QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*SJP v Department of Child Safety, Youth and Women Services* [2020] QCATA 96
PARTIES:	**SJP** (applicant/appellant) **v** **DEPARTMENT OF CHILD SAFETY, YOUTH AND WOMEN** (respondent)
APPLICATION NO/S:	APL179-18
ORIGINATING APPLICATION NO/S:	CML037-18
MATTER TYPE:	Appeals
DELIVERED ON:	26 June 2020
HEARING DATE:	27 November 2019
HEARD AT:	Brisbane
DECISION OF:	Senior Member Howard, Presiding Member Member Traves
ORDERS:	**1. Leave to appeal is granted.** **2. The appeal is refused.**
CATCHWORDS:	APPEAL – FAMILY AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – CHILDREN IN NEED OF PROTECTION – PROCEEDINGS RELATING TO CARE AND PROTECTION – GENERALLY – where appeal of decision on review confirming placement decision – where Tribunal confined review to whether placement decision was appropriate - whether error in defining scope of review – whether Tribunal has power to amend placement decision or must remit matter to original decision-maker – whether error in omitting to consider paternal grandmother for placement – where paternal grandmother in process of applying for kinship carer status at time of hearing – whether Department's decision 'illegal' for being outside the terms of the care agreement – where father opposed to placement on religious grounds – where father claims

placing child same sex couple contrary to his religious beliefs – whether father owed a duty to consult in making placement decision – where child in the custody of chief executive under temporary custody order at time of review – whether Tribunal's omission to consider Department policy 'Placement Matching Principles' an error – whether Tribunal in error in concluding Department's decision was an emergency placement.

Child Protection Act 1999 (Qld), s 5, s 5A, s 5B, s 5D, s 12, s 13, s 82, s 86, s 247, schedule 2, schedule 3
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20, s 20, s 24, s 142

AH & GR v Department of Communities (Child Safety Services) [2012] QCAT 723
*DZ v Department of Communities, Child Safety and Disability Services [*2016] QCAT 453
F v F [1902] 1 Ch 688
In the matter of M (Children) [2017] EWCA Civ 2164
Kehl v Board of Professional Engineers [2010] QCATA 58
LPI & OGW v DHHS (Review and Regulation) [2019] VCAT 1651
Re G (Education: Religious Upbringing) [2012] EWCA Civ 1233; [2013] 1 FLR 677.
Shi v Migration Agents Registration Authority (2008) 248 ALR 390
SJP v Department of Child Safety, Youth and Women Services [2018] QCAT 277

APPEARANCES & REPRESENTATION:

Appellant:	Self-represented
Respondent:	J. McArdle instructed by the Director-General, Department Child Safety, Youth and Women
Separate representative for the child:	AM Bertone, counsel instructed by Ms Cleeland

REASONS FOR DECISION

[1] On 1 February 2018, SJP applied for review of a decision by the Department of Child Safety, Youth and Women (the Department) to place his son, ASW, in the care of approved foster carers ACL and BCL, pursuant to s 82 of the *Child Protection Act* 1999 (Qld) (the CP Act).

[2] SJP objects to the placement on the grounds that ACL and BCL are a same sex couple and that homosexuality is against his religious beliefs. SJP is of the Christian

faith. We make no finding about whether homosexuality is inconsistent with Christianity. However, we accept that SJP believes that it is and that he is distressed by the placement primarily on this basis.

[3] SJP would like ASW placed in the care of his paternal grandmother, WS. At the time of the original placement decision and at the time of the Tribunal's review, WS was not an approved kinship carer.

[4] The decision to place ASW in the care of ACL and BCL was confirmed by the Tribunal on 25 July 2018. SJP now seeks leave to appeal and, if successful, to appeal that decision pursuant to s 142 of the *Queensland Civil and Administrative Act* 2009 (Qld) (the QCAT Act).

[5] The question of whether leave should be granted is determined according to established principles: is there a reasonably arguable case of error in the primary decision;[1] is there a reasonable prospect that the applicant will obtain substantive relief;[2] is leave necessary to correct a substantial injustice to the applicant caused by some error;[3] and is there a question of general importance upon which further argument and a decision of the appellate court or tribunal, would be to the public advantage.[4]

Relevant statutory framework

[6] Section 247 of the CP Act provides that an 'aggrieved person' may apply to the Tribunal for the review of a 'reviewable decision'. Definitions of an aggrieved person and a reviewable decision for the purposes of the CP Act are set out in Schedule 2. Reviewable decisions include, relevantly, placement under a child protection order.

[7] A 'reviewable decision' under the CP Act includes a decision 'deciding in whose care to place a child under a child protection order granting the chief executive custody or guardianship (section 86(2))' (commonly referred to as a 'placement decision').[5] SJP, as the child's parent, is an 'aggrieved person' in respect of that decision and is entitled to apply for review.[6]

[8] The tribunal's review of a decision is a 'merits review.' The tribunal must hear and decide the review by way of a fresh hearing on its merits and has all the functions of the original decision-maker.[7] That is, the tribunal stands in the shoes of the decision-maker and decides anew or afresh whether the decision is the correct and preferable decision, based on the facts and the applicable law. There need not be an error in the original decision for the tribunal to come to a different decision and there is no presumption that the original decision was correct.[8]

---

1 *QUYD Pty Ltd v Marvass Pty Ltd* [2008] QCA 257; [2009] 1 Qd R 41.
2 *Cachia v Grech* [2009] NSWCA 232, [13].
3 *QUYD Pty Ltd v Marvass Pty Ltd* [2008] QCA 257; [2009] 1 Qd R 41.
4 *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 578–80.
5 CP Act, sch 2.
6 Ibid, s 247; Schedule 3 which defines "aggrieved person" for a reviewable decision to mean a person stated opposite the decision in schedule 2; schedule 2 provides that the child's parents or the child are each an "aggrieved person" for the purposes of a decision made under s 86(2).
7 QCAT Act, s 19, s 20.
8 *Kehl v Board of Professional Engineers* [2010] QCATA 58.

