FEDERAL COURT OF AUSTRALIA

Batson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1660

Appeal from:	Application for Judicial Review: *Batson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 2343
File number:	QUD 253 of 2021
Judgment of:	**LOGAN J**
Date of judgment:	19 October 2021
Catchwords:	**MIGRATION** – application for judicial review of Administrative Appeals Tribunal's decision to affirm Minister's non-revocation of mandatory visa cancellation – where applicant submitted to Tribunal that he maintained a relationship with an Australian women with a young child – where Minister conceded before the Tribunal that the applicant had a close family tie to his partner and her daughter – held: Tribunal failed to consider the effect on the applicant's partner as a result of his removal from Australia – where applicant's grandparents submitted a statement detailing the effect the applicant's deportation would have on them – where Tribunal only quoted statement from applicant's father that grandparents would be impacted – held: Tribunal failed to consider the evidence of the applicant's grandparents – whether Tribunal failed to refer to applicant's health conditions as impediment to removal – where Tribunal clearly had regard to symptomatology of applicant – application granted
Legislation:	*Constitution* *Migration Act 1958* (Cth) ss 499, 500, 501, 501CA
Cases cited:	*AAL19 v Minister for Home Affairs* (2020) 277 FCR 393 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123

	Jebb v Repatriation Commission (1988) 80 ALR 329 *Kwatra v Minister for Immigration* [2021] FCA 58 *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 *Minister for Home Affairs v Omar* (2019) 272 FCR 589 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 *QHRY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 827 *Re Patterson; ex parte Taylor* (2001) 207 CLR 391 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286
Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	45
Date of hearing:	19 October 2021
Counsel for the Applicant:	Mr J Donnelly with Mr E Vu
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr JD Byrnes
Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice, save as to costs

ORDERS

QUD 253 of 2021

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

ORDER MADE BY: **LOGAN J**

DATE OF ORDER: **19 OCTOBER 2021**

THE COURT ORDERS THAT:

1. A writ of certiorari issue from the Court directed to the second respondent, quashing the second respondent's decision made on 29 June 2021.
2. A writ of mandamus issue directed to the second respondent, requiring the second respondent to reconsider and determine the applicant's application for review according to law.
3. The first respondent pay the applicant's costs of and incidental to the application to be fixed by a Registrar if not agreed.

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

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1 The applicant is a citizen of the United Kingdom. He is also, because he was born in that country, a British subject. He came to Australia as a child aged 13 with his family following a considered decision by his family to settle in Australia. He has not, since his arrival in Australia, returned to the United Kingdom.

2 If one reads the Australian *Constitution*, one might be forgiven for thinking that the applicant's status as a British subject necessarily meant that he could not be an alien and thus not amenable to removal from Australia pursuant to the *Migration Act 1958* (Cth) (the Act). There was a time, and it was as recently as earlier in the present century, when such a view commanded the support of a majority in the High Court of Australia, see *Re Patterson; ex parte Taylor* (2001) 207 CLR 391.

3 That view that a British subject is not an alien no longer prevails in the High Court: see *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28. Given that position, it is unsurprising that there was no submission made on behalf of Mr Batson, the applicant, that it was beyond the legislative competence of the Commonwealth Parliament to provide by the Act for its application so as to authorise a decision by a Minister or a delegate a consequence of which would be his removal.

4 Following his arrival in Australia, and over the course of the decade or so which has passed, Mr Batson has engaged in a truly lamentable course of criminal conduct. The particular detail in respect of that course of criminal conduct is to be found in the reasons of the Administrative Appeals Tribunal (Tribunal) in respect of the decision which is the subject of the present judicial review application.

5 Suffice it to say, there were particular terms of imprisonment imposed on Mr Batson which unremarkably provided occasion for satisfaction on the part of a delegate of the Minister that he had a substantial criminal record such that it was obligatory under s 501 of the Act to cancel the visa which provided the foundation for his being a lawful non-citizen. Mr Batson applied to the Minister, in response to an invitation in that regard, for revocation of that cancellation

decision. It will be necessary to return later in these reasons for judgment in greater detail to that revocation application.

6 For the present, it is enough to record that a delegate of the Minister declined to revoke the cancellation. As was his right, Mr Batson then sought the review of that adverse revocation decision by the Tribunal.

7 In dealing with such review applications, s 500(6L) of the Act imposes a particular time constraint on the Tribunal. The Tribunal heard the review application on 22 and 23 June this year. The effect of s 500(6L) of the Act was that the 84th day made applicable expired on 29 June 2021. In order to ensure compliance with the statutory regime, the Tribunal adopted the practice of giving its decision in writing on 29 June 2021 and publishing thereafter the reasons for the decision. Those reasons were published on 9 July 2021.

8 It may well be that the expedition, which is the evident purpose of s 500, can carry with it the doubtless unintended consequence of placing the Tribunal under a pressure which can be conducive, notwithstanding the best endeavours, to the commission, of jurisdictional error grounded in omission. The present might well be thought a paradigm example of such a case. I should now elaborate upon why, in my view, that is so.

9 The grounds of review are somewhat lengthy but none the worse for that in the sense that they take up nicely in a summary way the points which came to be developed in submissions made by counsel on behalf of Mr Batson.

10 The grounds of review are as follows:

> **Ground 1**
>
> **The Administrative Appeals Tribunal (T) denied the applicant procedural fairness.**
>
> 1. A failure to respond to a substantial, clearly articulated argument relying on established facts is a failure to accord natural justice.
>
> 2. First, the applicant (**A**) advanced a substantial, clearly articulated argument (and was otherwise evident on the evidence) that his partner would suffer emotional, financial, and practical hardship if he were removed from Australia to the United Kingdom (the **partner hardship claim**). The partner hardship claim falls within the scope of the non-exhaustive other considerations reflected in paragraph 9(1) of Direction 90.
>
> 3. At [79] of the Applicant's Statement of Facts, Issues, and Contentions (**ASFIC**), the A contended, *inter alia*, that his familial ties comprised his partner and her child. At [81], the A contended, *inter alia*, that the A's partner would not be in a position to relocate with him to the United Kingdom (**UK**)

and relied upon him for financial support. At [83], the A contended there was a degree of emotional dependency between the A and his partner. The A contended his partner would suffer a sense of loss and pain if he is removed.

