tribunal's reasoning with respect to the primary considerations of the protection of the Australian community, family violence and expectations of the Australian community. But for the impugned errors, the Tribunal could realistically have offset or moderated the "adverse ascription of weight to the impugned primary considerations" and the Tribunal could realistically have come to a different result when it ultimately conducted its balancing exercise.

128 The Minister advances the following principal submissions in response to Ground 2.

129 *First*, the applicant has understated the nature of the relationship between the applicant and Ms S and there was nothing inapt, let alone legally erroneous, in the Tribunal characterising the applicant and Ms S as "intimate partners".

130 *Second*, Direction 90 does not itself expressly identify the scope or boundaries of the phrase "member of the person's family". The Minister submits that this suggests that the Direction leaves it open to the decision-maker to "make that factual assessment for itself, on the evidence before it and given the particular relationship at hand."

131 *Third*, the Minister submits that there is no basis to consider that it was not open for the Tribunal to find that Ms S was the applicant's "intimate partner" and that she fell within the phrase "member of the [Applicant's] family" for the purposes of the family violence consideration.

132 *Fourth*, it is not apparent why a broad conception of "family" should not be adopted for the purpose of the family violence consideration given the infinite variety of relationships between people and evolving conceptions of "family" over time. The Minister submits that "[p]lainly, the intention behind the inclusion of the family violence consideration was to signify the Government's view that violent conduct in a family or domestic setting is of particular concern to the Australian community".

133 *Fifth*, the Minister notes that the Tribunal also found that the applicant had engaged in family violence against his sister, not only against Ms S. The Minister submits that the family violence consideration was thereby engaged independently of Ms S and the Tribunal was entitled to place significant weight on it.

134 *Sixth*, the Minister submits that the applicant has not demonstrated that any error in relation to Ms S could realistically have led to the Tribunal making a different decision.

Consideration

135 The expression "family violence" and the family violence consideration in cl 8.2 of Direction 90 did not appear in previous iterations of the directions issued by the Minister pursuant to s 499(1) of the Act. Direction 90 commenced on 15 April 2021.

136 I have not been able to locate any previous judicial consideration of cl 8.2 of Direction 90, in particular, any consideration of the meaning of "a member of the person's family" in the definition of "family violence" in cl 4(1) of the Direction.

137 The definition of "family violence" in cl 4(1) encompasses behaviour:

(a) that "coerces or controls"; and

(b) is directed at "a member of the person's family (the **family member**)"; or

(c) causes the family member to be fearful.

138 There is no definition of "a member of the person's family" or "family" in the Direction.

139 The expression "family violence" is also used in cls 5.2(5), 8(2), 8.1.1(1)(a)(iii), 8.3(4)(g) and 8.4(2)(a) of Direction 90.

140 Note 1 to cl 4 of Direction 90 states that a number of expressions used in the Direction are defined in s 5 of the Act. Note 2 to cl 4 states that a number of expressions used have the same meaning as in the Act. The expressions "a member of a person's family" or "family" do not appear in any of the expressions identified in the two notes.

141 Nevertheless, given that Direction 90 is directed at persons having functions or powers under the Act, I am satisfied that it is appropriate to look to the Act to determine what guidance it might provide to the meaning of the expression "a member of the person's family".

142 Section 5G(2) of the Act provides:

> (2) For the purposes of this Act, the members of a person's family and relatives of a person are taken to include the following:
>
> (a) a de facto partner of the person;
>
> (b) someone who is the child of the person, or of whom the person is the child, because of the definition of ***child*** in section 5CA;
>
> (c) anyone else who would be a member of the person's family or a relative of the person if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family or a relative of the person.
>
> This does not limit who is a member of a person's family or relative of a

person.

143 For present purposes, it is relevant to note that for the purposes of the Act, a member of a person's family includes a de facto partner and the definition is stated to be inclusive. It does not purport to limit who might be a member of a person's family or a relative of a person for the purposes of the Act.

144 The definition in s 5G(2) encompasses both "a person's family" and "relatives of a person". The distinction sought to be drawn is not readily apparent. It suggests that a person's family may include persons who are not relatives of a person and that relatives of a person may not be members of a person's family. Before considering this issue further, it is necessary to have regard to the definition of a "de facto partner" of a person.

145 Section 5CB of the Act provides:

> *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.

