FEDERAL COURT OF AUSTRALIA

Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 115

Appeal from:	*Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1456
File number:	NSD 1340 of 2021
Judgment of:	**FARRELL, MOSHINSKY AND BURLEY JJ**
Date of judgment:	11 July 2022
Catchwords:	**MIGRATION** – mandatory cancellation of visa under s 501(3A) of the *Migration Act 1958* (Cth) – where the appellant requested revocation of the cancellation decision – where a delegate of the respondent declined the request for revocation – where the Administrative Appeals Tribunal affirmed the delegate's decision – where the primary judge dismissed application for judicial review – whether Tribunal erred by failing to consider the appellant's health when considering the extent of impediments if the appellant were removed – whether the Tribunal acted on a misunderstanding of the applicable law in connection with the definition of "family violence" in Direction 90
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth), s 43 *Migration Act 1958* (Cth), ss 5CB, 5G, 499, 501, 501CA *Migration Regulations 1994* (Cth), reg 1.09A *Family Violence Protection Act 2008* (Vic), s 8
Cases cited:	*AYY17 v Minister for Immigration and Border Protection* (2018) 261 FCR 503 *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 *FKP18 v Minister for Immigration and Border Protection* [2018] FCA 1555 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 *Peacock v Repatriation Commission* (2007) 161 FCR 256 *Wei v Minister for Immigration and Border Protection*

	(2015) 257 CLR 22 *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	132
Date of hearing:	17 May 2022
Counsel for the Appellant:	Mr D Hooke SC with Dr J Donnelly
Solicitor for the Appellant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr GT Johnson SC with Mr NDJ Swan
Solicitor for the First Respondent:	Sparke Helmore
Solicitor for the Second Respondent:	The Second Respondent filed a submitting notice, save as to costs

ORDERS

NSD 1340 of 2021

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

ORDER MADE BY: **FARRELL, MOSHINSKY AND BURLEY JJ**

DATE OF ORDER: **11 JULY 2022**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the primary judge on 23 November 2021 be set aside and in lieu thereof it be ordered that:
   (a) The decision of the second respondent (the **Tribunal**) dated 5 July 2021 be quashed.
   (b) The first respondent pay the applicant's costs, as agreed or taxed.
   (c) The matter be remitted to the Tribunal, constituted by a different member, for determination according to law (as set out in the reasons of the Full Court).
3. The first respondent pay the appellant's costs of the appeal, as agreed or taxed.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The appellant appeals from a judgment of a Judge of this Court: *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1456.

2 The appellant is from the country now known as South Sudan. He first arrived in Australia in September 2006, when he was 12 years old. He arrived with his mother and other family members. The appellant was granted a Woman at Risk (Class XB) (Subclass 204) visa, as a member of his mother's family.

3 On 23 May 2019, the appellant's visa was mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) (the **cancellation decision**).

4 The appellant applied to the respondent (the **Minister**) for revocation of the cancellation decision pursuant to s 501CA of the *Migration Act*.

5 On 12 April 2021, a delegate of the Minister declined the appellant's request to revoke the cancellation decision (the **non-revocation decision**).

6 The appellant applied to the Administrative Appeals Tribunal (the **Tribunal**) for review of the non-revocation decision.

7 On 5 July 2021, the Tribunal affirmed the non-revocation decision.

8 By originating application, the appellant applied to the Federal Court of Australia for judicial review of the Tribunal's decision. The primary judge dismissed that application. The appellant appeals to the Full Court from that judgment.

9 The appellant relies on two grounds, which are set out in his notice of appeal:

(a) The primary judge erred in failing to find that there was a constructive failure to exercise jurisdiction by the Tribunal. In summary, the appellant contends that the Tribunal failed to consider the appellant's health (specifically, his mental health) when considering the extent of impediments if the appellant were removed from Australia and returned to South Sudan, and the primary judge erred in not so finding (**ground 1**).

(b) The primary judge erred in failing to find that the Tribunal acted on a misunderstanding of the applicable law. In summary, the appellant contends that the Tribunal erred in treating a particular person (referred to in the Tribunal's reasons as "Ms S") as a family member for the purposes of the definition of "family violence" in *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**). It is submitted that the primary judge erred in not so finding (**ground 2**).

10 In our view, for the reasons that follow, ground 1 is not made out, and ground 2 is made out.

Key legislative provisions

11 Section 501(3A) of the *Migration Act* 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.

12 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;

13 If a visa is cancelled pursuant to s 501(3A), 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.

Direction 90

14 Direction 90 is a direction given by the Minister under s 499 of the *Migration Act*. In considering whether to exercise the discretion in s 501CA(4), the Tribunal was bound to comply with Direction 90: see s 499(2A).

15 The expression "family violence" is defined in paragraph 4(1) of Direction 90, as follows:

> ***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, or his or her liberty.

16 The expression "member of the person's family" is not defined in Direction 90. Nor is the word "family". However, s 5G of the *Migration Act* provides that certain persons, including a de facto partner, are taken to be members of a person's family. The expression "de facto partner" is defined in s 5CB of the *Migration Act*. Sections 5CB and 5G provide:

> **5CB De facto partner**
>
> *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.

…

5G Relationships and family members

(1) For the purposes of this Act, if one person is the child of another person because of the definition of ***child*** in section 5CA, relationships traced to or through that person are to be determined on the basis that the person is the child of the other person.

(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.

17 Section 8 of Direction 90 is headed "Primary considerations" and provides that, in making a decision under ss 501(1), 501(2) or 501CA(4), the following are primary considerations:

(a) protection of the Australian community from criminal or other serious conduct;

(b) whether the conduct engaged in constituted family violence;

(c) the best interests of minor children in Australia; and

(d) expectations of the Australian community.