4. In the A's closing oral submissions to the T (by his legal representative), the A contended he would provide his partner with support in the future (**CB1373[40]**). The A contended that the evidence of his partner was to the effect that she had no other real form of support around her (**CB1375[1]**). It was further contended that the A's partner would stand to gain a lot of assistance from the A in the event of a revocation decision (**CB1375[7]-[9]**). The A contended that the T was required to engage with the human consequences of his removal upon his family in Australia (**CB1376[5]-[7]**). In that context, the A contended that means the impact on his partner (**CB1376[8]-[10], [23]**). The A further contended that his partner would benefit from the assistance he could give to her in undertaking parenting responsibilities (**CB1376[27]-[28]**).

5. In the Minister's (**M**) closing oral submissions to the T (by his legal representative), the M conceded that the A has a number of 'close ties' to Australia that included his partner (CB1381[25]-[26]).

6. Secondly, the T failed to lawfully consider and respond to the partner hardship claim.

7. At [274] of the decision, the T concluded the A's immediate family included his mother, father, brother, and sister. At [282]-[284], the T considered the hardship a non-revocation decision would occasion to the A's immediate family in Australia. Critically, at [284] of the decision, the T found that the impacts on the A's mother, father, and adult brother would be significant in the event of a non-revocation decision.

8. At [291], the T identified other family and social links the A had in Australia (i.e. the A's maternal grandfather, maternal grandmother, and maternal aunt).

9. Critically, there was no active intellectual consideration with the A's partner hardship claim when addressing the other considerations in the decision.

10. Thirdly, the error was material because had the T lawfully considered the partner hardship claim, in the broad exercise of discretionary power, it was open for the T to give the partner hardship claim significant weight in favour of the A. In turn, when the T came to undertake the ultimate balancing exercise at [302] of the decision, the positive attribution of weight to the partner hardship claim could have tipped the balance in the A's favour. It could realistically have resulted in a different outcome.

Ground 2

1. The A repeats particular Ground 1(1) above for this ground.

2. First, the A contended that in the event of a non-revocation decision, his grandparents would be emotionally devastated. The A also contended that he might never see them again if removed from Australia (i.e. the **grandparents hardship claim**).

3. The delegate of the M found that the effect of non-revocation upon the A's family members (which included his grandparents in Australia) would be significant emotional hardship (CB28-29). The grandparents hardship claim was also reflected (variously) in the A's Personal Circumstances Form (the

PCF) (**CB104, 115, 118**).

4. The A's mother gave evidence that if the A were removed to the UK, he would never be able to visit the family (which included the A's grandparents) in Australia again (**CB124, 266**). The A's mother said that the A's possible deportation was having a negative impact on the whole family (**CB266**).

5. The A's father gave evidence that if the A is removed to the UK, it will affect the whole family (**CB272**). The A's father said that if the A is removed from Australia, the A's grandparents would be devastated (CB272).

6. The A gave evidence that if he were returned to the UK, it would have a devastating effect on his family (**CB138**). The A claimed that if he were sent back to the UK, he would not be able to see his grandparents again (**CB137, 1252[20]-[30]**). The A said he had a very close relationship with his grandparents, and he knew it would cause them a difficult emotional impact (**CB137**). The A said the thought of never seeing his grandparents again was devastating (**CB137**).

7. The A expressly advanced the grandparents hardship claim in his Statement of Facts, Issues and Contentions (**ASFIC**) before the T (**CB252**). In closing oral submissions, the A's legal representative made clear that the joint statement prepared by the A's grandparents should be given weight (**CB1384[30]-[40]**).

8. Secondly, the T failed to lawfully consider the grandparents hardship claim.

9. The T dealt with the topic of the A's grandparents at [291]-[293] of the decision. Nowhere in this aspect of the reasons for the decision did the T lawfully consider and resolve the grandparents hardship claim. Neither did it resolve the claim elsewhere in the T's decision.

10. At [292], writing in the context of the A's grandparents in Australia, the T found that rather than directly speak about adverse impacts either or both of them will experience upon the A's removal, they express those adverse impacts in terms of the pain they feel for what will befall the A's family in the event of his removal. However, that finding misconstrues the evidence and is plainly wrong.

11. The joint written evidence of the A's grandparents was to the effect that this was 'a terrible time on all of us, we all love our lives in Australia but knowing [the A] may have to return to England is destroying us all' (**CB273**). Regardless, the grandparents hardship claim was otherwise supported by evidence given by the A and his parents. It was not something that could be ignored.

12. Thirdly, nothing in s 501CA(4) of the *Migration Act 1958* (Cth) made the A's grandparents hardship claim a prohibited irrelevant consideration. As such, as a matter of procedural fairness, the A's grandparents hardship claim had to be lawfully resolved. It was not.

13. Fourthly, the *collective failure* of the T to consider and resolve the grandparents hardship claim and partner hardship claim was material. Had the T lawfully considered the relevant claims, the T could realistically have come to a different decision when undertaking the ultimate balancing exercise at [302].

Ground 3

There was a constructive failure to exercise jurisdiction by the T.

1. By paragraph 9.2(1)(a) of Direction 90, the T was required (as a mandatory consideration) to consider the extent of any impediments the A would face if removed to the UK having regard, *inter alia*, to the A's health and any medical support available to him in that country.