146 Regulation 1.09A of the *Migration Regulations 1994* (Cth) (**Regulations**) makes provisions in relation to the determination of whether the conditions in sub-sections (2)(a) to (d) of s 5CB exist. It provides:

(1) For subsection 5CB(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB(2)(a), (b), (c) and (d) of the Act exist.

Note 1: See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2: The effect of subsection 5CB(1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB(2) sets out conditions about whether a de facto relationship exists, and subsection 5CB(3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

147 The definition of a de facto relationship in s 5CB of the Act, as amplified in reg 1.09A of the Regulations, does not stipulate any requisite time period for the relationship to exist. Rather it is directed at persons who have a mutual commitment to a shared life, exclusivity, a genuine and continuing relationship, are living together and are "not related by family".

148 The last integer, "not related by family", would appear to help explain the rationale for the distinction between "members of a person's family" and "relatives of a person" in s 5G(2). A de facto partner cannot be a relative of a person by reason of s 5CB(2)(d) if they fall within any of the categories of relationship identified in s 5CB(4).

149 The distinction between a family member and relatives of a person is important in approaching the family violence consideration in Direction 90. The touchstone is being a "member of the person's family" not being related to the person. The specific focus on what might be characterised as the family or household unit rather than some broader concept of extended family or relations is apparent from the following examples of family violence listed in the definition of that expression in cl 4(1) of Direction 90:

g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had;

h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominately dependent on the person for financial support; or

i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

j) unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.

150 The precondition to the indicia of family violence identified in paragraphs (g) and (h) is that the family member is financially dependent on the perpetrator. This is consistent with a focus on the family unit living together or at least being financially dependent on each other, rather than a broader concept of family where such financial dependency would be less likely to exist.

151 The indicia of family violence in paragraphs (i) and (j) distinguish between, on the one hand, "a family member" and, on the other hand, a "member of the family member's family". The violence is relevantly directed at a "family member" by restricting access to the "member's family" or by depriving the "family member" or members of the "family member's family" of their liberty. I note in this respect the presumably unintended circularity of using the defined term "family member" in paragraph (j) in contradistinction to the expression "member of the family member's family" when the expression "family member" has been defined in the chapeau to cl 4.1 of Direction 90 to be "a member of the person's family".

152 The other indicia of family violence identified in paragraphs (a) to (f) of cl 4.1 are of a generic nature and do not provide any assistance in understanding the scope of the expression "a member of the person's family".

153 It is also relevant, in construing the meaning of the expression "a member of the person's family" in cl 4.1, to have regard to the principles set forth in cl 5.2 of Direction 90. These principles are stated in the chapeau to cl 5.2 to provide the framework within which decision-makers should approach their task of whether to revoke a mandatory cancellation under s 501CA.

154 Clause 5.2(5) relevantly provides:

> In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the

> non-citizen does not pose a measureable risk of causing physical harm to the Australian community.

155 I am satisfied that the expression "a member of the person's family" as that term is used in the definition of family violence in cl 4(1) of Direction 90 extends to at least persons who are related to each other, are living together and who are financially dependent upon each other. It would also include those persons who satisfy the criteria for a de facto relationship in s 5CB(2) of the Act, as amplified by reg 1.09 of the Regulations. I do not consider that it would extend to relatives of a person who are not financially dependent on the person and who are not living with the person.

156 Given the absence of any explicit definition of the expression in Direction 90, the seriousness with which "family violence" is treated in Direction 90 and the inclusive definition of "members of a person's family" in s 5G(2) of the Act, I am satisfied that the expression "member of the person's family" in Direction 90 should not be narrowly construed and should not be limited to close relatives and de facto partners of the non-citizen. Rather, in my view the expression is apt to also capture persons that might be living together in a household, providing companionship and emotional support to each other, sharing expenses or otherwise being financially dependent upon each other and in a relationship of mutual affection and obligation. It could, by way of example, extend to a child living with an uncle or an aunt for an extended period or to persons who are in an intimate relationship that are living together but do not satisfy all of the criteria of a de facto relationship for the purposes of s 5CB of the Act and reg 1.09 of the Regulations. Such persons would be particularly vulnerable to coercion or control by the non-citizen or fearful of behaviour of the non-citizen.