[9] The child may be represented by a lawyer and may be separately represented.[9] The Tribunal appointed a separate representative for ASW for the purposes of the review and appeal proceedings.

[10] The purpose of the CP Act is to provide for the protection of children.[10] Section 5A of the Act makes clear that the paramount consideration in administering the Act is the safety, wellbeing and best interests of a child, both through childhood and for the rest of the child's life.

[11] Section 5B sets out a list of principles for ensuring the safety, wellbeing and best interests of a child. Those principles are as follows:

> (a) a child has a right to be protected from harm or risk of harm;
>
> (b) a child's family has the primary responsibility for the child's upbringing, protection and development;
>
> (c) the preferred way of ensuring a child's safety and wellbeing is through supporting the child's family;
>
> (d) if a child does not have a parent who is able and willing to protect the child, the State is responsible for protecting the child;
>
> (e) in protecting a child, the State should only take action that is warranted in the circumstances;
>
> (f) if a child is removed from the child's family, support should be given to the child and the child's family for the purpose of allowing the child to return to the child's family if the return is in the child's best interests;
>
> (g) if a child does not have a parent able and willing to give the child ongoing protection in the foreseeable future, the child should have long-term alternative care;
>
> (h) if a child is removed from the child's family, consideration should be given to placing the child, as a first option, in the care of kin;
>
> (i) if a child is removed from the child's family, the child should be placed with the child's siblings, to the extent that is possible;
>
> (j) a child should only be placed in the care of a parent or other person who has the capacity and is willing to care for the child (including a parent or other person with capacity to care for the child with assistance or support);
>
> (k) a child should be able to maintain relationships with the child's parents and kin, if it is appropriate for the child;
>
> (l) a child should be able to know, explore and maintain the child's identity and values, including their cultural, ethnic and religious identity and values;
>
> (m) a delay in making a decision in relation to a child should be avoided, unless appropriate for the child.

[12] For the purposes of s 5B(h), 'kin' is defined to mean:

> (a) any of the child's relatives who are persons of significance to the child; and

---

9 QCAT Act, s 43; CP Act, s 99Q.

10 CP Act, s 4.

(b) anyone else who is a person of significance to the child.[11]

[13] In this case, the decision to first place ASW with ACL and BCL was made under the authority of a Care Agreement entered into between SJP and ASW's mother with the Department. The placement decision was formalised on 18 December 2017 by which time ASW was under a temporary custody order made on 14 December 2017 under s 51AE of the Act.[12] By the terms of that order, ASW was in the custody of the chief executive.[13] An application was made for a child protection order prior to the expiration of the temporary custody order on 19 December 2017. Consequently, custody continued with the chief executive, pursuant to s 99 of the Act under a number of consecutive interim orders, granting custody to the chief executive. From 19 December 2017, the order in place was a 'child protection order' for the purposes of the CP Act.[14]

[14] The Tribunal on its review of a placement decision is to apply the law and facts at the time of its review decision. At that time, custody resided with the chief executive.

[15] Chapter 2, Division 4 of the CP Act is headed 'Placing child in care'. That division applies if the chief executive has custody or guardianship of a child.[15] Section 82 gives the chief executive the power to make a placement decision.

[16] Section 82 provides:

> **82 Placing child in care**
>
> (1) The chief executive may place the child in the care of:
>
> (a) an approved kinship carer for the child; or
>
> (b) an approved foster carer; or
>
> (c) an entity conducting a departmental care service; or
>
> (d) a licensee; or
>
> (e) if it is not possible, or not in the child's best interests, for the child to be placed in the care of an entity mentioned in paragraphs (a) to (d), a provisionally approved carer for the child; or
>
> (f) if the chief executive is satisfied another entity would be the most appropriate for meeting the child's particular protection and care needs, that entity.
>
> *Example for paragraph (f):*
>
> A particular medical or residential facility may be the most appropriate entity for a child with a disability.
>
> (2) Also, if the child is in the chief executive's custody or guardianship under a child protection order, the chief executive may place the child in the care of a parent of the child.

[17] An 'approved kinship carer' for a child is defined as follows:

---

11 Ibid, sch 3.
12 Temporary Custody Order dated 14 December 2017 which expired on 19 December 2017.
13 CP Act, s 51AF(1)(a)(ii).
14 CP Act, Schedule 3 Dictionary, 'child protection order' and CP Act s 67.
15 Ibid, s 81.

> a person who holds a certificate of approval as an approved kinship carer for the child.[16]

Background

[18] On 9 November 2017, ASW was removed from the care of his mother under a Temporary Assessment Order placing ASW in care pursuant to s 18 of the CP Act. That Order expired on 14 November 2017. Under s 23 of the CP Act, an order of that kind may be made to enable an investigation to assess whether a child is at risk of harm. A child reasonably believed by an authorised officer under the Act to be at immediate risk of harm may be taken into the custody of the chief executive of the Department. It appears that occurred in this case.

[19] On 9 November 2017, ASW was placed with carers (the first foster carers). On 10 November 2017, the carers advised the Department that they were also caring for another baby and that ASW had kicked the baby in the head. On 13 November 2017, the first foster carers advised they could not continue with ASW's placement.

[20] On 13 November 2017, ASW was placed with alternative foster carers (the second foster carers). This placement ended on 8 December 2017 due to ASW's behaviour towards their son and animals in the home. An urgent inter-departmental referral was made in the days before the placement ended by the then Child Safety Officer seeking an alternative placement. A temporary placement with ACL and BCL was identified on 8 December 2017, although ACL and BCL indicated a willingness to be considered for ongoing placement.