18 Paragraph 8.1.1 provides as follows:

> **8.1.1 The nature and seriousness of the conduct**
>
> (1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following:
>
> a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:
>
> (i) violent and/or sexual crimes;
> (ii) **crimes of a violent nature against women** or children, regardless of the sentence imposed;
> (iii) **acts of family violence**, regardless of whether there is a conviction for an offence or a sentence imposed;
>
> b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:
>
> (i) causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;
> (ii) crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;
> (iii) any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));
> (iv) where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, or an offence against section 197A of the Act, which prohibits escape from immigration detention;
>
> c) with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;
>
> d) the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;

e) the cumulative effect of repeated offending;

f) whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;

g) whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).

(Emphasis added.)

19 Paragraph 8.1.2 deals with the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

20 Paragraph 8.2 provides:

8.2 Family violence committed by the non-citizen

(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 noncitizen, 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 noncitizen's migration status, should the non-citizen engage in further acts of family violence.

21 Section 9 of Direction 90 deals with "Other considerations". Paragraph 9(1) provides that, in making a decision under (relevantly) s 501CA(4) other considerations must be taken into account where relevant. These include:

(a) international non-refoulement obligations;

(b) extent of impediments if removed;

(c) impact on victims; and

(d) links to the Australian community, including:

(i) strength, nature and duration of ties to Australia; and

(ii) impact on Australian business interests.

22 Paragraph 9.2 provides:

9.2 Extent of impediments if removed

(1) Decision-makers must consider the extent of any impediments that the non-citizen 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**;

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

c) any social, medical and/or economic support available to them in that country.

(Emphasis added.)

Background facts

23 The following summary of the background facts is based on the reasons for the decision of the Tribunal. It should be noted that the following is only a summary and does not include all the background facts found by the Tribunal, as set out at [20]-[100] of the Tribunal's reasons.

24 Insofar as the following summary is based on police records, it is to be noted that, ultimately, the Tribunal considered the police records to be an accurate summary of what occurred, notwithstanding the appellant's denials of most of the allegations during the hearing before

the Tribunal: see the Tribunal's reasons at [97]-[100]. There is no challenge to the Tribunal's fact-finding in this regard.

25 According to police records: on 28 March 2012, there was a report to the police that the appellant had arrived home and argued with his sister, causing her to feel so intimidated that she had attempted to run away from him; the appellant then punched a wall, smashing a hole in it; the incident was witnessed by two children; when the police arrived, they noticed that the appellant's sister was fearful and that there was a fresh hole in the wall consistent with a punch; and the appellant initially refused to comment on how the damage occurred.

26 In the hearing before the Tribunal, the appellant said he had never before heard the allegation that he had smashed a hole in the wall, that he had never been spoken to about it before, and that he had never had anything like that occur with his sister. He said there had never been any incident that would have resulted in the police coming and questioning his sister or questioning him. He added that he was not using drugs or drinking alcohol at that time.

27 In the hearing before the Tribunal, the appellant denied knowledge of the protection order that was subsequently made on 3 April 2012. He said he had never been to court regarding anything to do with his family and he had never been spoken to by the police about any incident with his family.

28 However, a protection order was made on 3 April 2012 naming the appellant as the respondent and requiring him to be of good behaviour and not to commit domestic violence against the aggrieved. The order contains a signature above the word "Respondent". The Tribunal stated at [26] that the signature looked similar, although not identical, to the appellant's signature on other documents before the Tribunal. In the hearing, the Tribunal asked the appellant if it was his signature and he said the signature was not his signature and he did not sign the document.

29 On 28 July 2013, the police applied for a protection order on behalf of Ms S, naming the appellant as the respondent. The application indicated that: on 23 July 2013, the appellant and Ms S had argued because she had received a text message on her phone, and the appellant had demanded "give me the fucking phone"; he then grabbed the phone from Ms S and threw it onto the bed; he twisted Ms S's arm behind her back and pulled it up; she was crying from the pain; he then pushed her head into her bedroom wall; he questioned her about the text message and spoke abusively to her; as she got up, the appellant pushed her out the

door; Ms S's mother asked the appellant to give Ms S's phone back; Ms S then asked for her phone back, and the appellant spoke abusively to her again; and he then grabbed Ms S by the front of her shirt and hit her stomach with the palm of his hand making her fall to the ground. Ms S's mother's partner arrived home and asked what was going on; the appellant packed his things and told Ms S to burn all of her photos; he pulled photos off the wall and ripped them up; when he had packed everything in his car, Ms S asked him for her phone back; he pushed her out of the way calling her a bitch and a liar and told her he smashed her phone on the road; her mother yelled from her room for him to give the phone back; and he responded, "Listen to me, if your mum keeps yelling out to me I'm going to knock you the fuck out".

30 Ms S told the police that she had been the victim of previous domestic violence including physical abuse from the appellant. She said they had previously separated because of this. When the police asked her if the appellant was usually violent, she said:

> Yep, he's always angry – he's probably left his bong behind. He has thrown me downstairs 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.

31 A protection order was issued on 8 August 2013. The order indicates that it was made "by consent without admissions". It included the condition that the appellant had to be of good behaviour towards Ms S and not commit domestic violence against her. He was also prohibited from approaching her or approaching within 100 metres of her home or work.

32 In the hearing before the Tribunal, the appellant said that he recalled the incident where he broke up with Ms S but he did not know that a protection order had been made. He denied that there was an argument about her phone, that he twisted her arm behind her back, that he pushed her head into the bedroom wall, that he grabbed her by the front of the shirt and hit her, or that he pushed her out of the way and called her a bitch and a liar. He also denied telling Ms S that he was going to "knock you the fuck out". He said there was no swearing, it was a clean break-up and he was the one who was hurt. When asked why, if it was a clean break-up, Ms S had told the police that he did all those things, he did not suggest a reason.

33 Between 2013 and 2019, the appellant was convicted of 37 offences including assaults, drug offences, property offences, and offences arising from contravening directions and breaching bail undertakings (by failing to appear).