2. First, at [90] of the ASFIC, writing in the context of paragraph 9.2(1), the A contended that without the emotional support of his family in Australia, this could carry the consequence of increasing his risk of relapse into drugs if returned to the UK. The A expressly contended at [91] of the ASFIC that this obstacle will likely hamper his reintegration and rehabilitation in the UK (the **drug use impediment claim**).

3. In the A's Reply Contentions (**ARC**), at [15] (writing in the context of paragraph 9.2(1) of Direction 90), the A contended that he had taken steps towards dealing with his drug health issues by undertaking drug therapy (**CB382**). At [2] of the ARC, there was a concession of the A's drug dependency.

4. In the A's closing oral submissions to the T (by his legal representative), the A expressly contended (in the context of paragraph 9.2(1) of Direction 90) that an impediment was his capacity to maintain a drug-free and contributing lifestyle in the future (**CB1376[35]-[37]**). The A further contended that if he was removed to the UK, he had a concern that his prospects of maintaining abstinence were relatively low (**CB1376[38]-[40]**).

5. The A filed an expert report with the T (which he relied upon) of Professor Freeman (the **Freeman Report**) (**CB355-363**). There, the learned expert diagnosed the A with (1) drug-induced psychosis (remission); (2) methamphetamine dependency (partial remission in a controlled environment) (**CB358**). The learned expert also gave evidence that the A planned to engage in additional drug treatment programs to enhance his relapse prevention skills (**CB359**).

6. Secondly, the T failed to resolve the drug use impediment claim as required by paragraph 9.2(1) of Direction 90.

7. At [252] of the decision, the T quoted an aspect of the A's Personal Circumstances Form (the **PCF**), where the A raised a separate claim that if he were *homeless* in the UK, he would struggle with (1) his drug addiction; and (2) his mental health, even more than he has in Australia.

8. At [254] of the decision, the T noted the clinical assessment of Professor Freeman, who opined that the A had the following conditions: (1) drug-induced psychosis (remission); and (2) methamphetamine dependency (partial remission in a controlled environment).

9. Critically, at [261], the T summarised its findings made for paragraph 9.2(1) of Direction 90. Nowhere in [261] or otherwise in the T's decision does it engage in an active intellectual process (i.e. lawfully consider) and resolve the A's drug use impediment claim.

10. At [261], the T finds that the A has mental health symptomatology that is an impediment to his return and successful re-establishment in the UK. By contrast, the T makes no express findings of whether and to what extent the

A's methamphetamine dependency impedes his return and successful re-establishment in the UK.

11. At [255] and [260], the T found that the A's psychological symptomatology could be adequately treated and managed in the UK. Again, no finding is made on whether the A's methamphetamine dependency could be adequately treated and managed in the UK.

12. Thirdly, regardless, a claim might "clearly emerge" before a decision-maker from their findings and the material before them upon which the findings are reached. Here, in the context of the A's methamphetamine dependency disorder and drug abuse generally, the T:

    (a) Summarised expert evidence of Professor Freeman, which included two identified conditions: (1) drug-induced psychosis (in remission) and (2) methamphetamine dependency (in partial remission in a controlled environment) ([86]).

    (b) Summarised the A's release plans, including engaging in additional drug treatment programs to enhance his relapse prevention skills ([88]).

    (c) Summarised expert evidence of Professor Freeman, that noted the A had been enrolled in multiple drug treatment interventions ([90]).

    (d) Noted the ready acknowledgment that the A's previous attempts at drug abstinence have failed ([94]).

    (e) Found that the A's previous instances to achieve some level of satisfactory management of his mental health symptomatology and to otherwise try to achieve a satisfactory level of rehabilitation from abusing illicit drugs have all failed ([100]).

    (f) Found that the A's stated intentions to better and more effectively manage his mental health, maintain a drug-free lifestyle and engage in rehabilitation are not as strong and advanced as he has contended ([115], [122]).

    (g) Noted that the A had been involved in drug and alcohol abuse programs during his time in immigration detention ([117]).

    (h) The A's rehabilitation from a propensity to return to abusing illicit drugs, specifically methamphetamine, remains incomplete and is otherwise subject to a number of exigencies the loss of any one or more of which may again predispose him to a return to abusing those drugs ([119]).

    (i) Noted the evidence of the A's father, which included, *inter alia*, the A's long term drug abuse is the common factor behind all his offences ([180])

13. Given the preceding, the A's methamphetamine dependency and ability to maintain a drug-free lifestyle were critical matters held against the A for all the primary considerations to find that the A was a material risk of reoffending (i.e. committing further criminal offences or otherwise engaging in serious adverse conduct).

14. However, in contrast, when the T came to consider the extent of impediments

> if removed criterion under paragraph 9.2 of Direction 90, there was a conspicuous absence of the T lawfully addressing the extent of impediments that the A would face in the UK on account of his (1) methamphetamine dependency disorder; and (2) the A's lack of capacity to live a drug-free lifestyle more generally. Given the T's extensive findings on these issues when addressing other aspects of Direction 90, they were not something that could be ignored under paragraph 9.2 of Direction 90.
>
> 15. Fourthly, the error was material. Legal compliance could realistically have led the T to give the other consideration under paragraph 9.2 greater weight in favour of the A. Subsequently, when the T came to undertake the ultimate balancing exercise at [302], there was a realistic possibility that the T could have made a different decision.
>
> [emphasis in original]

11 There was no dispute between the parties as to applicable principles. Overarchingly, the Tribunal's task was to review the delegate's decision. In that task, it was unconstrained by the view reached by the delegate. The Tribunal was required to make its own assessment based on the material before it. In so doing, the Tribunal was obliged to review a decision made in response to a particular revocation application. For the Tribunal to fail to deal with a particular aspect or integer of that revocation application would be either or each a constructive failure to exercise the jurisdiction consigned to the Tribunal or to deny Mr Batson procedural fairness: see *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 and *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, at 17.