[21] On 14 November 2017, an Assessment Care Agreement was entered into between SJP and ASW's mother with the Department which expired on 14 December 2017.

[22] On 8 December 2017, ASW was placed with third foster carers, ACL and BCL. ASW's mother was contacted about the placement on 8 December 2017. SJP was not contacted by the Department until several days later, by which time the placement had occurred. SJP says that the Department knew he was Christian, and by inference, that placing ASW with a same sex couple would offend SJP's beliefs and values. He also considers that, at that time, the Department did not have authority under the Assessment Care Agreement to place ASW without his approval.

[23] SJP objected to the placement.

[24] On 14 December 2017, an application was made by the Department for a Temporary Custody Order in relation to ASW. That order was granted on 14 December 2017 and operated until 19 December 2017.

[25] On 18 December 2017, the Department wrote to SJP formally advising of the placement pursuant to s 86(2) of the CP Act.

[26] On 19 December 2017, the Director of Child Protection Litigation made an application for a Child Protection Order and, due to s 99 of the CP Act, the previous order operated. The next order was made on 19 January 2018, which was followed by a series of orders until a final Child Protection Order was made.

---

16 Ibid, sch 3.

[27] Since the placement made on 8 December 2017, ASW has remained in the care of ACL and BCL.[17]

The decision on review

[28] On 25 July 2018, the Tribunal made a decision to confirm the decision of the Department made pursuant to s 82 of the CP Act to place ASW in the care of ACL and BCL.

[29] The scope of the review was held by the Tribunal to be confined to the issue of whether or not the placement of ASW with ACL and BCL was in ASW's best interests. It is apparent from the transcript of the hearing in the Tribunal that SJP was seeking, by the review, to change the placement decision to the child's paternal grandmother, WS. At the time of the review, WS was not an approved kinship carer.[18]

[30] The purpose of the review is for the Tribunal to make the correct and preferable decision,[19] and in this statutory context, to make that decision based on the facts and the law at the time of its decision.[20] The Tribunal must hear and decide a review by way of a fresh hearing on the merits.[21] The Tribunal on review may:

> (a) confirm or amend the decision; or
>
> (b) set aside the decision and substitute its own decision; or
>
> (c) set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions the tribunal considers appropriate.[22]

[31] The Tribunal considered the scope of the Tribunal's power on review of a placement decision in *DZ v Department of Communities, Child Safety and Disability Services*.[23] There it was held:

> [14] The Tribunal has been asked to review this placement decision and the review must be undertaken by way of a fresh hearing in accordance with the *Queensland Civil and Administrative Tribunal Act* 2009 ('the QCAT Act') and the enabling Act. We may either confirm (or amend) the decision or set aside the decision. If we set aside the decision we can either substitute our own decision or return the matter to the decision maker with directions.
>
> [15] The limits of the Tribunal's power were argued in submissions. The department argued it was not appropriate for the Tribunal to make its own placement decision. The opposing argument was that the wording of the legislation is clear, the Tribunal is empowered to substitute its own decision and no restriction should be applied.

---

17 Ms Bertone, T1-25.

18 Defined as a person who holds a certificate of approval as an approved kinship carer for the child; sch 3 of the CP Act.

19 QCAT Act, s 20(1).

20 *Shi v Migration Agents Registration Authority* (2008) 248 ALR 390, 423-424 [142]-[147] (Keifel J); 413, [101] (Hayne and Haydon JJ); *AH & GR v Department of Communities (Child Safety Services)* [2012] QCAT 723, [22]-[23]. Similar approach adopted in VCAT where legislative framework materially similar, see for example, *LPI & OGW v DHHS (Review and Regulation)* [2019] VCAT 1651, [26].

21 QCAT Act, s 20(2).

22 Ibid, s 24.

23 [2016] QCAT 453.

> [16] Making a new decision would require the Tribunal to exercise the executive functions of the department. This would involve an exhaustive investigation of the carer options available at the time of the decision. It would also have the effect of denying the parties a layer of review, since any appeal against the decision would be made to the appeal tribunal.
>
> [17] Having considered these consequences, the Tribunal confirms the previous Tribunal practice that in reviewing a placement decision, and in determining that the placement is not suitable, the only possible remedy is for the Tribunal to set aside the decision and return the matter for reconsideration to the decision maker for a new placement decision to be made, with directions if appropriate.

[32] This approach was applied in this case by the Tribunal at first instance.[24]

[33] With respect, we disagree with that approach in several respects. First, to the extent that in paragraph [16] of *DZ,* it suggests that the tribunal would overstep if it exercised the executive functions of the Department in making a different placement decision, the Tribunal misunderstood the nature of the tribunal's task and function on review. The decision reviewed is an administrative decision of the executive government made under an enactment.[25] In the review, the tribunal has all the functions of the decision-maker for the reviewable decision being reviewed.[26] In its merits review jurisdiction generally, the tribunal, in standing in the shoes of the decision-maker and making the decision afresh, exercises functions of the executive government decision-maker for the reviewable decision. When the tribunal confirms or amends the decision or sets it aside and substitutes its own decision, the decision is taken to be a decision of the decision-maker for the reviewable decision.[27] Merits review is not an appeal process: therefore, unlike in an appeal, as discussed earlier, an error need not be identified in the original decision for the tribunal to conclude in the review that a different decision is the correct and preferable decision.[28]

[34] That said, we accept that the role of the tribunal is limited to an adjudicative decision-making role in respect of the reviewable decision: it has no investigative powers that would allow it in effect to seek out new possible alternative placement options. Further, it may not consider a placement that is not authorised by the legislative scheme for decision-making. The tribunal's role is limited to hearing and deciding the review of the reviewable decision by determining the correct and preferable decision based on the evidence before it and according to law.