157 Ultimately, I consider that whether a person falls within the expression "a member of the person's family" for the purposes of the family violence consideration in Direction 90 is a matter of fact to be determined by the decision maker, informed by the indicia of family violence in cl 4.1 of Direction 90 and the definitions of "family members" and "de facto partners" in ss 5G and 5CB, respectively, of the Act. While relevant, the existence of an "intimate relationship" is not determinative. Nor can any conclusion be drawn simply by focusing on the use of persons referring to each other in language such as girlfriend, boyfriend, partner or de facto.

158 The Tribunal did not expressly address any of the evidence as to the specific nature of the relationship between the applicant and Ms S. The Tribunal referred to Ms S as the applicant's

"now ex-girlfriend" at [21] but at [104] and [151] referred to Ms S as the applicant's "intimate partner".

159 In his statement of facts, issues and contentions provided to the Tribunal, the applicant described his relationship with Ms S in these terms:

> I met a girl who then became a partner and it developed into a serious relationship. We spent so much time together so she was basically living with me anyway and I asked her to move in.
>
> Her Mother was very supportive of our relationship together and we were getting along very well. One day when my partner and my partner's mum were together, there was a conversation that revealed that my partner had not been taking her medication for her Bi-Polar disorder. My partner's Mother asked to the effect of 'why she hadn't been taking her medication'.
>
> This was the first time I was made aware of my partner's mental health condition. But it explained a lot of her mood swings that were happening while we spent time together. The difficulty of having a relationship with someone with Bi-Polar became too much and our relationship broke down after being together for 3 years. The night we broke up, after I told [Ms S] I didn't want to be with her anymore, things became complicated and as a result I was charged with Assault Occasioning Bodily Harm. I was given an 18 month wholly suspended sentence. I didn't spend any time in jail for this. I was advised by the duty lawyer to plead guilty as it would help me avoid a potential jail sentence. I feel now that I didn't have the best legal advice especially as he was unaware of what it meant for me and my visa status by pleading guilty. Had I have known what it meant for my visa status, I would not have pleaded guilty. I feel that the duty lawyer giving this advice should have some knowledge of the difficulty we face when we plead guilty and what this means for those on visas.
>
> I didn't take the break-up very well at all as it was a messy break up. Being at the house without my partner was a difficult time. I used to sit alone in the house and miss her a lot. I spent more time with my friends and went to parties, and did things I had never done before, that being smoking drugs. This was a way to take my pain and hurt away from the break-up. It made me not care about anything, as I was struggling to deal with it.

160 I am satisfied that the combined effect of the following statements in the applicant's statement of facts, issues and contentions provide a sufficient evidentiary basis to preclude a finding that the Tribunal acted on a misunderstanding of the provisions of cl 8.2 of Direction 90 in concluding that Ms S was a family member of the applicant, at least by the time of the applicant's assault occasioning bodily harm on Ms S on 7 January 2015, as by this time:

(a) the relationship was serious;

(b) she was basically living with him and he asked her to move in;

(c) they had been together for 3 years;

(d) being at home without a partner was a difficult time and he missed her a lot;

(e) the break-up made him "not care about anything".

161 The following further matters also tend to preclude a finding that the Tribunal acted on a misunderstanding of the provisions of cl 8.2 of Direction 90.

162 *First*, the application for the August 2013 Protection Order recorded the following information relevant to the status of the relationship between the applicant and Ms S as at 23 July 2013:

(a) they were in an intimate personal relationship as a couple for approximately 1.5 years;

(b) the stated grounds for the protection order included the following statements:

> The Respondent Joseph Ador DENG and the Aggrieved [Ms S] are in an intimate boyfriend/girlfriend relationship and have been in such relationship for 1.5 years. The Respondent has been living at the address of [redacted] for 2-3 weeks with the Aggrieved and her mother. The Respondent and Aggrieved do not have any children together.
>
> On the 23rd of July 2013, the Aggrieved attended Acacia Ridge Police Station to report an incident of Domestic Violence against herself. The Agg was visibly upset and scared.
>
> The Agg stated - My boyfriend asked me to call his boss to say that he wasn't going to come into work today.
>
> …
>
> The Agg also stated that she has been victim to previous incidents of domestic violence, including physical abuse from the Resp. The Agg stated they had previously separated due to the Resp's violent nature towards her. When asked by Police if the Resp is usually violent, the Agg stated "Yep, he's always angry - he's probably left his bong behind. He has thrown me down stairs and he has hit me with cords, belts or anything he has in his hands. He has slapped me and punched me before. I have never reported this to Police as I was too scared to ask to leave".
>
> It is necessary for this order to be made to protect the Agg from further physical violence, emotional abuse and controlling behaviour from the Resp.