12 A most helpful summary indeed of what is entailed in addressing a claim as made and thereby exercising the jurisdiction consigned to the Tribunal is to be found in the Full Court's judgment in *Minister for Home Affairs v Omar* (2019) 272 FCR 589 (*Omar*). In short, what follows from *Omar* is:

(a) The decision-maker is obliged to "engage in an active intellectual process with significant and clearly expressed representations" made in support of the request for revocation: *Omar*, at [37].

(b) This obligation demands an honest confrontation with the human consequences involved with refusing an application for revocation: *Omar* at [38]; see also *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628, at [3] (Allsop CJ).

(c) Whether a particular matter raised in the representations is significant and clearly expressed so as to give rise to that obligation, is a question of fact: *Omar* at [34](i); or

put another way, there must be "nothing ambiguous" about the claim or matter: *Kwatra v Minister for Immigration* [2021] FCA 58, at [36] (Burley J).

(d) Practically, the obligation requires more than acknowledging or noting that representations have been made. Depending on the nature and content of those representations, the Tribunal may be required to make specific findings by reference to relevant parts of the representations in order to discharge the obligation according to law: *Omar* at [39]; see also: *QHRY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 827 (***QHRY***) at [43] – [47] (Rangiah J).

13 Whether the Tribunal in a given case has failed to deal with a claim as made is inherently fact-specific. However, as was recognised in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, a failure by the Tribunal expressly to deal with an issue in its reasons can give rise to an inference that that particular issue was not considered at all.

14 Even so, for such a failure to amount to jurisdictional error, it must be material in the sense described in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; and, most recently and by way of reiteration of observations made in those earlier cases, in the joint judgment in *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, at [2]:

> [2] Materiality was subsequently explained in *Minister for Immigration and Border Protection v SZMTA* to involve a realistic possibility that the decision in fact made could have been different had the breach of the condition not occurred. Existence or non-existence of a realistic possibility that the decision could have been different was explained to be a question of fact in respect of which the plaintiff in an application for judicial review of the decision on the ground of jurisdictional error bears the onus of proof.

[footnote reference omitted]

15 Yet another way of characterising an error of the kind promoted in ground 1 is a failure to take into account a relevant consideration. Section 501CA(4) of the Act provides:

> (4) The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (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 decision should

be revoked.

16 If nothing else, representations made in accordance with the invitation are, in the sense described by Sir Anthony Mason in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 40, relevant considerations.

17 Of course, what is set out in a representation made in response to an invitation is but part of an administrative decision-making continuum. It is quite possible that particular aspects of a representation may fall away over the course of a progression of a case from decision-making by a delegate through to a decision on external merits review by the Tribunal.

18 In *AAL19 v Minister for Home Affairs* (2020) 277 FCR 393, at [24], and with reference to a passage in a Tribunal decision taken up with approval by Davies J in *Jebb v Repatriation Commission* (1988) 80 ALR 329, at 333 – 334, and in turn by Kirby J in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, and then in the joint judgment of Bell, Gageler, Gordon and Edelman JJ in *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250, at [53]:

> 24 The ambit of a review by the [Tribunal] is necessarily influenced by the ambit of the steps and proceedings that have taken place prior to its review, for the function of the [Tribunal] is to review a decision.

19 In this particular case, however, particular statements made by Mr Batson in his revocation application did not fall away, but were rather emphasised again and again in later stages of the administrative decision-making continuum up to and including evidence given and submissions made to the Tribunal. Further, and notably, particular points made by Mr Batson in his revocation application were the subject of express concession by the Minister in the proceedings before the Tribunal.

20 Ground 1 focuses attention on the applicant's partner. In his review application, the applicant stated:

> **Please describe your relationship with your partner (e.g. how you met, how long you have been together):**
>
> We met mid-2018 after Rhyannah's daughter was born in May 2018. We started dating a week after we met. We broke up in 2019 for about a year, then rekindled our relationship earlier this year (2019).
>
> Prior to our breakup in 2019, I help Ryannah pay rent, do grocery shopping, and I bought her daughter presents. I was also there for her daughter. Since our relationship started again, we have been talking visa Facebook Messenger every day (messages and calls). We stay up late at night/early in the mornings talking about life and our every day going ons, as well as our future plans.

> **Please describe the impact the cancellation of your visa would have, or has had, on your partner:**
>
> We are making plans for our future. We want to ge ta rental and live together, if I am permitted to remain in Australia. Rhyannah will experience emotional distress if we are not able to return to a life of living and sharing our lives together as partners. She also needs the support of a partner, who can help her with the care and upbringing of her daughter. We haven't spoken about Rhyannah moving to England but I know she is worried as all of her family is in Australia. Australia is the only country she and her daughter have ever known.
>
> [sic]

21 I will come back to that statement.

22 In the course of submissions before the Tribunal, the following concession was made on behalf of the Minister by a Ms Anderson, a solicitor who appeared on behalf of the Minister:

> Turning now to the other relevant considerations. The Minister acknowledges that the applicant arrived in Australia from the United Kingdom at 13 years of age and that he has a number of close family ties to Australia through his partner and her daughter, his parents and siblings who are Australian citizens and extended family members.
>
> Beyond the applicant, the applicant's father, mother, brother and partner have provided evidence as to the applicant's ties to Australia. The applicant's grandparents and sister and Kenneth and (indistinct) and Jasmine Batson were not called to give evidence and their evidence has not been able to have been tested in cross-examination. We submit that this limits the weight that should be given to the evidence in this regard.

23 It will be necessary to return to the concluding sentence in that submission in the context of considering ground 2. For present purposes, it is enough to observe of the Tribunal's reasons that one will look in vain to them, notwithstanding their length and detail, for any recognition whatsoever by the Tribunal of the express concession made on behalf of the Minister. Indeed, notwithstanding that explicit reference by Mr Batson to his partner in his revocation application, one will look in vain also to the Tribunal's reasons for any explicit consideration whatsoever of the impact of Mr Batson's removal from Australia on her.