[35] Second, there is nothing in the relevant provisions of the CP Act or the QCAT Act which requires the restrictive construction adopted by the Tribunal in *DZ.* As earlier discussed, the tribunal on review has all the functions of the decision-maker for the reviewable decision being reviewed.[29] The functions are provided for in the enabling Act, relevantly here the CP Act in respect of placement decisions. In deciding the review, the tribunal exercises the functions in accordance with s 24 of the QCAT Act. Under s 24(1)(a), the tribunal may 'confirm or amend' the decision the subject of review. Alternatively, under s 24(1)(b), it is empowered to set the reviewable decision aside and substitute its own decision. In respect of a placement decision, in

---

24 *SJP v Department of Child Safety, Youth and Women Services* [2018] QCAT 277 at [7]-[9] (*SJP*).
25 *Laidlaw v Queensland Building Services Authority* [2010] QCAT 70.
26 QCAT Act s 19(c); *Queensland Building & Construction Commission v Mudri* [2015] QCATA 78.
27 QCAT Act s 24(2).
28 *Kehl v Board of Professional Engineers* [2010] QCATA 58.
29 QCAT Act, s 19.

our view, those functions must include deciding in whose care to place the child. That decision may, on the evidence before the tribunal, though will not necessarily, involve a decision between two or more alternative placements. (For example, between an approved kinship carer for the child and an approved foster carer.) If there is only one placement option available on the evidence before the tribunal, the tribunal will be limited, in effect, to determining whether that placement is suitable. If the tribunal considers it is not suitable, it may, under s 24(1)(c), set the decision aside and return the matter to the decision-maker with directions.

[36] While it may be that the tribunal decides in a particular case, on the material before it and in the exercise of its discretion, that it is not the correct and preferable decision to make an alternative placement because, for example, it is not sufficiently informed by the evidence to do so, that is different to saying that the 'only possible remedy'[30] is to set aside the placement decision and return the matter to the decision-maker.

[37] In our view, the tribunal has the power to make an alternative placement decision. Whether it does so is a matter for the tribunal in each case, depending upon whether on the evidence before it, the tribunal is in a position to make an alternative placement decision and whether it is in the best interests of the child for the tribunal to do so.

[38] We are satisfied that there is a question of general importance that arises in the determination of the application for leave to appeal as to the scope of the tribunal's task on review of a placement decision made under s 82 of the CP Act. The approach to this issue had the potential to affect the outcome of one or more of the appeal grounds raised by SJP. Leave to appeal is granted.

The grounds of appeal

[39] SJP is self-represented. He was asked to confirm his appeal grounds during the appeal.[31] SJP confirmed his three appeal grounds were as follows:

(i) The placement was illegal when first made on 8 December 2017 because, under the Assessment Care Agreement which applied at that time, SJP had authority to make the decision, or at least to be consulted. SJP submitted that he retained legal custody and guardianship of ASW under the Agreement and that, accordingly, he was responsible for any significant decisions, including placement.

(ii) There was no need for an emergency placement. SJP maintains that the Tribunal was misled into believing the placement on 8 December was an emergency. He says Julie Fox (a CSO) lied about this in her affidavit: [29]-[31]. SJP says that it is incorrect to say that the Department had no time to inform ASW's parents and to ascertain their views. SJP says that the Department knew on 29 or 30 November 2017 that the former placement was going to end on 9 December and had ample time to contact him. SJP also argues that when ASW was initially placed with the second foster carers on 13 November that the Department knew that placement was going to end on 9 December 2017.

---

30 *DZ* at [17].

31 AT 1-33.

(iii) The initial kinship application assessment report by SJP's mother, WS, was not considered by the Tribunal. Although it was not the place of the Tribunal to determine that application, SJP argued that the Tribunal should have taken into account that a kinship application by WS had been made and should have had before them documents relating to her application, including her initial kinship assessment report.

[40] Although agreeing at the outset of the appeal hearing that they were his appeal grounds, SJP also argued during the course of the appeal hearing that the 'placement matching principles' of the Department had not been considered by the Tribunal and that the placement decision was not made in accordance with the Department's own policies, namely the 'Placement Matching Principles'. This policy document was not before the Tribunal.[32] SJP says that his religious views were not considered by the Department in making their placement decision and should have been. He says they knew he was Christian and yet his child was placed 'into the Anti-Christian placement of the two homosexual men on the 8th December 2017',[33] and that his religious views were not respected. The Appeal Tribunal dismissed SJP's application to adduce fresh evidence, including the 'Placement Matching Principles' document.[34] The policy document was not before the Tribunal and it cannot therefore be an error for the Tribunal not to have considered it. In any event, it is clear the Tribunal was aware of SJP's religious beliefs and of the need, in applying the general principles in s 5B, in particular s 5B(l), to consider a child's religious identity and values. Having said that, as the relevance of SJP's religious beliefs was an issue of importance to SJP and was raised by him numerous times in the course of arguing the appeal, we have considered it below.

[41] The appeal grounds, doing the best we can, are summarised as follows:

(i) The placement decision made by the Department was illegal because SJP had guardianship of ASW at the time and therefore had authority to make the decision.

(ii) The Tribunal made its decision on the basis of an incorrect fact, namely that the original decision was an emergency placement.

(iii) The Tribunal did not consider the initial kinship assessment report of WS.

(iv) The Tribunal made its decision without proper consideration of SJP's religious views.

[42] Prior to considering the appeal grounds, we note that SJP made a number of applications at the commencement of the appeal hearing seeking to adduce fresh evidence and for the issue of notices to attend. These applications were dismissed for the reasons we have outlined below.