34 On 24 February 2014, the appellant committed an assault. The police record of the assault indicates that: the appellant and three other males were approached by the female victim

(referred to as "Ms G" in the Tribunal's reasons) and her friend while walking down the street; the appellant aggressively told one of the males not to talk to the victim and pulled him away; the appellant said to the victim, "Why are you talking to my girlfriend?", "Saying that I raped your sister", "Why would I rape her when she is the one who opens her legs?"; the appellant punched Ms G with a clenched fist on the left side of her face; she tried to defend herself by hitting him back and he punched her again on the left side of her head; two of the other males blocked him from continuing to hit her and he walked away; and when questioned by the police, the appellant denied striking Ms G, stating she attacked him, and he tried not to lose his temper.

35 In his written materials before the Tribunal, the appellant said "In complete honesty, I do not remember the events of this offence. At this time, I was heavily drinking alcohol and smoking marijuana".

36 In the hearing before the Tribunal, the appellant said he did not punch Ms G. He said she and her friend were walking around drinking alcohol in the street and when he got off the bus she started latching onto them and saying "You're a fucking rapist". He said she was trying to hit him with a bottle and all he did was open his hand to try to stop the bottle, and in the end he pushed her. He said the bottle hit him and she went to the police station. He told the police his part of the story, being that he did not punch her in the face.

37 The appellant pleaded guilty to this offence on 24 September 2014 and he was sentenced to a fine without a conviction being recorded.

38 On 14 September 2014, an incident occurred between the appellant and Ms S which resulted in the police making an application for a protection order against him. According to the application: the police were called to a disturbance at a bus stop where the appellant was physically assaulting Ms S; the police attended and separated them both; earlier, Ms S and the appellant had been at home when Ms S wanted to leave, and the appellant tried to stop her; Ms S walked to the bus stop and the appellant followed; as Ms S tried to get onto a bus, the appellant held her and pulled her back; and a witness told the police that the appellant had his arms around Ms S and was hitting her hands so she could not hold onto anything and that the appellant had physically assaulted Ms S several times.

39 The appellant was not prosecuted for this conduct. Rather, the police applied for a protection order and it was granted on 16 September 2014. It included conditions that the appellant had to be of good behaviour towards Ms S and not commit domestic violence.

40 On 7 January 2015, in contravention of those conditions, the appellant committed an assault occasioning bodily harm against Ms S. According to police records: the police responded to a report of a disturbance and saw Ms S in a very distressed state on the footpath with the appellant nearby; she was crying and had blood coming from a cut on her left forehead; she also had cuts to her chest, bruising to her eye and a cut to her top lip; she said the injuries were caused by the appellant; she said she and the appellant had just had an argument; when she had tried to leave, the appellant grabbed her by the hair, dragged her back and hit her on the left ear; she became very upset and went down the stairs, approaching the front glass door; her head hit the glass door, breaking the glass; she crouched down near the door crying; the appellant put one hand on her throat and squeezed, beginning to choke her; he then used his other hand and began choking her with both hands; he had her pinned against the wall and he put his body weight against her neck choking her; and eventually he stopped and she called the police.

41 In the hearing before the Tribunal, the appellant admitted to having grabbed Ms S by the hair, but he denied the other violence. He said that he had tried to leave, then Ms S had grabbed him by the shirt from behind, telling him not to go. He had grabbed her by the hair and pushed her, trying to go outside. Because she was "bipolar in a way" she started screaming and ran through the glass door. He said he started crying and sat down next to her and the neighbours called the police. He said she was telling him to run but he would not leave her. He denied having choked her. The Tribunal noted that, in his written materials before the Tribunal, the appellant denied having grabbed Ms S by her hair, but he admitted to that in the hearing.

42 On 7 January 2015, the appellant was convicted for the assault and contravention of release conditions. On 2 December 2015, he was sentenced to a term of six months' imprisonment, which was suspended for 18 months.

43 On 4 October 2018, the appellant committed an assault occasioning bodily harm and obstruction of a police officer. According to police records: the appellant and a woman (referred to by the Tribunal as "Ms V") were inside her unit when the appellant became angry, stood up and flipped over the coffee table; the corner of the table struck Ms V in the

right breast causing pain and discomfort; books that were on the table also landed on her; the appellant then stood over her while she was on the ground and hit her across the face several times with open hands; and he then took her phone and left.

44 Later, the police arrived and the appellant yelled at them from the street. According to police records: as they tried to take him into custody, he actively resisted; he was warned about obstructing the police multiple times and eventually he was put in handcuffs; the police asked the appellant to state his full name and he was warned multiple times that it was an offence to refuse to comply, yet he refused to comply; when the police attempted to search the appellant, he vigorously obstructed them, shaking about and turning around to stop them from searching him; he was again warned multiple times about obstructing the police; he was put into the rear of a police vehicle; his identity was then confirmed; at the watch house, the appellant became highly aggressive and refused to answer any further questions; he threatened to murder the interviewing police; and when the police searched the appellant, they found a used glass pipe and some cannabis in his pocket.

45 In a document provided by the appellant on 29 September 2020, he said "I was visiting a friend [Ms V] at her house. We got into an argument and I slapped her." In the hearing before the Tribunal, before the appellant was asked about this incident, he said that he had prepared that document. Later, when he was asked about that incident, he denied having slapped Ms V and said he only pleaded guilty because he was already in custody and he was advised by a lawyer to plead guilty in order to be released. Even after his previous admission to slapping Ms V was put to him, he said that he had not done that.

46 On 6 February 2019, the appellant was convicted and sentenced as follows:

(a) for obstruction of a police officer (two charges), he was sentenced to imprisonment for four months;

(b) for assault occasioning bodily harm, he was sentenced to imprisonment for 12 months;

(c) for wilful damage (three charges), he was sentenced to imprisonment for six months;

(d) for three drug offences, possessing a knife in a public place, trespass and unlawful possession of suspected stolen property, he was sentenced to three months' imprisonment;

(e) for possessing dangerous drugs (two charges), he was sentenced to imprisonment for nine months;

(f) for possession of a knife in a public place, he was fined $500; and

(g) for contravening a direction or requirement (two charges), he was convicted and not further punished.