24 That is not to say, as was so helpfully emphasised in submissions on behalf of the Minister by counsel, that the Tribunal did not, in another context, make reference to aspects of the evidence given by Mr Batson's partner. The Tribunal did this in the context of considering factors which had been put in submissions on behalf of Mr Batson which it was submitted mitigated or led to a low and acceptable risk of recidivism on his part. In that context, and by way of engaging with that minimising submission, the Tribunal stated the following with respect to the evidence of the partner:

> 99. With reference to the propounded protective element of a rekindled domestic

relationship acting as a protective factor, it is important to review the evidence regarding the Applicant's relationship with Ms Rhyannah Woodham. It is contended that this apparently now rekindled relationship is one of the protective factors militating against the Applicant's recidivist risk. Ms Woodham and the Applicant have known each other for three years. They were previously in a year-long relationship during the period 2018–2019. The relationship ended in January 2019, some two and a half years ago at or around the time the Applicant lost his job. She says the loss of his job caused the Applicant to go downhill and turn to drugs.

100. In her statutory declaration declared on 3 June 2021 Ms Woodham says, "*Ashley and I have been in a serious relationship for the last six months*". There is a difficulty with this contention arising from the evidence. In cross-examination, she said the re-kindled relationship had been running since *"[a]round April this year [(2021)]".* She sought to clarify this evidence by saying "*April or March, sorry, but yes*." Either way, the reference to six months in her written statement must be wrong. Any re-kindled relationship can only have thus far had a life of two–three months and no more. She described her re-connection with the Applicant thus:

> *"Ms White: How did it come to pass that you came to reconnect with Ashley when he was in immigration detention earlier this year? How did that occur?*
>
> *Ms Woodham: I've just been - I was just thinking about him a lot and missing him and what we had, so I decided to contact him. I had no idea that he was in migration, so I contacted him and he told me and so we've just been talking and been in a relationship since then and it has gone very well so far.*
>
> *Ms White: It must be difficult conducting a relationship with someone when they're in immigration detention; how often do you speak with him?*
>
> *Ms Woodham: We speak every day.*
>
> *Ms White: Is that by phone, video calls, how do you contact each other?*
>
> *Ms Woodham: Video calls and normal phone calls, messaging."*

101. The further difficulty with Ms Woodham's evidence about the nature and extent of any relationship with the Applicant can be seen in her evidence about how things will transpire between them upon his return to the community. The arrangement will be that during the week the Applicant resides at his brother's residence but then spends weekends with Ms Woodham and her three year old child. It is not a stretch of the evidence to suggest that things are still at a formative stage between them and are very much reliant on the Applicant proving himself – in terms of staying away from drugs – if returned to the community. She said this in her evidence:

> *"Senior Member: All right. Well, I'll just finish this off then. So, the best estimate you can give us, and it's entirely reasonable for you to have this estimate, I think, is that if he comes back into the community, you will see how things go for maybe a couple of months, he lives at his brother's house during the week and then he comes and spends weekends with you and your daughter, that's generally the plan, right,*

generally?

Ms Woodham: Yes.

Senior Member: Okay. Now, you agree, don't you, that if he comes out back into the community, there is a chance, no one knows the extent of that chance, but there is a chance that he could return to the drugs, and if he did that would be a game changer or a game breaker for you, wouldn't it? You wouldn't have him back then?

Ms Woodham: I - if he did I would try to support him and help him, but if my support wasn't enough, then yes."

[footnote references omitted – emphasis in original]

25 What the Tribunal did not do was to take up or engage with the impact on Mr Batson's partner in the context of addressing "other considerations".

26 In that failure, the Tribunal denied Mr Batson procedural fairness and, also failed to discharge its statutory function of reviewing the decision having regard to the revocation application as made and the explicit reference therein to Mr Batson's partner and the apprehended impact on her.

27 True it is that the Tribunal addressed an impact on the partner's child. That is separate, although admittedly not unrelated, to an impact on the partner. It may well be that the temporal pressure so evidently felt by the Tribunal as a result of the statutory regime to which it was subject was a contributing factor to this omission. Particularly, that is so given that, in another context, the Tribunal did make reference to evidence given by the partner.

28 However, giving full weight to the emphatic requirement not to read the reasons of the Tribunal narrowly and with an eye for error, the complete omission of reference to the impact on the partner in the place in the reasons where one might have expected such a reference, necessarily leads to the inference that the subject was not addressed at all. That subject can hardly be dismissed as entailing no realistic possibility of a different outcome. It was, therefore, material. The error was thus jurisdictional. That in itself provides a basis to quash the Tribunal's decision, but there is another basis that is found in ground 2.

29 The focus of ground 2 is upon not Mr Batson's partner but rather his maternal grandparents. The Tribunal addresses under the heading, "Strength, Nature and Duration of Ties", as part of its other consideration, the position of the applicant's immediate family, which the Tribunal took to be his mother, his father, his brother and his sister, and a child known as Child J. The apparent occasion for the Tribunal's focus on immediate family was the dictates of the present ministerial direction, Direction 90, made relevant by s 499 of the Act. That direction is not

exhaustive nor could it be, with respect, having regard to the open-ended quality of other reason in s 501CA(4).

30 In this particular case, such is the breadth of other reasons and such was the specific reference to the grandparents in Mr Batson's revocation application that a failure to address the impact on them would also amount to either or each of a denial of procedural fairness and a constructive failure to exercise jurisdiction.