Applications for leave for fresh evidence and notices to attend

[43] SJP attended the appeal hearing with a bundle of extra documents that he wished to rely upon. Those documents included:

---

32 AT 1-30.
33 Application for leave to appeal filed on 30 July 2018.
34 AT 1-80.

- Family contact report of 13 November 2017
- Email of 13 November 2017
- Email of 29 November 2017
- Email of 30 November 2017
- PSU documents of those dates
- Case note of Aileen Grant of 8 December 2017
- Authority to care forms
- Case notes of various dates
- CCTV footage of 12 December 2017
- Placement matching principle – department policy

[44] The application to adduce the above evidence was opposed by the respondent and separate representative on the basis the information was not relevant to the question before the Appeal Tribunal. The documents did not address any error of law or fact in the Tribunal's decision to confirm the placement of ASW. We accepted those submissions and refused the application to adduce fresh evidence during the hearing on 27 November 2019.

[45] The application for notices to attend was also refused during the hearing. SJP sought to establish through fresh evidence given by those persons viva voce that the timings surrounding the initial placement on 8 December 2017 were wrong and that, as a consequence, there was no 'emergency' placement. This evidence was not relevant to the decision made by the Tribunal on 25 July 2018 and does not point to any error of law or fact that might result in the decision of the Tribunal being unsound. In any event, SJP had ample opportunity to cross-examine witnesses from the foster agency and the Department at the Tribunal hearing; which he did.

[46] We turn now to consider the appeal grounds.

Ground One: That the decision to place ASW with ACL and BCL was illegal because of the terms of the Assessment Care Agreement.

[47] SJP argues that under the care agreement he retained legal guardianship and legal custody which meant that any placement decision had to be approved by him or at least that he should be consulted prior to the making of the decision.

[48] This issue depends upon the construction of the care agreement which is a question of law.

[49] The Care Agreement provides:

> **The parent or guardian agree to have the abovenamed child or children placed with an approved carer, licensed care service, or another entity by the department**, authorise the department and/or the carer to act in all day-to-day matters, including urgent medical attention, and (3) have contact with the children at such times and in such manner as mutually acceptable to themselves and the carers and the department.

[50] Further, the Agreement sets out which decisions the parents should be consulted about and states that the Department agrees to advise the parents of the name and

other details of the approved carer. This suggests that the approved carer was something which the Department had the ability to determine, otherwise the parent would not need to be told who they were.

[51] SJP argues that the term which provides that he agrees to have his child placed with an approved carer should be read with the rest of the form which has a section for the names and phone numbers of the approved carers. SJP appears to be arguing that he needed to know who the carers were before he could be bound by the agreement. Here, the form had the name of the second foster carers but not their telephone numbers.

[52] SJP further says he should have been consulted under s 51ZF(e) of the Act when ASW was moved to the current carers. He says that moving ASW from the then carer's home to a new address was a 'pretty big, significant decision' that parents should be consulted about.[35] He says he was also required to be informed by the terms of the agreement and he was not.

[53] SJP says:

> At the end of the day, it was my decision by law on that day. Now, we can say, "He's doing well now" or whatever we would like to say. That's not the question. The question is by law on that day whose decision was it to make – if there was - if he was going to move. Now, if I had been consulted, I wouldn't have agreed to this, and this is why I wasn't told, your Honour.[36]

[54] SJP also intimates that, had he known his son had attended hospital on 17-18 November 2017, he would have cancelled the agreement immediately. In essence, he submits that he was obliged to be told about this and that, if he had been, he would have exercised his rights to cancel the agreement.

[55] The placement decision in question was made on 8 December 2017 by the Department under the agreement. There was a temporary custody order in place giving the chief executive custody of ASW from 14 December 2017. At the time the placement decision was confirmed on 18 December 2017, the temporary custody order operated. From 19 December 2017, and at the time of the Tribunal's review, ASW was subject to a child protection order and the Department was entitled to make decisions about his placement under that order.[37] SJP disagrees because he says at the end of the day, they were only temporary orders and he retained legal guardianship.[38]

[56] The issues SJP raises with respect to the Department's conduct during the assessment care agreement are largely irrelevant to the decision taken by the Tribunal to confirm the placement. Similarly, even if it was invalid, which we do not accept, there is no error of law by the Tribunal in not declaring the decision to have been invalidly made on 8 December 2017. The Tribunal's task was to determine the correct and preferable decision at the time of its review.

---

35 T1-36.

36 T1-38.

37 Although written notice of the placement decision was dated 18 December 2017, SJP's right to review the decision crystalized on 19 December 2017 when ASW became subject to a child protection order.

38 T1-56.

[57] As discussed earlier, the Tribunal, on review of a placement decision made under s 82 of the CP Act, is obliged to consider the decision in light of the facts and law at the time the decision is reviewed. The Tribunal's decision on review is a decision afresh.[39]

[58] Section 12 of the CP Act sets out the effect of granting custody to the chief executive under, relevantly, a care agreement, temporary custody order or child protection order. Section 12 provides:

> **12 What is effect of custody**
>
> (1) This section applies if—
>
> (a) an authorised officer or police officer takes a child into the chief executive's custody; or
>
> *Note—*
>
> Under section 18, a child at immediate risk of harm may be taken into custody.
>
> (b) the chief executive has custody of a child under a care agreement; or
>
> (c) the chief executive or someone else is granted custody of a child under an assessment order, temporary custody order or child protection order.
>
> (2) The chief executive, or other person granted custody of the child, has—
>
> (a) the right to have the child's daily care; and
>
> (b) the right and responsibility to make decisions about the child's daily care.

[59] In our view, it is clear that the power bestowed by s 12, given it includes the right and responsibility to make decisions about the child's daily care, extends to making placement decisions.

[60] At the time of the review, the power to make the placement decision had vested in the Department. There was no illegality associated with the making of that decision. Whether the Department had authority to place ASW initially with ACL and BCL was an issue that was overtaken by the making of the temporary custody order and subsequently the child protection order. That said, we are satisfied, in any event, that the Department had that authority by the terms of the care agreement and by s 12(1)(b) at 8 December 2017.