47 The sentences of imprisonment were to be served concurrently, with 118 days of pre-sentence custody deemed as time already served, and immediate release on parole.

48 According to police records, on 20 March 2019 a protection order was made naming Ms V as the aggrieved and the appellant as the respondent. The application was made by the police and the application form included:

> Police were called by the Aggrieved to attend the address after the Aggrieved called to report that the respondent had assaulted her. Police attended and spoke to both parties separately. Both gave a similar version. The Respondent had attended the address and the Aggrieved and the Respondent had become involved in a verbal altercation regarding money. The verbal altercation has escalated and the Aggrieved stated to police that the Respondent has struck her to the head. The Respondent denied that the argument had become physical. The Aggrieved does not have any visual physical injuries and declined QAS [Queensland Ambulance Service] assistance.

49 The order provided that the appellant was to be of good behaviour towards Ms V and not commit domestic violence against her. The appellant was present in court when the order was made.

50 In the hearing before the Tribunal, the appellant said that he did not remember the incident, but he did remember a protection order being made. He denied having struck Ms V on the head.

51 The appellant said 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. The Tribunal accepted this and found that although the appellant and Ms V had a domestic and social relationship, they were not intimate partners.

52 The Tribunal found that the appellant has been convicted of numerous offences involving violence and there have been reports of him engaging in violent behaviour that did not result in prosecutions: at [97]. The alleged violent behaviour spans a period from 2012 to 2019.

53 In the hearing before the Tribunal, the appellant denied all but a tiny fraction of the alleged violence. The Tribunal noted at [97] that the violence that the appellant denied involved the following victims: his sister, Ms S, Ms G, Ms V, Ms V's friend (as described in the Tribunal's reasons) and police officers. The Tribunal noted that there did not appear to be any connection between these victims, except between Ms S and Ms G, and between Ms V and her friend, and that it seemed fanciful that all of those people made false allegations of violence against the appellant.

54 As noted above, the Tribunal found the police evidence to be more reliable than the appellant's evidence: at [100]. Where the two differed, the Tribunal preferred the police evidence. Accordingly, the Tribunal was satisfied that the appellant did everything that the police records alleged he did.

The Tribunal decision

55 The hearing before the Tribunal took place over three days. The appellant, who was self-represented, gave evidence by video-conference. Ms Caitlin Boyd-Ford, whom the Tribunal described as a trauma counsellor, and the appellant's brother gave evidence by telephone.

56 The Tribunal identified, at [7], that there were two issues before the Tribunal: whether the appellant passed the character test; and whether there was "another reason" why the cancellation decision should be revoked.

57 In relation to the character test, the Tribunal found that the appellant did not pass the character test. There is no issue on appeal regarding this aspect of the Tribunal's decision.

58 The balance of the Tribunal's reasons dealt with whether there was "another reason" why the cancellation decision should be revoked. The Tribunal set out the background facts, including details of the appellant's offending, at [20]-[100].

59 The Tribunal then considered each of the primary considerations referred to in Direction 90.

60 The first primary consideration – protection of the Australian community – was considered at [101]-[149]. The Tribunal considered two aspects:

(a) the nature and seriousness of the appellant's conduct to date; and

(b) the risk to the Australian community should the appellant commit further offences or engage in other serious conduct.

61 In the course of considering the nature and seriousness of the appellant's conduct to date, the Tribunal stated, at [104]:

> The Applicant has engaged in violent crimes against numerous people, mainly women. The violence has included choking, hitting, punching, shoving, hitting with objects, and pulling his victim to the ground by the hair. **One of the victims, namely Ms S, was the Applicant's intimate partner, meaning his violence against her was an act of family violence.** While Ms V was not an intimate partner, she shared a home with the Applicant, and she was not safe in her own home because of him. All of this violence is very serious conduct.
>
> (Emphasis added.)

62 The highlighted sentence in the above passage is important for the second ground of appeal. It is convenient to note at this stage that the Tribunal appears to have proceeded on the basis that, because Ms S was the appellant's intimate partner, she was therefore a member of his family for the purposes of the definition of "family violence" in paragraph 4(1) of Direction 90, with the consequence that his violence against her was "family violence" for the purposes of the Direction. However, the Tribunal did not refer to the definition of "family violence" in its reasons, or expressly consider whether or not Ms S was a member of the appellant's family for the purposes of that definition.

63 It is also noteworthy that the Tribunal, at [104], drew a distinction between Ms S, who the Tribunal considered to be an intimate partner of the appellant, and Ms V, who was not considered to be an intimate partner. Earlier, at [85] of the Tribunal's reasons, the Tribunal referred to the appellant's evidence 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. The Tribunal stated, at [85], that it accepted this and found that, although the appellant and Ms V had a domestic and social relationship, they were not intimate partners.

64 In relation to the *nature and seriousness of the appellant's conduct*, the Tribunal concluded, at [111], that this factor weighed heavily against revocation of the cancellation decision.

65 The Tribunal then considered the *risk to the Australian community* should the appellant commit further offences or engage in other serious misconduct. At [117], the Tribunal stated that there was not any independent, expert evidence about the risk the appellant would re-offend, therefore the Tribunal needed to make its own assessment based on the evidence. The Tribunal considered the evidence in detail in the paragraphs that followed. In the course of doing so, the Tribunal noted at [126] that the appellant had attended counselling sessions with the Queensland Program of Assistance to Survivors of Torture and Trauma (**QPASTT**).

Ms Boyd-Ford, who gave evidence at the hearing, was a counsellor at QPASTT. The Tribunal made the following statements about Ms Boyd-Ford's evidence and the appellant's risk of re-offending at [140]-[143]:

> 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 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; bold emphasis added.)

66 After further consideration, the Tribunal found that there was at least a moderate risk that the appellant would commit further offences in future of the kind that he has committed: at [148].

67 The Tribunal concluded that first primary consideration weighed heavily against revocation of the cancellation decision: at [149].