31 The point was made on behalf of the Minister that, at [277] of the Tribunal's reasons, there is reference to broader family in a quote by the Tribunal from evidence given by Mr Batson's father. What is stated there is there is analogous evidence:

> 277. There is analogous evidence from the **Applicant's father**. He speaks of the impact of any removal of the Applicant upon the broader family thus:
>
> > *"If Ashley is deported back to England, it will affect all our family and jeopardise all our lives which we are currently enjoying and have worked hard to build in Australia. Soon after our arrival in Australia (Myself, Tina, Ashley, Joshua, and [Child J]}, my wife's sister Gemma, came to join us and shortly afterwards my mother and father-in-law followed. Gemma is also an Australian Citizen and has 2 young daughters who were born in Australia. My in laws own their own property and call Australia their home. They are currently on a bridging visa, awaiting permanent residency since their application under the aged parent visa. The current processing time of onshore aged parent visas are 10 years plus hence the need for the bridging visa. If Ashley were to be deported his grandparents would be devastated, they came here to keep our family together and there is no-one in England left to support him."*
>
> [footnote references omitted – emphasis in original – sic]

32 It is one thing to set out evidence, it is another actively to engage with the particular claimed adverse impact on the grandparents.

33 The grandparents' evidence came in the form of a statement. They were not required to attend for cross-examination. Thus, the sentence which appears in the concession quoted above of the Minister was the subject of prompt and pertinent correction by Ms White, a solicitor who appeared on behalf of Mr Batson before the Tribunal. She highlighted – and there was no suggestion that this was a misstatement to the Tribunal – that there had been correspondence exchanged between the parties including her contacting the Minister's solicitor and asking whether or not they intended to cross-examine any other witness aside from that contained in the proposed witness schedule. The answer in reply was, no, they did not intend to do so. This was never gainsaid before the Tribunal. Thus Ms Anderson's statement concerning weight

was a misstatement to the Tribunal in respect of the position agreed between the parties as to attendance for cross-examination.

34 The grandparents' statement made explicit reference to the impact on "all of us". Of this, the Tribunal observed, at [292]:

> 292. The Applicant's maternal grandparents have provided a joint statement made on 28 May 2021 which appears in the material. These grandparents have, like the Applicant's family, relocated to Australia from England. They maintain a close relationship with their children and grandchildren. Rather than directly speak about adverse impacts either or both of them will experience upon the Applicant's removal, they express those adverse impacts in terms of the pain they feel for what will befall the Applicant's family in the event of his removal. While not called to give oral evidence at the hearing, their joint statement says the following things:
>
> *"He is always caring and fun to be around, he has a good relationship with his younger brother, sister and nieces. He is just a troubled boy who needs to break free of the drug habit he has had for a long time now. We truly believe that if Ashley is to quit the drugs, he would not commit another offence.*
>
> *[…]*
>
> *We are worried about his mental health should he be deported, he is at risk of selfharm as he has low self-esteem and coping skills.*
>
> *[…]*
>
> *If Ashley gets deported, we are unsure what he will do, or if our Daughter and Son in Law will feel the need to return also to support him. This would have a detrimental effect on their daughter [Child J] who is doing well at school and is in a soccer team. This is a terrible time on all of us"*

35 On no reasonable view, at all, of the statement of the grandparents was this an accurate statement, with respect. The only view as a matter of ordinary English open in respect of the grandparents' statement was that the reference to all of us embraced them and each of them. This apart, the impact on the grandparents was a subject explicitly mentioned in the revocation application. For the Tribunal to misapprehend the grandparents' statement was fundamentally to fail to address an integer of the revocation application as made.

36 Once again, either alone but more particularly in conjunction with the failure to address the impact on Mr Batson's partner, this can hardly be dismissed as having no realistic probability of a different outcome. The error was material and thus jurisdictional.

37 This leads to the consideration of ground 3. Regard to the Tribunal's reasons discloses that it is likely that much, if not all, of Mr Batson's offending conduct is referable to his unfortunate

addiction, an addiction which occurred in Australia, not the United Kingdom, to methamphetamine.

38 The Tribunal had the benefit of evidence from a forensic psychologist, Professor Freeman. There is no question that Professor Freeman's views influenced the Tribunal in relation to the Tribunal's assessment of Mr Batson's risk of reoffending. One might have expected, given the unremarkable impact of Mr Batson's conditions on the Tribunal's assessment of risk of reoffending that there would be a reciprocal consideration of those very same conditions in the context of addressing as the ministerial direction required, impediments to removal including health. In his report of 11 June 2021, in evidence before the Tribunal, at paragraph 10.3, Professor Freeman opined:

> 10.3 Mr. Batson has a history of methamphetamine dependency and treatment for perceptual disturbances (e.g., schizophrenia), with the two being directly linked. In regard to his methamphetamine, such consumption created clinical impairments in psychosocial functioning (e.g., impaired decision making) and is a primary contributor to his offending history. In regard to his previously diagnosed schizophrenia, Mr. Batson acknowledged a past history of experiencing perceptual disturbances (that required hospitalisation), however such symptoms have completely abated upon him maintaining abstinence from methamphetamines. As a result, this past symptomatology (e.g., elevated paranoia) is likely to be better explained via Drug Induced Psychosis (which is in remission) rather than schizophrenia. At the time of assessment, there was no explicit evidence of mood or perceptual disorders and he was not a client of mental health services. Nevertheless, he is naturally concerned about the upcoming visa appeal decision with utilisation of the Depression Anxiety Stress Scale (DASS 21) revealing mild anxiety-based symptoms e.g., "*I'm constantly worried about my visa*."
>
> [emphasis in original]

39 Mr Batson has a history of methamphetamine dependency and treatment for perceptual disturbance, eg, schizophrenia, with the two being directly linked.