[61] There is therefore no error demonstrated by this ground of appeal.

Ground Two: The Tribunal based its decision on a mistaken fact, that it was an emergency placement.

[62] SJP argues that the respondent knew from around 13 November 2017 that the placement would be ending on 9 December 2017. SJP said that the respondent wrongly stated that the placement was an emergency. The Tribunal relied on this in making its decision and accepted that, because it was an emergency placement, there was no time for him to be consulted. SJP says the Department knew ASW's

---

[39] QCAT Act, s 20.

placement was going to end from at least 13 November 2017 or on 30 November 2017 when they were clearly informed that the placement would be ending.[40]

[63] Ms Julie Fox states in her affidavit:

> It is to my understanding from perusing departmental records that the previous carers for [ASW] indicated they were unable to continue caring for [ASW] on the 8th of December 2017. The department had little notice of the decision to end the placement and CSO Grant therefore made an urgent referral to the placement service…

[64] SJP says that this is incorrect. He says that the second foster carers informed the respondent on 29 or 30 of November 2017 which was 10 days prior to the date Ms Fox nominates in her affidavit. The Placement Service Unit was not notified abruptly on 8 December, but on 30 November. SJP says that Susan Russell, a social worker with Mercy Community, also lied, in that she says she was contacted on 8 December 2017 when the request went out on 5 December. SJP says he was at the office of the Department on 5 December and no-one mentioned it to him.

[65] SJP also says that the new carers were given 'Authority to Care' forms to complete on 8 December 2017 and that, if the placement was only intended to be a temporary emergency placement until the parents could be consulted on Monday and a permanent decision made, there would have been no need for the forms. SJP says that this shows the placement with ACL and BCL was never intended to be an emergency placement just for the weekend.

[66] On 30 November 2017, a placement worker informed Moreton Region Placements by email that the second foster carers for ASW, could not continue the placement beyond 8 December 2017.[41] Later that day another email was sent advising that their preference would be to end the placement earlier if another carer could be identified.[42]

[67] Even if the Appeal Tribunal accepted SJP's argument that the Tribunal made its decision on a wrong premise, being that the respondent had, at the time, approximately one week to find a placement and consult with the parents, that does not mean that the decision to confirm the placement was not made in ASW's best interests. The original placement decision was made on 8 December 2017. By the time of the Tribunal's review, ASW had been with the current carers for 6 months. Even if the original decision had not been an emergency placement, the Tribunal was not in error by concluding that it was in ASW's best interests that he stay where he was. That SJP was not consulted does not mean the decision was not in ASW's best interests, or that the Tribunal made an error on review of that decision.

Ground Three: Kinship carer application of WS.

[68] SJP argues that the kinship carer application by his mother, WS and the related kinship carer initial assessment report should have been considered by the Tribunal and that it was an error for the Tribunal to have made the placement decision without considering it.

---

40 T1-33.

41 Email from Bridget Saltzer, Placement Worker, Brisbane Foster and Kinship Care Family Lives to Aylene Grant, Child Safety Officer, Chermside Child Safety Service Centre of 30 November 2017.

42 Email from Bridget Saltzer to Alethea Wallace of 30 November 2017.

[69] The Kinship Carer Initial Assessment Report (the report) in respect of WS is dated 19 June 2018; which postdates the Tribunal hearing. The report was included in the documents provided subsequently on 16 November 2018 to the Appeal Tribunal.

[70] It cannot be an error of the Tribunal to have omitted to consider the report which was not in existence at the time of the hearing (and there was no application to reopen the evidence). In any event, we note that that the report was subsequently withdrawn by Melissa King, Director, Assessor and Child Protection Professional, Future Focused Families due to a number of deficiencies identified in the report including WS's 'vehement denial of any child protection concerns regarding her son, SJP's behaviour'.[43]

[71] We turn to consider whether it was an error for the Tribunal to have omitted to have taken into account that WS had applied to become an approved kinship carer. Although the application itself was not before the Tribunal, it is clear from the Tribunal's Reasons that the Tribunal was aware the application had been made. The Tribunal held, relevantly, as follows:

> [6] The applicant's mother has commenced the process of seeking approval as a kinship carer for ASW. At the time of the hearing, that process had not been completed. In light of his mother's application, the applicant requested the Tribunal to consider removing ASW from the care of ACL and BCL and placing ASW with his mother.
>
> [7] The Tribunal has previously decided that in reviewing a placement decision, and in determining the placement as not suitable, the only possible remedy is to set aside the decision and return the matter to the Department for a new placement decision to be made, with directions if appropriate.
>
> [8] Therefore, the Tribunal did not consider the question of where ASW should be placed if it determined that the current placement decision was not suitable.
>
> [9] The only question before the Tribunal was whether ASW's current placement was suitable.

[72] The Tribunal, as we have discussed, applied *DZ v Department of Communities, Child Safety,*[44] in concluding that its review was confined to the question of whether ASW's placement at that time was suitable.[45] Although we do not agree that the Tribunal's powers are necessarily so confined and in that regard that the Tribunal was in error, we do not consider the error to be determinative in that WS at that time was not an approved kinship carer.

[73] Section 82 of the CP Act gives the chief executive, and in our view, the Tribunal on review, the power to place a child with either an approved kinship carer, an approved foster carer, an entity conducting a departmental care service or a licensee. It is only if it is not possible, or not in the child's best interests for the child to be placed in the care of persons falling within one of those categories, that the child can be placed with a provisionally approved carer. Alternatively, if the chief executive is satisfied that another entity (the legislation gives as examples a particular medical or residential facility) would be the most appropriate for meeting the child's protection and care needs, the child may be placed there.