163 Notwithstanding the references to a "boyfriend/girlfriend" relationship and to only living with Ms S and her mother for "2-3 weeks", I consider that, on balance, the statements in the Protection Order Application would weigh in favour of a finding that Ms S was a "family member of the applicant" for the purposes of the Direction 90 family violence consideration at the time of the incident on 23 July 2013. In particular, I note the references to living in an intimate relationship as a couple for 1.5 years, the attendance at the Acacia Ridge Police Station to report an incident of domestic violence, the previous incidents of domestic violence and the stipulated reasons for the order; namely to protect Ms S from "further physical violence, emotional abuse and controlling behaviour".

164 *Third*, the applicant gave the following oral evidence relevant to the nature of his relationship with Ms S in the course of his cross examination before the Tribunal:

(a) with respect to his assault occasioning bodily harm against Ms S on 7 January 2015:

> … This is what happened on my part of the story and I'll tell you what I don't accept and what didn't really happen (indistinct) and she was my girlfriend. From there w**e were living in Annerley. When we were living in Annerley together** and mum was gone for a holiday and they have a little dog at home that **we couldn't have in our accommodation** to look after it, **so we had to go to her mum's house** then look after the dog there. When we went there, spent two nights there. When we spent two nights there, the third night we were having a little bit of problems like between each other like – we were having so much arguments every day, and on the third day we went to break up …
>
> (Emphasis added.)

(b) with respect to the assault of Ms S at the bus stop:

> … that's when me and her **were living at the same house**, we were boyfriend and girlfriend then.
>
> (Emphasis added.)

165 *Fourth*, it is important to note that the Tribunal's reasoning with respect to the assaults by the applicant on Ms V caused it to conclude that Ms V was not an "intimate partner" of the applicant. The Tribunal referred to the evidence from the applicant that he had "been living with Ms V but they were not a couple, rather they were friends who had slept together two or three times". On the basis of that evidence the Tribunal found that "although the Applicant and Ms V had a domestic and social relationship, they were not intimate partners".

166 By reason of the matters outlined above, I am satisfied that the Tribunal was using the expression "intimate partner" as a shorthand expression for a person who fell within the concept of a "member of a person's family" for the purposes of cl 8.2 of Direction 90 and that there was a sufficient evidentiary basis before the Tribunal to proceed on that basis so as to preclude a finding that the Tribunal had acted on a misunderstanding of the applicable law, namely cl 8.2 of Direction 90.

167 Ground 2 has not been established.

Materiality

168 Although it is not necessary, given my findings above, to consider materiality, I am satisfied that if Ground 2 had otherwise been established that there was a realistic chance that the Tribunal could have come to a different decision.

169 *First*, the Tribunal may well have given less weight to Primary Consideration 2 if the incidents involving Ms S were not to be taken into account because she was not a member of the applicant's family. The only remaining "family violence", in that case, would have been the incident involving the applicant's older sister in March 2021.

170 *Second*, the Tribunal also relied upon its characterisation of the incidents involving Ms S as "family violence" in addressing Primary Considerations 1 and 4.

171 The Tribunal observed in relation to Primary Consideration 1 at [104] of its reasons:

> One of the victims, namely Ms S, was the Applicant's intimate partner, meaning his violence against her was an act of family violence,

172 Similarly, the Tribunal more generally observed in relation to Primary Consideration 4 at [176] of its reasons, in assessing the weight attributable to that consideration:

> [T]he Applicant has engaged in crimes of violence, including violence against women and violence against police officers in the performance of their duty. He has engaged in family violence …

173 *Third*, the significance of the additional concern with respect to "family violence" is explicitly emphasised not only in cl 8.2 of Direction 90 for the purposes of Primary Consideration 2, but also in cl 8.1.1(1)(a)(iii) in addressing the nature and seriousness of the criminal offending or other conduct for the purposes of Primary Consideration 1, cl 8.3(4)(g) in addressing the best interests of minor children in Australia for the purposes of Primary Consideration 3, and in cl 8.4(2)(a) in addressing the expectations of the Australian community for the purposes of Primary Consideration 4.

DISPOSITION

174 For the reasons advanced above, I reject both of the grounds of review advanced by the applicant. It follows that the application should be dismissed with costs.

I certify that the preceding one hundred and seventy-four (174) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley.

Associate:

Dated: 23 November 2021