40 The Tribunal's consideration of Mr Batson's health condition is to be found in its addressing the subject 'extent of impediments if removed'. In particular, the Tribunal states:

> 254. With reference to the three components relative to determining weight allocable to this Other Consideration (b), I make the following findings. *First*, in terms of the Applicant's age and state of health, he is now 24 years of age. It can be safely found that he has the significant majority of his working life before him. In his PCF, he was asked whether he has any diagnosed medical or psychological conditions. The Applicant ticked the "*yes*" box. He refers to a diagnosed condition of "*schizophrenia*" and "*ADHD*". In terms of medication prescribed for the schizophrenia condition, he nominates "*aripiprazole*". In addition, reference should also be made to the clinical assessment of Professor Freeman who opined that the Applicant had the following conditions: (1) drug induced psychosis (remission); and (2)

methamphetamine dependency (partial remission in a controlled environment).

255. I took from the evidence a reality that the Applicant's mental health conditions have been adequately treated in Australia. It would be unsafe to find that the UK, being at a broadly similar stage of economic and social development – in terms of the provision of adequate social services for mental health care – would not be able to offer the Applicant a level of care and treatment for his mental health issues similar to that which he has experienced in Australia. No two healthcare and social support systems are identical between two countries. That said, there is little to cavil with the proposition (and finding) that the Applicant's psychological symptomatology could be adequately treated and managed in the UK. He will have access to the same extent of treatment types and procedures as is currently available to other UK citizens.

256. Second, the next component of this Other Consideration (b) requires me to consider whether there are any "*substantial language or cultural barriers*" to the Applicant returning to the UK. He spent the first 13 of the 24 years of his life in the UK. He grew up speaking the English language and would be broadly familiar with the pattern of life in England. Further, the Applicant has resided in Australia for about the last 8–9 years. Australia and England share the same language and, in broad terms, the same cultural and social values. Thus, I cannot find any substantial language or cultural barriers to him returning to the UK and re-establishing himself there and maintaining basic living standards.

257. Third, the final component of this Other Consideration (b) compels an inquiry into the extent of any social, medical and/or economic support available to the Applicant in the UK. In cross-examination, the Applicant was asked "*[…] what do you think you would do if you were returned to the United Kingdom*?". "*He replied with I don't know at all. Like, I've got no family, no friends, no prospects. I've got no money. I don't remember the country*." In terms of actual relatives that could accommodate him, even on a short-term basis, the Applicant said the following during cross-examination:

> *"Ms Anderson: And you've said also in that statement that your grandparents left their own siblings in the United Kingdom. So is it correct to say that you have some ties in the United Kingdom?*
>
> *Applicant: I've got an uncle but I haven't seen him in about 10 years. And I don't really know him at all."*

258. The abovementioned uncle of the Applicant is actually the brother of his mother. According to the evidence of the Applicant's mother, there would likely be some kind of resistance or resentment to that uncle taking in the Applicant and affording him any sort of safe haven were the Applicant to be returned to the UK. The Applicant's mother said the following in her evidence in chief:

> *"Ms Anderson: Could [the Applicant's uncle] provide any support to Ashley of any type if he was removed to that country?*
>
> *Ms Batson: Like I say, he's only - he hasn't got kids, he's - he works - he works at the steelworks, so he works - even as night shifts, he hasn't really - I mean I haven't asked - in all fairness, in all honesty I haven't asked him, I haven't even told him what's going on with Ashley because, you know, we're kind of embarrassed. And I know it's sad to*

say, but because we made the decision to take our family away from the UK, my mum and dad followed us, and there's kind of - sometimes there's a bit of resentment there, it's like, "You all think you're better than England and better than us and you've gone off to do your own life and now look what has happened." I just feel like there would be a bit of, yes, well, you know, "You shouldn't have left" kind of thing. So I just don't feel like he would be in a position to say, you know, "I will pick the pieces up now it has all gone wrong for you" and I don't think he would be able to offer Ashley the support because Ashley will be in no mental state when he got to England."

259. Reference should also be made to the evidence of the Applicant's father. To my mind, it is important to any consideration of this third element of Other Consideration (b) for two reasons. First, his evidence serves to dispel any suggestion of a wholesale uprooting of the entire family and its return to the UK to be with the Applicant. Second, there is a hint in the father's evidence of him travelling back to the UK to help the Applicant re-establish himself there. However, any possibility of this second item becoming a reality is significantly hamstrung due to its very significant financial cost to the Applicant's parents and its adverse impact on the Applicant's younger sister, Child J. The Applicant's father said the following in cross-examination:

"Ms Anderson: Have you considered moving? If Ashley were to be returned to the United Kingdom, I understand that your family are British citizens, would you consider moving back with Ashley?

Mr G Batson: It's just I just don't know. It's just so difficult. It's such a difficult choice. You know, realistically how can I go back? You know, I've got my family here, I've got my wife, you know, we're not all going to go back. We just, we came to England - we left England 10 years ago for a reason and we've settled. This is our home now. Our daughter's doing really well, she's (indistinct) she's in all sorts of sports now and she's doing really well, in the State Futsal team. She's got her circle of friends. We know nobody there, we've got no inclination to go back at all as a family to live there. So, you know, I've thought about going back and helping him set up but, you know, unfortunately, we've not got a lot of spare money, we've just bought a new house. Just the flight alone would - we haven't even got money for the flight alone, let alone how do we go back and help him set up. To get accommodation you're going to need two, three, or six months' money upfront, that's if you can find somewhere. What town do we even go into? You know, my contacts from the town we lived in, you know, a lot of them have moved on and I just, I don't know. I don't know how - I've no thought, I - it just it would be very difficult to go back and as a family. You know, we're a family, we're here now. It's hard enough that Josh is in Queensland, you know, where it feels a little bit broken like that. But for one to be in Queensland and the other in England, it would just be horrendous for us. Yes, so, sorry I didn't really answer the question there but, no, I don't think. I couldn't. We couldn't."