---

43 Letter from Melissa King, Future Focused Families to WS of 28 August 2018.
44 [2016] QCAT 453.
45 *SJP* at [9].

[74] It follows, in our view, as WS was not an approved kinship carer at the time of the review of the placement decision, the Tribunal was not in error in omitting to consider her as an alternative placement on review of the decision to place ASW with ACL and BCL.

[75] Accordingly, although we find the Tribunal erred in articulating the scope of the review and powers of the Tribunal in reviewing a placement decision, the error was not determinative in that WS did not satisfy the legislative criteria to enable her to be considered as an alternative placement for ASW at that time.

Ground four: placement matching principles not adhered to.

[76] Although not expressly articulated as a ground of appeal, we have considered the nub of the argument raised by SJP that the placement did not take into account the Department's own 'placement matching principles', in particular, by failing to take into account his religious beliefs.

[77] Although we refused SJP's application to adduce fresh evidence which included the 'placement matching principles' policy document, the following principle in s 5B of the CP Act is one of the general principles relevant in ensuring the safety, wellbeing and best interests of a child:

> a child should be able to know, explore and maintain the child's identity and values, including their cultural, ethnic and religious identity and values.[46]

[78] SJP says he informed the Department on 13 November 2017 that he was a Christian and that the contact report of 13 November 2017 proves that the Department knew this. Despite this, SJP says, the Placement Service Unit form states against child's religion: 'unknown'. SJP also denies that the Department said on 13 November 2017 that 'his mother said we could put him with homosexuals'.

[79] SJP said:

> The principles – the matching principles haven't been followed for the child, and there has been no respect for the parents and their views and their wishes for their child, or where they're going to live and what they're going to be exposed to. I certainly wouldn't expose my son to two men being together, or two women, in that – you know what I mean? Or a transvestite couple, or Japanese people that can't speak English or a Muslim family. I wouldn't agree to any of this, you know what I mean? So where do we draw the line?[47]

[80] SJP later says:

> I've completely lost my rights to expose my own son to what I believe and what I'm wanting him to find in life.[48]

[81] He makes it clear it is against his religious beliefs:

> …I didn't bother to put this question to him [the carer] but this was their way of trying to somewhat make me feel more comfortable about my son being exposed to watching two men live together, go to bed, wake up, that this is completely contradictory to the Christian lifestyle. It's all through Leviticus. It's all through Romans. It's plain and simple. It's a sin. It's against what God believes in, and that is what the word of God says. Now, we can twist the

---

46 CP Act, s 5B(l).
47 T1-98.
48 T1-105.

> word of God and say hey, we're going to accept it. People do it all the time, but, at the end of the day, that's what the Bible says.[49]

[82] Again, SJP is directing his focus to the original decision of 8 December 2017. By the time of the Hearing on 14 June 2018, the Tribunal was aware of SJP's views and the 'distress' he had been caused because of the placement with a same-sex couple. In relation to this, the Tribunal observed that, in effect, over time, some of SJP's concerns 'had been calmed'.[50] The Tribunal was also satisfied that the carers knew of SJP's religious beliefs and of his wish for ASW to be raised a Christian. As the separate representative says:

> ...it was, in my submission, apparent from the carers that they were very sensitive to the father's wishes about a religion, and the carers were appreciative and comfortable and happy to ensure that [ASW] was exposed to Christian values and Christian beliefs.[51]

[83] The Tribunal also found that the carers were 'impressive witnesses' who displayed 'an understanding of ASW's needs and sensitivity to the applicant's concerns.'[52]

[84] The best interests of the child in matters concerning custody and guardianship have been regarded as paramount by the court from early in the twentieth century.[53] The 'paramountcy principle' has since been enshrined in statute in all states and territories. The overriding consideration is the safety, wellbeing and best interests of the child.[54] The Tribunal recognised this and the need to also consider other relevant principles as prescribed by ss 5B and 5D of the CP Act.[55]

[85] In *Re G (Education: Religious Upbringing)*,[56] a decision of the Court of Appeal of the United Kingdom, the Court was faced with an appeal of 'profound significance' in determining how it should respond to the impact on the child of behaviour which is or may be unlawfully discriminatory. In that case, the children's father was transgender and they would, as members of the Jewish community, have faced ostracism if they were to have direct contact with their father. The trial judge held that the children should have no direct contact. This decision was reversed on appeal. It was held that evaluating a child's best interests should be approached holistically, 'taking into account, where appropriate a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations.'[57] The issue of how the court should approach welfare evaluation where religion was a dominant feature was considered recently in *In the matter of M (Children)*.[58] There it was held, citing *Re G*:

> Religion - whatever the particular believer's faith, - is not the business of government or the secular courts, though the court will, of course, pay every respect to the individual or family's religious principles…The starting point of the common law is thus respect for an individual's religious principles,

---

49 T1-73.
50 *SJP* at [35].
51 T1-71; at hearing 61.
52 *SJP* at [39].
53 *F v F* [1902] 1 Ch 688.
54 CP Act, s 5A.
55 *SJP* at [9]-[10]; Transcript of Hearing: 61, 62 and 49.
56 [2012] EWCA Civ 1233; [2013] 1 FLR 677.
57 *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233; [2013] 1 FLR 677 at [79]-[80].
58 [2017] EWCA Civ 2164.