68 The next section of the Tribunal's reasons concerned the second primary consideration, namely family violence. This is a relatively brief section, comprising only four paragraphs. The Tribunal set out paragraph 8.2 of Direction 90 and then stated:

> 151. **I am satisfied that the Applicant committed family violence against his sister and that he was violent to an intimate partner, Ms S, on multiple occasions**. In my consideration of Primary Consideration 1, I have addressed the matters I am required to address under Primary Consideration 2, and **I apply rather than repeat that analysis here**.
>
> 152. 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.
>
> (Emphasis added.)

69 It is convenient to observe at this stage that, in the first sentence in [151], the Tribunal appears to delineate between the violence committed by the appellant against *his sister*, which the Tribunal describes as family violence, and the violence committed by the appellant against *Ms S*, which the Tribunal does not describe as family violence. There appears to be a tension between the Tribunal's statement at [104] that Ms S was the appellant's intimate partner "meaning his violence against her was an act of family violence" and the first sentence in [151], where the Tribunal does not attach that label to the violence against Ms S (in a context where it does attach that label to the violence against the sister). It should also be noted that, in the last sentence of [151], the Tribunal stated that it applied its earlier analysis.

70 The Tribunal concluded that the second primary consideration weighed heavily against revocation of the cancellation decision: at [153].

71 The Tribunal considered the third primary consideration (the best interests of minor children in Australia) at [154]-[169], concluding that the best interests of the children mentioned in this section weighed to a limited extent in favour of the revocation of the cancellation decision.

72 The Tribunal considered primary consideration 4 (the expectations of the Australian community) at [170]-[177]. The Tribunal referred to paragraph 8.4 of Direction 90. The Tribunal stated at [176]:

> Accordingly, in assessing the weight attributable to Primary Consideration 4, it is 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).
>
> (Emphasis added.)

73 The Tribunal concluded in relation to this consideration that: the appellant had breached the trust of the Australian community; the nature of the appellant's offending was such that the Australian community would expect that he should not hold a visa; and this consideration weighed heavily in favour of non-revocation of the cancellation decision: at [177].

74 The next section of the Tribunal's reasons is headed "Other Considerations". The Tribunal dealt with the following matters:

(a) International non-refoulement obligations;

(b) Extent of impediments if removed;

(c) Impact on victims; and

(d) Links to the Australian community.

75 The section dealing with the *extent of impediments if removed* is relevant for present purposes. After referring to paragraph 9.2 of Direction 90, the Tribunal stated at [200]:

> **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; emphasis added.)

76 It is relevant to note that, in the context of considering the *extent of impediments if removed*, the Tribunal did not refer to the evidence of Ms Boyd-Ford that it had discussed earlier in its reasons, in the context of considering the *risk of re-offending*.

77 The Tribunal then considered communication issues and cultural issues if the appellant were removed from Australia and returned to the country that is now South Sudan: at [201]-[204]. The Tribunal considered the lack of family or social support for the appellant in South Sudan: at [205]. The Tribunal stated that the standard of medical care and other services is very poor in South Sudan, and it would be very difficult for the appellant to establish himself and maintain basic living standards. The Tribunal concluded that the "extent of impediments if removed" weighed heavily in favour of revocation of the cancellation decision.

78 The Tribunal summarised its conclusions in relation to the four Other Considerations in a paragraph immediately after [221]:

> The application of the Other Considerations in the present matter can be summarised as follows:
>
> (a) international non-refoulement obligations: weighs to a limited extent in favour of revocation;
>
> (b) extent of impediments if removed: weighs heavily in favour of revocation;
>
> (c) impact on victims: neutral; and
>
> (d) links to the Australian community: weights to a moderate extent in favour of revocation.

79 The Tribunal's reasons contain a section headed "Conclusion" in which the Tribunal stated:

> 222. I am now required to weigh all of the Considerations in accordance with the Direction.
>
> 223. In considering whether there is another reason to exercise the discretion afforded by s501CA(4) of the Act to revoke the mandatory visa cancellation decision, I find as follows:
>
> - Primary Consideration 1 weighs heavily in favour of non-revocation;

- Primary Consideration 2 weighs heavily in favour of non-revocation;
- Primary Consideration 3 weighs to a limited extent in favour of revocation;
- Primary Consideration 4 weighs heavily in favour of non-revocation; and
- To the extent that Primary Consideration 3 and Other Considerations (a), (b) and (d) weigh in favour of revoking the mandatory visa cancellation decision, they cannot, even when combined, outweigh Primary Considerations 1, 2 and 4.

224. Consequently, I cannot exercise the discretion to revoke the cancellation of the Applicant's visa.

The reasons of the primary judge

80 The appellant, who was represented at the hearing before the primary judge, relied on two grounds of review, which correspond with the two grounds relied on in the appeal.

81 The primary judge set out the background facts and summarised the Tribunal's reasons at [4]-[80] of his reasons.

82 The primary judge considered the first ground of review at [81]-[115] of his reasons. This ground was that the Tribunal constructively failed to exercise jurisdiction in that it failed to comply with the requirement in paragraph 9.2(1)(a) of Direction 90 to have regard, among other things, to the appellant's health in the context of considering the extent of any impediments to the appellant's removal.

83 As the primary judge noted at [82], the appellant sought to contrast the findings made by the Tribunal with respect to the evidence of Ms Boyd-Ford in considering the *risk of the appellant re-offending* with the absence of any references to her evidence in the Tribunal's assessment of the appellant's health and state of mind when making findings in relation to *impediments to removal*.

84 After setting out the parties' submissions, the primary judge considered the first review ground at [99]-[115]. The primary judge was not satisfied that the Tribunal's failure to refer to the evidence of Ms Boyd-Ford in its reasoning with respect to the appellant's health when considering impediments to removal constituted a constructive failure to exercise jurisdiction: at [102]. In essence, the primary judge considered that the Tribunal *did* have regard to the appellant's health when considering impediments to removal, as demonstrated by its findings at [200].

85 In the course of the primary judge's reasoning on the first review ground, at [104]-[105], the primary judge set out extracts from the evidence at the hearing that supported the Tribunal's findings at [200].