[The Tribunal's underlining]

260. It is next necessary to determine the extent of medical support and economic support the Applicant will have available to him in the UK. I have already found that the UK does have close or similarly resourced publicly available

mental health facilities to deal with the Applicant's disclosed symptomatology. In his oral evidence given in cross-examination, the Applicant's father referred to the relative equivalence of the British National Health Service ("NHS") and social security apparatus to their Australian equivalents. He spoke about the ability of the NHS and the social security apparatus to provide the Applicant with (1) medical support; and (2) economic support upon a return to the UK. While the father contended that the NHS is "a lot worse than the Australian system", he nevertheless conceded that he will have these medical and economic supports available to him:

> *"Ms Anderson: The final question, it was suggested that he could access the same sorts of medical services and social support that's available to people in the UK. I'm assuming that's correct for the moment. Do you agree that that is contingent on Ashley's willingness to access that support and his motivation to gain assistance to reintegrate into the UK?*
>
> *Mr G Batson: Yes. Yes, and I mean what you said the support and assistance, well, it's just like you said, there's Centrelink, which is the dole. [sic] Like if you can't get work, there's NHS system, which is as broken as what - it's worse - it's worse - it's a lot worse than the Australian system as in time. Yes, drug - yes, he's got to – to maybe help, he'd be just drugs - turn to drugs as a rehabilitation [sic]. It's probably just as difficult to get - to get help there as what it is here. You know, there's – there is a lot of drug issues in the UK as well and maybe the basic help would be NHS, yes, Social Security, dole, Centrelink, yes, he'd get that help but that's not the help he's going to need. The help he's going to need there is finding accommodation and getting - and finding a job and trying to integrate into a group of friends, or people, anyone, which is very difficult at 24 when you don't know anybody, you've got nothing - where do you start?"*

261. I have had regard to the three basic components to this Other Consideration (b). I am of the view that:

(a) the Applicant's age is not an impediment to his removal. With reference to his physical health, he appears to be a physically fit 24 year old young man who speaks of returning to manual labouring-type work in the building industry. I accept that his mental health symptomatology – to the extent he cannot readily or expeditiously find treatment for it to the same extent he has in Australia – is an impediment to his return and successful re-establishment in the UK.

(b) I am of the view that there are little or no substantial language or cultural barriers impeding the Applicant's return to the UK. The UK and Australia share the same language and, broadly speaking, the same cultural values.

(c) The Applicant will probably experience logistical difficulty in accessing medical and economic support in the UK. As against that, he will have available to him whatever assistance can be sought and obtained from the NHS and the British equivalent of Centrelink in terms of economic support. In this way, he will have access to those things in the context of what is generally available to other citizens of that country. The Applicant's likely difficulties in accessing social, health and economic support, while present, are not necessarily

> substantial. Perhaps the most significant impediment for this Applicant is his relative absence of social connectivity to a support-base or safe-haven in the UK. There are, according to his mother's evidence, certain intra-family prejudices and ill-feelings that may impede the Applicant's capacity to immediately find a safe place to reside. As against that, there is the evidence of the father which points to a possibility of him going to the UK with the Applicant to help him settle in there.
>
> [footnote references omitted – emphasis in original]

41 It was put on behalf of Mr Batson that in this consideration there is a failure to address the methamphetamine dependency aspect in relation to health impediments if removed. In effect, the submission was that the Tribunal had made a like error to that which recently I found had been committed by the Tribunal in *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 (*LRMM*).

42 The Minister, in submissions, drew attention to two further paragraphs in the Tribunal's reasons, namely [87] and [110] in which, respectively, the Tribunal stated:

> 87. Professor Freeman's clinical assessment of the Applicant caused him to arrive at two identified conditions or symptomatologies comprising (1) Drug Induced Psychosis (in remission) and (2) Methamphetamine Dependency (in partial remission in a controlled environment). Professor Freeman was of the view that the Applicant did not meet the criteria to have a personality disorder. Professor Freeman did not consider that the Applicant has been consistently engaged in violent offending. He was of the view that the Applicant's "*offending history is likely to be better explained by: (a) methamphetamine dependency; and (b) alignment with a negative peer-support group that promoted or condoned such drug use*."
>
> 110. I have recounted previous instances where the Applicant has sought to achieve some level of satisfactory management of his mental health symptomatology and to otherwise try to achieve a satisfactory level of rehabilitation from abusing illicit drugs, all of which have failed. These failures have occurred despite the very dedicated support and sacrifices made by members of his family – primarily his parents – who must now understandably be at the end of their tether with the Applicant. None of these familial relationships have effectively militated against his recidivist risk. Accordingly, despite the plan now propounded by the Applicant to minimise his return to drug abuse, many, if not all, of the elements of that plan have been in place in the past but have done little or nothing to prevent him from returning to offending.

43 I am not persuaded that the Tribunal made in relation to health impediment consideration an error of the kind found in *LRMM*. A clue in that regard to an absence of error bearing in mind the need not to read the Tribunal's reasons narrowly and with an eye for error is to be found in the opening sentence of [255] and the reference therein in the plural to "the applicant's mental health conditions".

44 True it is that it is possible to see if one looks at passages in isolation some absence – or some differentiation between psychological symptomatology and the other drug dependency condition, but overall, it does, when one reads [87] and [110], appear to me that the Tribunal is not using psychological symptomatology or, for that matter, mental health symptomatology with the degree of precision for which Mr Batson contends. Rather, it appears, taking up the Minister's submission, that these are generic terms which embrace each of the conditions described by Professor Freeman. As it is, an absence of success in relation to ground 3 is of no moment with respect to the fate of the application. For the reasons given, the Tribunal's decision must be quashed and the matter remitted to the Tribunal so as to have the Tribunal hear and determine it afresh.

45 In the ordinary course of events, one would not expect the Tribunal to be constituted by the senior member who made the decision under review. However, I do not consider it necessary to make any precise direction in that regard, instead consigning that particular function to the good sense and judgment of the president of the Tribunal in his administration of the Tribunal.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan.

Associate:

Dated: 9 February 2022