> coupled with an essentially neutral view of religious beliefs and a benevolent tolerance of cultural and religious diversity.
>
> It is not for a judge to weigh one religion against another. The court recognises no religious distinctions and generally passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to respect, so long as they are 'legally and socially acceptable' (Purchas LJ in *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163 at 171) and not 'immoral or socially obnoxious' (Scarman LJ in *Re T (minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239 at 244) or 'pernicious'(Latey J in *Re B and G (Minors)(Custody)* [1985] FLR 134 at 157, referring to scientology).
>
> …
>
> Although a parent's views and wishes as to the child's religious upbringing are of great importance, and will always be seriously regarded by the court, just as the court will always pay great attention to the wishes of a child old enough to be able to express sensible views on the subject of religion, even if not old enough to make a mature decision, they will be given effect to by the court only if and so far as and in such manner as is in accordance with the child's best interests. In matters of religion, as in all other aspects of a child's upbringing, the interests of the child are the paramount consideration.[59]

[86] Although we accept that a parent's views, here SJP's, should be respected, we do not find that ASW being cared for by a same sex couple is inconsistent with or prevents SJP from practising Christianity or from educating ASW in the Christian faith. In any event, our primary consideration is what is in ASW's best interests and we are not persuaded, notwithstanding SJP's religious views, that moving ASW from the care of ACL and BCL would be in his best interests.

[87] In the United Kingdom, it is settled as a 'core principle' that the function of a judge in matters involving the welfare of a child is to act as a 'judicial reasonable parent' which involves 'judging the child's welfare by the standards of reasonable men and women today…having regard to the ever changing nature of our world including…changes in social attitudes.'[60] In *Re M* it was held:

> We live, or strive to live, in a tolerant society. We live in a democratic society subject to the rule of law. We live in a society whose law requires people to be treated equally and where their human rights are respected. We live in a plural society, in which the family takes many forms, some of which would have been thought inconceivable well within living memory.[61]

[88] An approach which resulted in moving ASW, who is settled and well cared for, because he was with approved foster carers who were a same sex couple which was against the father's beliefs or wishes, would be unreasonable and not in ASW's best interests. It could also have the effect, as observed in *In the matter of M (Children)* that:

> the more enmeshed a child is in a narrow and constricting way of life, and the more intransigent the adults are in seeking to protect the child from what the parent sees as the undesirable aspects of any other way of life, the more hamstrung

---

59 Ibid at [52], citing *Re G* at [35]-[43].
60 Ibid at [60]; *Re G* at [79]-[80].
61 *In the matter of M (Children)* [2017] EWCA Civ 2164 at [60].

> the court will be, the less it will feel able to intervene to further what would otherwise be seen as plainly required in the child's best interests.[62]

[89] There are no mandatory considerations which must be taken into account in making a placement decision. The separate representative submitted that the only considerations which are relevant, beyond the best interests of the child, are those specified in s 82 of the CP Act; namely, that the child be placed, if not with a parent or kinship carer, then with an approved foster carer. It follows that the only issue beyond whether the decision was in ASW's best interests, was whether, at the time the child was placed with the two carers in question, they were approved foster carers, which they were.

[90] The Tribunal acknowledged that SJP was 'clear that the placement of ASW with carers in a same-sex relationship did not work with his faith' and that he had 'clearly and frequently expressed the distress that he has been caused by the placement'.[63] The Tribunal also found that SJP was unable to point to any particular harm ASW had faced as a result of the placement.[64] The Tribunal found that the current carers were 'impressive witnesses' who displayed an understanding of ASW's needs and 'sensitivity to the applicant's concerns'.[65] The Tribunal also found that ASW was well-cared for, happy and settled and that he does not react well to change. The Tribunal confirmed the placement decision. We find no error in the principles they applied or in the considerations they took into account in deciding to confirm the placement decision. Ultimately, the Tribunal, while acknowledging SJP's expressed concerns and beliefs, gave paramountcy to ASW's best interests as it was required to do in performing its statutory task. We find that the Tribunal was not in error in doing so.

[91] The other question raised by SJP's submissions is whether the Department had the power in these circumstances to place ASW in the care of approved foster carers without first consulting the parents. In our view, they did. However, a parent must be told as soon as practicable after the decision has been made if the child is under a child protection order.[66] Even if SJP was not consulted about the placement, it would not have meant, on review, that continuing the placement was not in ASW's best interests. Accordingly, we find no error disclosed by this ground.

Conclusion

[92] SJP has not shown any errors of law or of fact in the decision of the Tribunal on review that affects the decision to confirm the placement of ASW with the carers, ACL and BCL.

[93] The decision by the Tribunal in the review proceeding was not an appeal of the original placement decision by the Department. Therefore, whether the Department made an error in making its decision was not relevant. The Tribunal made the decision afresh as to whether that placement was in ASW's best interests at the time of the review.

---

62 Ibid at [63].
63 *SJP* at [35].
64 Ibid at [36].
65 Ibid at [39].
66 CP Act s 86(2)(a).

[94] Whether, under the assessment care agreement, the Department had the power to make the decision on 8 December 2017 (although in our view it did) does not affect whether the Tribunal's decision on the review was in error. Whether the Department had an obligation to consult with SJP in making their decision is also not relevant to the Tribunal's decision. The Tribunal was aware of SJP's views regarding where his son should be placed and to his objections to the placement on the grounds of his religious beliefs. The Tribunal received evidence as to how the carers might ensure ASW was aware of Christianity by having them read him Christian books. Although religion was said to be so important to SJP, he has objected to having to buy the books for the carers to read to his son and says that it is their responsibility.

[95] It was not an error for the Tribunal to confirm the placement in view of SJP's objection to the foster carers' homosexuality. The paramount consideration is ASW's best interests. There is nothing to suggest that ASW is not properly taken care of or that the environment is in any way detrimental to his upbringing or development. The evidence is to the contrary, that ASW is happy, well settled and that his behaviour is improving.

[96] The paramount consideration was ASW's best interests at each stage of the decision-making process. One of the important factors is that ASW has been well cared for by the carers since December 2017, that is now for more than 2 years. His stability, personal and emotional development would be affected if he was to be moved now to different carers.

Orders

[97] We give leave to appeal. The appeal is refused.