86 Further, at [106], the primary judge also expressed the view that the evidence given by Ms Boyd-Ford with respect to the appellant's mental health and drug dependence was "inconclusive and qualified".

87 The primary judge also considered whether, if he were mistaken in his conclusion, any error would be material. His Honour was not persuaded that any error would be material: at [111].

88 The primary judge considered the second ground of review at [116]-[173] of his reasons. This ground was that the Tribunal acted on a misunderstanding of the provisions of paragraph 8.2 of Direction 90 in finding that the appellant had committed "family violence" against an intimate partner, Ms S, on multiple occasions.

89 The primary judge stated, at [119], that the Tribunal is required to form a state of satisfaction as to whether there is "another reason" why the cancellation decision should be revoked on a correct understanding of the law, referring to *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 (***FCFY***) at [63] per Thawley J and cases there cited. Further, as the primary judge noted, by reason of s 499(2A), the Tribunal must comply with Direction 90 in the application to review the cancellation decision.

90 After setting out the parties' submissions, the primary judge considered the second ground at [135]-[173]. The primary judge noted that there is no definition of a "member of the person's family" or "family" in Direction 90: at [138]. The primary judge considered that it was appropriate to look to the *Migration Act* for guidance as to the meaning of these expressions: at [141]. The primary judge set out ss 5CB and 5G of the *Migration Act* and also reg 1.09A of the *Migration Regulations 1994* (Cth). The primary judge also referred to paragraph 5.2 of Direction 90.

91 The primary judge held, at [155], that the expression "member of the person's family" in the definition of "family violence" in Direction 90 "extends to at least persons who are related to each other, are living together and who are financially dependent upon each other". Further, at [156], the primary judge held that the expression "member of the person's family" "should not be narrowly construed and should not be limited to close relatives and de facto partners of the non-citizen". In the primary judge's 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". His Honour stated that it could, for example, extend to persons who are in an intimate relationship and who are living together: at [156].

92 The primary judge held, at [157], that whether a person falls within the expression "member of the person's family" is a matter of fact to be determined by the decision-maker, informed by the indicia of family violence in paragraph 4(1) of Direction 90 and by ss 5CB and 5G of the *Migration Act*: at [157]. The primary judge considered that, while relevant, the existence of an intimate relationship is not determinative: at [157].

93 At [159]-[160], the primary judge considered the appellant's statement of facts, issues and contentions before the Tribunal in which the appellant described his relationship with Ms S. That document included statements that it was a "serious relationship" and that "she was basically living with me". The primary judge considered that these and other statements provided a "sufficient evidentiary basis to preclude a finding that the Tribunal acted on a misunderstanding of the provisions of [paragraph] 8.2 of Direction 90 in concluding that Ms S was a family member of the [appellant], at least by the time of the [appellant's] assault occasioning bodily harm on Ms S on 7 January 2015": at [160].

94 The primary judge referred to other material before the Tribunal that he considered also precluded a finding that the Tribunal acted on a misunderstanding of paragraph 8.2 of Direction 90: at [161]-[165]. The primary judge concluded at [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.
>
> (Emphasis added.)

95 The primary judge also expressed a view as regards materiality, in the event he was wrong in his conclusion on the second ground. The primary judge considered that, if the second ground had otherwise been established, there *was* a realistic chance that the Tribunal could have come to a different decision: at [168].

96 The primary judge therefore dismissed the application for review.

The appeal

97 The appellant appeals from the judgment of the primary judge. The appellant's two grounds of appeal have been summarised in the Introduction to these reasons.

Consideration

Ground 1

98 The appellant contends, in summary, that the primary judge should have found that the Tribunal failed to consider lawfully the mandatory consideration of the appellant's health when considering the extent of impediments if removed.

99 The appellant submits that, contrary to the primary judge's reasoning, nothing in [200] of the Tribunal's reasons addressed the evidence before the Tribunal that demonstrated that:

(a) the appellant needed continued rehabilitation "focused on trauma processing" (see the Tribunal's reasons at [141]);

(b) the appellant self-referred for mental health assistance, reporting intense/persistent emotional distress and other symptoms (see the Tribunal's reasons at [140]); and

(c) the appellant had significant problems with alcohol and drug abuse for a number of years (see the Tribunal's reasons at [80], [94], [120] and [129]).

100 The appellant notes that the primary judge found that the findings made by the Tribunal at [200] reflected the evidence given by the appellant. However, the appellant submits that even an explicit concession by a party to a Tribunal cannot supplant the Tribunal's task, which is to reach the correct or preferable decision: see *Peacock v Repatriation Commission* (2007) 161 FCR 256 at [23]. The appellant submits that, regardless of what the appellant said in his evidence, an unarticulated claim might "clearly emerge" before a decision-maker from the decision-maker's own findings and the material upon which the findings are based: *AYY17 v Minister for Immigration and Border Protection* (2018) 261 FCR 503 at [26]. The appellant submits that: in the context of the appellant's risk of recidivism, the Tribunal concluded, at [144] and [146], that more work was needed concerning the appellant's rehabilitation; the Tribunal found, at [147], that the appellant had not had the opportunity to demonstrate long-term sobriety outside the highly structured and highly regulated environment in prison and detention. The appellant submits that, considered in context, the Tribunal was concerned that the appellant's various health issues had not been resolved.

101 The appellant submits that the primary judge erred in reasoning (at [106]) that the evidence given by Ms Boyd-Ford concerning the appellant's mental health and drug dependence was inconclusive and qualified.

102 The appellant notes the primary judge's statement (at [107]) that the Tribunal, in assessing the appellant's health for its consideration of impediments to removal, was focussing on "diagnosed" medical or mental health conditions. The appellant submits that, even if this is a correct construction of what the Tribunal was doing at [200], it reveals error because: (a) the word "health" in paragraph 9.2(1)(a) of Direction 90 is not qualified by the expression "diagnosed" and should be given its ordinary meaning; and (b) if the Tribunal did focus only on "diagnosed" medical or mental health conditions, this demonstrates that the Tribunal failed to have regard to the appellant's unresolved health issues.

103 The appellant notes that the primary judge reasoned, at [108], that it could not be assumed that the relevance of Ms Boyd-Ford's evidence as to the "health" of the appellant in assessing the risks of re-offending would be the same as in considering impediments to removal. The appellant submits that, while this can be accepted, it was a matter for *the Tribunal* to decide, by lawfully applying the mandatory consideration in paragraph 9.2(1)(a) (which it did not do).

104 The appellant submits that the primary judge erred in finding that the pleaded error, even if accepted, was not material.

105 The appellant submits that ground 1 has "striking similarities" to the ground that succeeded in *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 (***LRMM***).

106 In our view, for the reasons that follow, it is not established that the Tribunal failed to consider the appellant's health, in the context of applying paragraph 9.2(1)(a) of Direction 90, and thereby constructively failed to exercise its jurisdiction.

107 First, the Tribunal *did* expressly refer to the appellant's health in [200] of its reasons, which formed part of its assessment of "the extent of impediments if removed". The Tribunal's statement that the appellant was able-bodied and did not claim to have any diagnosed medical or mental health conditions was accurate. Similarly, the Tribunal's statement that the appellant described his mental health as good was an accurate statement about the appellant's evidence. The relevant evidence is set out in the primary judge's reasons at [104]-[105].

108 Secondly, insofar as it is submitted that the Tribunal fell into jurisdictional error by not considering, in this context, the evidence of Ms Boyd-Ford and the Tribunal's own findings at [140]-[143], we are not satisfied that the Tribunal failed to consider those matters. The Tribunal referred to the evidence of Ms Boyd-Ford in some detail at [140]-[143] and may be taken to be aware of this evidence when it came to deal with "the extent of impediments if removed". Likewise, the Tribunal was aware of its own findings in relation to the risk of re-offending when it came to consider "the extent of impediments if removed". Although the Tribunal did not expressly refer to that evidence and those findings in the section dealing with "the extent of impediments if removed", we are not satisfied that the Tribunal failed to consider them. In particular, we would infer that the Tribunal was conscious of these matters when it made its findings at [205] that the standard of medical care and other services is very poor in South Sudan, and that it would be very difficult for the appellant to establish himself and maintain basic living standards. It was on this basis that the Tribunal concluded that this consideration weighed heavily *in favour* of revocation of the cancellation decision (at [206]).

109 Thirdly, while it may be accepted that consideration of an applicant's health for the purposes of paragraph 9.2(1)(a) of Direction 90 is not limited to *diagnosed* conditions, we do not read [200] of the Tribunal's reasons as indicating that the Tribunal confined its consideration to diagnosed conditions. The Tribunal was merely stating (accurately) that the appellant did not claim to have any diagnosed conditions.

110 Insofar as the appellant relies on *LRMM*, each case turns on its particular facts, and a consideration of the particular reasons of the Tribunal, read as a whole.

111 For these reasons, no error is shown in the primary judge's conclusion in relation to the first ground of review below. It is not necessary to consider the primary judge's assessment that the evidence of Ms Boyd-Ford was "inconclusive and qualified". It is also not necessary to consider the primary judge's conclusion as regards materiality.

112 Accordingly, ground 1 is not made out.

Ground 2

113 By this ground, the appellant submits that the primary judge erred in failing to find that the Tribunal acted on a misunderstanding of the law.

114 The appellant submits that the Tribunal did not consider paragraph 4(1) of Direction 90 or ss 5CB and 5G of the *Migration Act* when considering whether the appellant engaged in

family violence within the meaning of Direction 90. The appellant submits that the Tribunal could hardly have acted on a correct understanding of the applicable law if it showed no appreciation of the applicable principles relevant to who meets the description of a "member of the person's family" for the purposes of paragraph 4(1) of the Direction. The appellant submits that (as the primary judge held at [158]) the Tribunal did not expressly address any of the evidence as to the specific nature of the relationship between the appellant and Ms S. The appellant submits that this itself reveals error, in that the Tribunal did not address the statutory task.

115 The appellant submits that, insofar as the primary judge held that statements in the application for a protection order relating to the 23 July 2013 incident would weigh in favour of a finding that Ms S was a family member of the appellant, this involved error. The appellant submits that the primary judge impermissibly engaged in merits review. The appellant submits that the primary judge purported to make a finding of fact; that was a task for the Tribunal to undertake. The appellant notes that the second ground of review was not pleaded as a legal unreasonableness ground.

116 The appellant notes that the primary judge held (at [166]) 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 the person's family" for the purposes of paragraph 8.2 of Direction 90. The appellant submits that the primary judge's holding is not supported by the Tribunal's reasons, considered as a whole.

117 The Minister submits that the appellant's submissions show no error in the primary judge's conclusion. The Minister submits that the onus was on the appellant to prove that there was a misunderstanding by the Tribunal as to the applicable law and he did not discharge that onus. The Minister submits that there was no statutory requirement in s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) or ss 5CB and 5G of the *Migration Act* for the Tribunal to spell out its understanding of paragraph 4(1) of Direction 90: see *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at [38]-[40].

118 The Minister submits that the primary judge was not engaging in "merits review", but rather simply explaining why he was not persuaded that the Tribunal had in fact misunderstood the applicable law.

119 The Minister notes the comparison drawn by the primary judge at [165] between the Tribunal's language in relation to Ms S and what it said about the appellant's relationship with Ms V. The Minister submits that this supported what the primary judge said at [166].

120 In the course of oral submissions, senior counsel for the Minister accepted that the Tribunal had found that Ms S was a member of the appellant's family for the purposes of paragraph 4(1) of Direction 90.

121 For the reasons that follow, we have concluded that the Tribunal did fall into jurisdictional error and that the primary judge erred in not so holding.

122 It is established that, in forming a state of satisfaction for the purposes of s 501CA(4), the decision-maker must proceed on the basis of a correct understanding of the law: *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [33]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [57]. Further, a failure to comply with a lawful direction made under s 499 can constitute jurisdictional error: *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112 at [34]-[35]; *FKP18 v Minister for Immigration and Border Protection* [2018] FCA 1555 at [34]; *FCFY* at [63].

123 Paragraph 4(1) of Direction 90 contains a definition of "family violence" that refers to a "member of the person's family". But the Direction does not contain any definition of this expression or of the word "family". Some assistance is provided by ss 5CB and 5G of the *Migration Act*, but these sections do not contain an exhaustive definition of a member of a person's family. The expression "member of the person's family", as used in the definition of "family violence" in paragraph 4(1) of Direction 90, is to be construed having regard to its text, context and purpose. The context includes paragraph 8.2 of the Direction and ss 5CB and 5G of the *Migration Act*.

124 It may be noted some statutory schemes define "family violence" in a way that includes violence against a person who is, or has been, an intimate partner: see, eg, the *Family Violence Protection Act 2008* (Vic), s 8(1), which defines a "family member" in relation to a relevant person as meaning (among other things) "a person who has, or has had, an intimate personal relationship with the relevant person". However, Direction 90 does not contain any equivalent or similar definition. The question is therefore left to be determined on the basis indicated above, namely by reference to the text, context and purpose of the expression

"member of a person's family". We agree with the primary judge (at [156]-[157]) that the expression should not be narrowly construed and that it could extend (depending on the circumstances) to a person who is in an intimate relationship with the person.

125 Insofar as the Tribunal referred to the violence committed by the appellant against *his sister* and considered this to be "family violence", no issue arises. Plainly, the appellant's sister was a member of his family and it was open to the Tribunal to treat the violence against her as family violence. The appellant does not contend otherwise.

126 The difficulty arises because of the way the Tribunal dealt with the violence committed by the appellant against *Ms S*. At [104], the Tribunal stated that Ms S "was the [appellant's] intimate partner, meaning his violence against her was an act of family violence". As has been observed, the Tribunal appears to have proceeded on the basis that, because Ms S was the appellant's intimate partner, she was therefore a member of his family for the purposes of the definition of "family violence" in paragraph 4(1) of Direction 90, with the consequence that the appellant's violence against her was "family violence" for the purposes of the Direction. The difficulty is that the Tribunal did not expressly refer to the definition of "family violence" in paragraph 4(1) of the Direction and did not expressly consider whether or not Ms S was a "member of [the appellant's] family" for the purposes of that definition. While Ms S *may* have been a member of the appellant's family for the purposes of the definition of "family violence", this was a contestable issue that needed to be considered. In the absence of any express consideration of this question in the Tribunal's reasons, we are not satisfied that the Tribunal considered this question. In the circumstances, this constituted a failure to carry out the statutory task (noting that this is not precisely the way ground 2 is put). Further, the statement in [104] suggests that the Tribunal erroneously proceeded on the basis that, *because* Ms S was the appellant's intimate partner, it followed that she was a member of his family for the purposes of the definition. This was an error of law. As the primary judge correctly held (at [157]), while the existence of an intimate relationship is relevant, it is not determinative of whether a person is a member of the person's family for the purposes of the definition of "family violence".

127 It is true that, at [151], the Tribunal appears to have delineated between the violence committed by the appellant against *his sister* (which the Tribunal described as family violence) and the violence he committed against *Ms S* (which the Tribunal did not describe as family violence). If taken in isolation, this tends to suggest that the Tribunal was not treating

the violence against Ms S as necessarily constituting "family violence" as defined. However, the Tribunal's reasons need to be read as a whole, and [104] contains a clear statement that the Tribunal regarded the violence against Ms S as family violence. Further, in the last sentence of [151], the Tribunal stated that it applied its earlier analysis, which may pick up the statement in [104].

128 The primary judge reasoned, in essence, that it was *open* to the Tribunal to find that Ms S was a member of the appellant's family for the purposes of the definition of "family violence" and that, in these circumstances, he was not satisfied that the Tribunal had misunderstood the applicable law. With respect to the primary judge, we consider that it was necessary for the Tribunal *to consider* whether or not Ms S was a member of the appellant's family for the purposes of the definition, and the failure to do so constituted a failure to carry out its statutory task. Further, the Tribunal's statement at [104] bespeaks error, for the reasons given above.

129 Insofar as the primary judge considered that the Tribunal used the expression "intimate partner" as a shorthand expression for a person who fell within the concept of a "member of the person's family", we respectfully consider that this is not clear from the Tribunal's reasons. In circumstances where the Tribunal did not refer to the definition of "family violence" or address whether or not Ms S was a member of the appellant's family for the purposes of the definition, it is not possible to know whether the Tribunal used the expression "intimate partner" in that way.

130 We are satisfied that the Tribunal's error was material. The Tribunal had regard to its finding that the appellant had committed "family violence" in its assessment of three of the four primary considerations: see [104], [151] and [176]. Given the particular weight that was required to be given (by the Direction) to "family violence", it is possible that, if the Tribunal had reached a different view as to whether the violence against Ms S constituted "family violence", it may have reached a different overall conclusion. The primary judge found that if (contrary to his view) there was an error, the error was material, and the Minister did not contend otherwise.

131 For these reasons, ground 2 is made out.

Conclusion

132 In our view, the appropriate orders are:

(a) The appeal be allowed.

(b) The orders made by the primary judge on 23 November 2021 be set aside and in lieu thereof it be ordered that:

(i) The decision of the second respondent (the **Tribunal**) dated 5 July 2021 be quashed.

(ii) The first respondent pay the applicant's costs, as agreed or taxed.

(iii) The matter be remitted to the Tribunal, constituted by a different member, for determination according to law (as set out in the reasons of the Full Court).

(c) The first respondent pay the appellant's costs of the appeal, as agreed or taxed.

I certify that the preceding one hundred and thirty-two (132) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Farrell, Moshinsky and Burley.

Associate:

Dated: 11 July 2022